VERSLAE

VAN DIE

NATURELLE-APPÈLHOWE

1953 (1)

REPORTS

OF THE

NATIVE APPEAL COURTS

DIE STAATSDRUKKER, PRETORIA
THE GOVERNMENT PRINTER PRETORIA
G.P.-S.5114–1953-4–815.

On perusal of the relative record, it was observed that the particulars of the claim and the defence in the Chief's Court, as set out in the notice of hearing of the appeal to the Native Commissioner's Court (N.A. 503), were at variance with the particulars in those respects as reflected in the Chief's written record (N.A. 502, No. 25607). It was also observed that the Clerk of the Native Commissioner's Court concerned had omitted to enter on the last-mentioned document the date on which it had been received by the Native Commissioner as well as the date on which the Chief's judgment concerned had been registered and the relative registration number.

As the variance referred to above should not have occurred if the provisions of paragraph (*c*) of sub-section (1) of section 10 and of sub-section (1) of section 7 of the Regulations for Chiefs' and Headmen's Civil Courts, published under Government Notice No. 2885 of 1951, had been observed, the Native Commissioner of the district concerned was requested to obtain explanations in regard thereto from the Clerk of the Court concerned and from the Acting Additional Native Commissioner *a quo* and to transmit those explanations to this Court. He was also requested to furnish this Court with the omitted information referred to above.

A copy of his reply and of the explanations referred to therein, the contents of which were explained to the parties who appeared in person in this Court, are appended.

1. *Native Commissioner's reply* (*No.* 37/52, *dated* 29.12.1952).

"Your N.A.C. 108/52 of the 17th instant refers.

Written explanations by the Assistant Clerk of the Court and the Acting Additional Native Commissioner are attached hereto.

The omission of the Clerk of the Court to register the case has now been rectified by entering the Chief's judgment as No. 303/52, on 23.12.52, the date of receipt of the information being 24.9.52".

2. *Clerk of the Court's explanation, dated* 23.12.1952.

"With regard to the above case, my explanation is as follows:—

1. *Form N.A.* 502—*No.* 25607.—This form was received in September, 1952, as a result of an interview which the Native Commissioner had with the Chief who tried the case, and in which the latter was ordered to register his judgment and furnish his reasons for judgment. This was, I think in August, 1952, and after several verbal requests made by me had failed to make the Chief move in the matter.

2. *Form N.A.* 503—*Notice of Appeal from Chief's Court.*—The Defendant noted his appeal on the 8th May, 1952.

Between that date and 4th September, 1952, when the form was finally completed in this office, the Chief had not sent in his written record, and the information on the form was, therefore, furnished entirely by the defendant. Defendant then complained that the Chief had seized his cattle.

3. There is no entry of the Chief's judgment in the book NA.188 owing to an unfortunate omission on my part. On 4.9.52 the Chief had been requested to furnish his reasons for judgment. When the form N.A. 502 was received, on 24.9.52, I remembered the pending appeal and simply filed the form in the jacket of the case without completing the reverse side. This particular Chief, when asked to furnish his reasons for judgment, has in more than one case filed the form N.A. 502, in addition to one originally sent in".

3. *Acting Additional Native Commissioner's Explanation, dated* 24.12.1952.

"In addition to the explanation offered by the Assistant Clerk of the Court I have the honour to report as follows:—

1. The defendant in the above case lodged his appeal against the Chief's judgment in May, 1952. The Chief had not submitted his written record nor was it registered.
2. During August, 1952, the defendant reported to the Native Commissioner and complained that the Chief had caused defendant's cattle to be attached in pursuance of the judgment given by him in May, 1952. The Chief was sent for and he appeared before me with the defendant. The Chief admitted that he had given judgment in this case and I then ordered him to submit his written record immediately and I authorised the case to be registered. In doing so I was acting in an administrative capacity. On again going through the rules it seems possible that I misinterpreted the proviso to Rule 7 (2) of G.N. 2885 of 9.11.51 that the registration of the judgment should have been the subject of an application to the Court of the Native Commissioner.
3. When the parties appeared in court it was explained to them that the case would be heard afresh. The plaintiff's claim and defendant's reply were taken down in Court. In view of this and the fact that the case had been before the Chief as long before as May, 1952, I did not attach importance to the fact that the claim and reply differed considerably in the Notice of Hearing and Written Record; I felt that in acting as I did, justice would be done and respectfully suggest that if there were any irregularity it did not effect the rightful outcome of the proceedings.
4. I wish to add that the Chief was warned on the 30th May, 1952, to submit his Reasons for Judgment timeously. The Clerk of the Court has also made numerous complaints regarding the manner in which this particular Chief prepares and submits his written records. It has frequently happened that he submitted two written records in respect of one case and that these varied as to the claim and reply. He has failed to carry out his duties in a proper manner and his behaviour has been such that it was reported to the Department on the 13th October, 1952, with a recommendation that serious action be taken, but to date the Department has given no instructions in the matter".

According to sub-section (2) of section 7 read with sub-sections (3) and (4) of section 6 of the regulations referred to above, if neither the Chief concerned nor the successful party delivers to the Native Commissioner having jurisdiction, the original or the duplicate, respectively, of the Chief's relevant written record within the period prescribed in the firstmentioned sub-section, then the Chief's judgment lapses unless the Native Commissioner "*on good cause shown*" authorises its registration.

It is manifest from the Acting Additional Native Commissioner's explanation, quoted above, that the Chief's written record concerned, was not delivered to the Native Commissioner within the said prescribed period and that the Acting Additional Native Commissioner authorised the registration of the Chief's judgment in question without good cause having been shown in that there was not before him a written application to the Native Commissioner's Court concerned for such authority supported by an affidavit or affidavits disclosing good and sufficient reasons for the failure to deliver the Chief's relevant written record timeously to the Native Commissioner, and by a return showing that due notice of such application had been given to the other side. It follows that the Chief's judgment in question had already lapsed and that the appeal therefrom to the Native Commissioner's

(1) written record N.A. 502 No. 25360 was the one furnished by the Chief in terms of section 6 of the Regulations for Chiefs' and Headmen's Civil Courts, published under Government Notice No. 2885 of 1951;

(2) document N.A. 502 No. 25378 was furnished by the Chief in response to a request to him for his reasons for judgment required in terms of section 11 of those regulations;

(3) the particulars of the claim and the defence as set out in the Chief's written record N.A. 502 No. 25360 are at variance with the particulars in those respects as reflected in the relative entries in the above-mentioned register; and

(4) the particulars of the claim and the defence and of the Chief's judgment as entered in that register and the particulars in those respects as reflected in the notice of hearing of the appeal to the Native Commissioner's Court, correspond.

As regards the above-mentioned variance between the particulars embodied in the Chief's written record N.A. 502 No. 25360 and those contained in the relative entries in the said register, it must be pointed out that, in terms of sub-section (1) of section 7 of the said regulations, it was incumbent on the Clerk of the Native Commissioner's Court concerned to have transcribed the particulars in question from that written record to that register. It is obvious that he did not do so since otherwise the variance in question could not have occurred. In this connection the need for strict compliance with the above-mentioned regulations cannot be too strongly stressed as failure to do so, as in this instance, gives rise to unnecessary difficulties and work.

The relative record does not disclose how it is that the above-mentioned variances came about. No doubt the Native Commissioner of the district concerned will take the necessary steps, if he has not already done so, to obviate similar occurrences in the future. Here it should be added that had the Acting Additional Native Commissioner *a quo* drawn attention in his reasons for judgment to the variances in question so that it would immediately have been clear to this Court what the position was in regard thereto, it would have assisted this Court considerably in that it would have obviated unnecessary difficulties and work.

As, in terms of the above-mentioned regulations, the criterion is the Chief's written record and as the correctness of that record (N.A. 502 No. 25360) has not been challenged, the particulars contained therein fall to be accepted as reflecting the true position and will therefore be so regarded.

It is common cause that the plaintiff and the defendant are full brothers, that the plaintiff is the eldest son and heir of their *house* and that the defendant is the next eldest son therein.

It is implicit in the defendant's evidence that none of the cattle claimed were returned or otherwise made good by him. It is also implicit therein that he gave nineteen head of cattle as *lobolo* for his wife concerned, viz. Tembane, but his version as to their source is that only nine of those cattle were obtained by him from his late father (hereinafter referred to as "the deceased"), that those nine head of cattle were a gift to him and that the remaining ten head consisted of cattle which had been *sisaed* to him by one Ruluwe Butelezi.

The Acting Additional Native Commissioner *a quo* accepted the evidence for plaintiff and in accordance therewith found the deceased had delivered nineteen head of cattle to the defendant to enable the latter to *lobola* his wife, Tembane, that fifteen of those cattle had been *house* property, having been *lobolo* received for the full sister of the parties, Mbombo, and that the remaining four head had been the property of the plaintiff.

The defendant's fantastic version regarding the alleged *sisa* to him of the ten head of cattle referred to above, to my mind, fully supports the Acting Additional Native Commissioner's

finding set out in the last preceding paragraph of this judgment. He further found that when the nineteen head of cattle were delivered no declaration was made that they formed a loan to the defendant, that the absence of such declaration at that time raised a presumption that those cattle were a gift to the defendant and that the plaintiff had failed to rebut that presumption. Accordingly he allowed the appeal with costs and altered the judgment given by the Chief's Court in favour of the plaintiff to a decree of absolution from the instance.

As pointed out by the Acting Additional Native Commissioner in his reasons for judgment, it is a well recognised custom that when lobolo cattle received for a daughter of a *house* are used to assist a younger son of the same *house* to *lobola* a wife for himself, no debt is created thereby, see Stafford's Principles of Native Law and the Natal Code at page 88.

In the instant case it emerges from the plaintiff's own testimony and that of his witnesses that—

(1) twenty-six of the cattle received as *lobolo* for the parties' full sister, Mbombo, were delivered by the deceased as *lobolo* for a girl to whom the plaintiff was engaged;

(2) the lastmentioned girl died and those twenty-six head of cattle were returned to the deceased;

(3) the deceased delivered ten of those twenty-six head of cattle together with five of the remaining cattle received as *lobolo* for the parties' full sister, Mbombo, and four head which were the property of the plaintiff, to the defendant to enable him to *lobola* his wife, Tembane;

(4) after the delivery of these nineteen head of cattle to the defendant at least sixteen head received as *lobolo* for the parties' full sister, Mbombo, remained in their *house;*

(5) the plaintiff acquiesced in the deceased's action in using those four of the nineteen head of cattle that were the plaintiff's property, to enable the defendant to *lobola* his wife, Tembane;

(6) the defendant made contributions from his earnings to the deceased for kraal maintenance;

(7) the plaintiff was under the impression that the deceased had made a gift of the nineteen head of cattle to the defendant; and

(8) it was only because of the deceased's declaration that those nineteen head of cattle were to be returned by the defendant to the plaintiff that the latter claimed them.

It is manifest from the evidence for plaintiff, however, that the declaration on which he relies, was made by the deceased some years after the celebration of the customary union between the defendant and Tembane, and during the deceased's last illness and shortly before his death.

The plaintiff does not allege that the defendant undertook to replace any of the cattle in question. On the contrary, it is implicit in the evidence for plaintiff that, as far as is known, the defendant did not give any such undertaking. It is also implicit in that evidence that, as far as is known, there was no stipulation by the deceased at the time of the customary union between the defendant and Tembane or when the *lobolo* for Tembane was paid, that the cattle in question were to be replaced or made good by the defendant. These factors give rise to a presumption that, in accordance with established custom, those cattle were a gift and not a loan, see the authority cited above and Ngema *v.* Ngema, 1, N.A.C. (N.E.) 213 at page 215.

As regards the contention of appellant's Counsel that effect should be given to the deceased's declaration, the plaintiff stated in his evidence that he did not know why the deceased had made it. It is true that, according to the evidence, Mbombo was the parties' only sister and that the opinion was expressed by one

3. The appellant having established his plea that the respondent accepted from the house heir (Lukas) of Nomakamelo's house, the balance of *lobolo* due for the latter, the respondent is estopped from subsequently bringing an action against the appellant for the same debt, and in any event respondent erred in refunding the *lobolo* cattle he received from Lukas in payment of the debt.
4. The respondent was not entitled to succeed on his claim against the appellant, in the absence of proof that the payment made to him by Lukas was made in error, under common mistake or that the debt did not in fact exist.
5. *Alternatively:* The appellant contends that he is neither the heir nor son of the house of Nomakamelo, and as such not liable for debts due by the house, and in any event the evidence was not sufficient to hold the appellant liable for the debt due by Nomakamelo's house.
6. The judgment is generally against the probabilities of the case."

It is common cause that defendant is the general heir to the late Mvunyelwa and that Mvunyelwa married Nomakamelo, the sister of the plaintiff, and that plaintiff is the person entitled to recover and receive any balance of *lobolo* still owing. It is also common cause that the marriage between defendant's father and Nomakamelo took place round about the year 1906, but there is a dispute firstly as to the number of cattle agreed upon as *lobolo* and secondly the number of cattle already paid.

The plaintiff states the agreed *lobolo* was fifteen head of cattle plus the *Ngqutu* beast and that only the equivalent of four head of cattle had been paid. Defendant avers that the agreed *lobolo* was ten head of cattle plus the *Ngqutu* beast.

Defendant admits he still owes three head of cattle being the number his father before his death instructed him to pay. Whatever dispute there was as to the number of cattle already paid, ground 2 of the notice of appeal does not attack the finding of the Native Commissioner that only four head of cattle or their equivalent had been paid. Grounds 1 and 6 of the notice of appeal cannot be read as covering the dispute concerning the number of cattle already paid especially as mention is specifically made that plaintiff had failed to prove that the agreed *lobolo* was more than eleven head of cattle.

Ground 2 is the only one that needs serious consideration by this Court.

Grounds 3, 4 and 5 may be dealt with together as the last ground, namely number 5, would appear to be an alternative to grounds 3 and 4.

The late Mvunyelwa evidently created a separate *house* when he entered into a customary union with Nomakamelo and out of that house was born Mtatshelwa *alias* Mupase Shoyisa who became the heir of the *house* but not the general heir, which honour fell on the defendant. When Nomakamelo's daughter, Semende, born during the subsistence of the customary union with her deceased husband, got married the *house* heir Mtatshelwa received her *lobolo* and out of that *lobolo* he paid to the plaintiff the balance of the *lobolo* the late Mvunyelwa still owed. The present defendant then averred that Mtatshelwa had no right or claim to Semende's *lobolo*. He sued Mtatshelwa and obtained judgment for Semende's *lobolo* to be handed over to him. He succeeded in his claim and to enable Mtatshelwa to carry out the judgment of the Court he obtained a refund of the cattle he had already paid to present plaintiff. It therefore follows that the plaintiff was then in the same position as he was before Mtatshelwa paid him the balance of the *lobolo* owed by Mvunyelwa and he is entitled to sue the defendant for that debt.

Defendant cannot now be heard when he in grounds 3, 4 and 5 of his notice of appeal states that he is not the proper person liable to liquidate the *lobolo* debt of his late father. He cannot hold Semende's *lobolo* and yet expect the heir of that *house* to liquidate the debt. He brought about the position himself and obtained a judgment in the Court in another case that he was the correct person to hold Semende's *lobolo*. That being the case grounds 3, 4 and 5 are without substance.

Reverting to ground 2 of the notice of appeal this Court is called upon to decide whether the agreed *lobolo* payable by the late Mvunyelwa was sixteen head of cattle or eleven head of cattle including the *Ngqutu* beast.

The plaintiff is a Swazi living at Hlatikulu, Swaziland. His late father, Nojuzu, negotiated the union and according to the evidence adduced by the plaintiff the *lobolo* was fixed at sixteen head of cattle because his father was an important man and that this claim of so many head of cattle is in accordance with the custom followed by the descendants of the Swazi King of whom his father was one. He describes how six goats, equivalent to one beast, and three head of cattle were paid. It is not necessary to labour the question as to the number of cattle paid as defendant has not appealed against that issue of the case.

Here it should be mentioned that at the time defendant's father entered into the customary union he was a resident of the Piet Retief district in the Transvaal Province and only later moved to Zululand.

This Court must bear in mind what the usual *lobolo* is in Swaziland and for that matter as both parties are Swazis what *lobolo* is usually fixed by members of that tribe, whether they are resident in the Transvaal or in Swaziland.

All the Native Commissioner states in his reasons for judgment is that sixteen head of cattle was the agreed *lobolo* for Nomakamelo. He gives no reason for this finding and it seems very much as if he had not applied his mind to the possibility that such a large number of cattle could not have been the *lobolo* agreed upon.

In the first place the plaintiff seems to base the agreed *lobolo* on the fact that as his father was the descendant of a Swazi King he is entitled to the number claimed.

The only case concerning the number of cattle payable as *lobolo* under Swazi Custom is that of Thela *v.* Nkambule, 1940, N.A.C. (T. & N.), 113. The remarks by Braatvedt (P) on page 114 may well be quoted with approval. He is reported to have stated as follows:—

> "When Natives say that the custom in their particular tribe is that a high number of cattle is payable as lobolo, such an assertion should be viewed with suspicion as it is probably not of ancient origin."

He goes on and states:—

> "Excessive demands in the Transvaal where there is no written code, should not be allowed not only because they have no foundation in original Native Law, but also because they tend to prostitute the underlying object and purpose of lobolo and to commercialise the transaction."

In that case although the Native Commissioner accepted the story that it was agreed that twelve head of cattle should be paid for the woman, the Appeal Court was not prepared to hold that such an agreement should receive judicial sanction.

In the instant appeal I am also not prepared to hold that such a large number of cattle, viz., sixteen, should receive our judicial sanction. An unfortunate bridegroom is often placed in this invidious position that he has no option but agree to the demands of the girl's father and it is for the Court to decide whether the *lobolo* demanded are reasonable and if we are not satisfied that

head had been paid but he did not say when. All he said was that there was a balance of three head. That is all I know. I was not present nor was defendant when it was said that some cattle were paid by Mvunyelwa to plaintiff . . . I do not know why Nomakamelo made no mention that defendant would have to pay three head of cattle. Defendant was not present. He was only a child at the time working for our landlord on a farm on which we lived."

And the defendant's witness, Mjezi, who is the defendant's uncle, stated—

"I was present when Nomakamelo said that Mvunyelwa spoke of three head owing when he died. This was at the time of Mvunyelwa's death at an inyanga's. I was with defendant and Mqoqolizi and Nomakamelo and Mbango. The discussion took place in Mvunyelwa's hut after his death. She said Mvunyelwa had said Ngozi (defendant) would have to pay three head of cattle to the Dhlimini's (plaintiff's people). No mention was made as to where the cattle were to come. Mvunyelwa was said to have said this to Nomakamelo and Mbango. Ngozi (defendant) was not there. Nomakamelo just told us this."

To my mind therefore the Native Commissioner *a quo* properly found on the evidence that sixteen head of cattle were agreed upon as *lobolo* for Nomakamelo and that three head of cattle and six goats (the equivalent of one beast) were paid on account of that *lobolo,* leaving a balance of twelve head due.

Turning to the question of whether or not the agreed upon *lobolo* of sixteen head of cattle, including the *ngqutu* beast, for Nomakamelo falls to be regarded as excessive, it seems to me that the answer is in the negative; firstly because none of the Natal or Zululand Codes of Native Law which *inter alia* restrict or restricted the number of *lobolo* cattle payable, apply in the instant case as the *lobolo* agreement in question was concluded outside of Natal, including Zululand, and the parties thereto were then neither resident nor domiciled in that Province; and secondly because, to my mind, the instant case is distinguishable from Thela *v.* Nkambule, 1940, N.A.C. (T. & N.), 113, in that it is clear from the judgment in the latter case that it applies only to commoners, whereas, according to the uncontroverted evidence for the plaintiff, Nomakamelo's father was a descendant of the Swazi King and it was the custom amongst the latter's descendants to fix the *lobolo* for the first daughter in each of their *houses* at twenty head of cattle and that of each subsequent daughter at sixteen head of cattle.

As regards the long delay in the bringing of the instant action, it is clear from the uncontroverted evidence for the plaintiff that when Mvunyelwa contracted the customary union with Nomakamelo in 1906, he paid six goats on account of her *lobolo* to her father, no cattle being available at that time as they had all died from East Coast Fever. Thereafter Nomakamelo's father demanded the balance of her *lobolo* from Mvunyelwa, who put him off as he had no cattle. After the death of Nomakamelo's father, the plaintiff demanded the balance of her *lobolo* from Mvunyelwa who thereupon paid him three head of cattle on account thereof. Shortly thereafter Mvunyelwa moved his kraal from the Ngotshe to the Nongoma district and it was not until the year 1951 that the plaintiff ascertained the whereabouts of the head of that kraal. That being so, the plaintiff can obviously not be held responsible for the delay in bringing the instant action and accordingly there is no call on him to prove that the defendant was not prejudiced by that delay.

It follows that the first, second and sixth grounds of appeal are not well founded.

As regards the third, fourth and fifth grounds of appeal, it is manifest from the defendant's plea and evidence that he neither pleaded nor relied upon any of the factors specified in those grounds. On the contrary he admitted unequivocally in his evidence that he was liable for the balance of the *lobolo* payable to the plaintiff for Nomakamelo and that it was only the extent of such balance that he disputed. It is the custom amongst the Swazis that the general heir inherits the *lobolo* paid for the first daughter of each of his late father's *houses* notwithstanding that there are *house* heirs and it is in all probability due to this custom that the Court in the prior case mentioned by Mtatshelwa in his evidence in the instant case, held that the present defendant who was the general heir of the late Mvunyelwa, and not Mtatshelwa, was entitled to the *lobolo* of the latter's full sister, Semende, notwithstanding that Mtatshelwa was the late Mvunyelwa's eldest son of his union with Nomakamelo. This custom also explains why the defendant admitted liability for the balance of the *lobolo* payable to the plaintiff for Nomakamelo. Consequently the third, fourth and fifth grounds of appeal are without substance.

In the result I am of the opinion that the appeal should be dismissed with costs.

For appellant: Mr. Du Toit of Messrs. S. E. Henwood & Co.
Respondent in default.

SOUTHERN NATIVE APPEAL COURT.

VANANDA *v.* VANANDA.

N.A.C. Case No. 1 of 1953.

Butterworth: 14th January, 1953. Before Sleigh, President, Bowen and Potgieter, Members of the Court.

COMMON LAW.

Practice and Procedure—Onus of proof—When on defendant—Ownership—Presumption of.

Plaintiff, whilst still residing with defendant, on the 30th March, 1950, purchased a certain heifer from an European trader, which beast was registered at the dipping tank in the name of defendant together with other cattle at the kraal. Defendant now refuses to deliver the said heifer to plaintiff.

Defendant in his plea avers that he gave plaintiff a red heifer which plaintiff undertook and agreed to replace at a latter date, and that plaintiff in or about March, 1950, delivered the heifer now in dispute and had it transferred to the name of defendant in the dipping register. Defendant is in possession of the said heifer and as it is his lawful property he admits his refusal to effect delivery.

The appeal is against a judgment for plaintiff as prayed with costs on the grounds that the Assistant Native Commissioner erred in holding that the onus of proof had shifted to defendant and that he failed to give due weight to the presumption of ownership following from the possession by defendant of the animal since March, 1950.

Held:

(1) That as defendant relied on a contract the "possessor had the benefit of the burden of proof being thrown on his adversary and of being entitled to succeed if no proof were offered on either side . . .

NORTH EASTERN NATIVE APPEAL COURT.

MKIZE *v.* **MEMELA.**

N.A.C. CASE No. 110 OF 1952.

PIETERMARITZBURG: 21st January, 1953. Before Steenkamp, President, Balk and McCabe, Members of the Court.

Cur. adv. vult.

Postea 27th January, 1953, at Eshowe where President delivers the judgment of the Court, Steenkamp (President) dissentiente.

ZULU CUSTOM.

Children—Illegitimate child—Customary union contracted by mother who was unmarried when child was born and natural father of the illegitimate child after such mother had become a widow, she having contracted a customary union with another man after the birth of the illegitimate child—Property rights in such child— Section thirty *of Natal Code of Native Law of* 1932.

Lobolo: Not an essential of a customary union in Natal.

Words and phrases: "Unmarried" in section *thirty* of Natal Code of Native Law of 1932: Maxim "Cattle beget children".

Summary: After an illegitimate child was born to an unmarried woman she contracted a customary union with a man other than the natural father of such child. She later became a widow and then contracted a customary union with the natural father of her illegitimate child, with the consent of the people of her late husband. The property rights in the illegitimate child are now in dispute.

Held: That in terms of section *thirty* of the Natal Code of Native Law the illegitimate child in question became legitimated on its mother contracting a customary union with its natural father.

Held further: That the property rights in the child in question thereupon vested in its natural father.

Held further: that the word "unmarried" in section *thirty* of the Code referred to a woman who had then not yet contracted a customary union.

Cases referred to:

Mantjoze *v.* Jaze, 1914, A.D. 144.
Mfanombana *v.* Fana, 1922 (1), N.H.C. 26.
Henkel *v.* Coomer, 1929, T.P.D. 992.
Mhlongo and Mnisi *v.* Sibeko, 1937, N.A.C. (T. & N.), 34.
Sila *v.* Masuku, 1937, N.A.C. (T. & N.), 121.

Statutes referred to:

Section *eleven* (1) of Act No. 38 of 1927.

Sections *one, thirty, thirty-one, thirty-two, forty-four, fifty-nine, eighty-seven* (3), *eighty-nine* and *one hundred and forty-four* of the Natal Code of Native Law of 1932.

Appeal from the Court of the Native Commissioner, Bulwer.

Balk (Permanent Member):—

The facts of this case emerge from the learned President's judgment, in which the relative judgment of the Court *a quo* and the grounds of the appeal therefrom are also set out.

I regret that I do not agree with the learned President's judgment as, to my mind, the language of section *thirty* of the Natal Code of Native Law published under Proclamation No. 168 of 1932, as amended (hereinafter referred to as "the Code") is perfectly clear and does not properly admit of any construction other than that an illegitimate child, whose mother *at the time of its birth* has not as yet contracted a customary union, is legitimated by its parents' entering into customary union *at any time after its birth*. In other words the sole criteria under that section for the legitimation of an illegitimate child are that its mother must not have entered into a customary union *at any time up to and including its birth* and that its parents must thereafter contract a customary union which may take place *at any time after its birth*. Both these requirements are present in the instant case and it is therefore immaterial that a customary union between Mkono, the mother of Zintombi, who is the child here concerned, and a man other than Zintombi's natural father, i.e. Sikonkwana, intervened between Zintombi's birth and the customary union contracted by her parents, i.e. by the defendant (present respondent) and Mkono, after the death of Sikonkwana. Counsel for appellant contended that the word "parents" in the section in question should, insofar as it relates to the mother of the illegitimate child, be construed to mean its mother only whilst the latter did not enter into a customary union with a man other than such child's natural father. But it seems to me that this contention is not well founded since the mother of an illegitimate child remains its parent after she has entered into a customary union with a man other than its natural father and if the legislature had intended otherwise it surely would have provided so specifically. This disposes of ground of appeal 1 (*a*).

As regards the submission by appellant's Counsel that rejection of the interpretation of the above-mentioned section, as contended for by him, would bring it into conflict with the fundamental principles of Native Law, it must be pointed out that the validity of a customary union subject to the Code, as is the case with the customary union between the defendant and Mkono, is no more affected by the custom of *lobolo* than is a civil marriage, since in terms of paragraph (*d*) of sub-section (3) of section *one* read with section *fifty-nine* of the Code, *lobolo* is not an essential of a customary union. Undoubtedly this provision is a departure from Zulu Law as it obtained prior to its modification by legislation, but here the provisions of the Code must prevail in terms of the proviso to sub-section (3) of section *one hundred and forty-four* thereof. It follows that the legitimation of Zintombi by the customary union entered into by her parents after her birth cannot be affected by any question arising from the custom of *lobolo,* including the Native Law maxim "cattle beget children". It also follows that acceptance of the appellant's contention that the instant case does not fall within the ambit of the legitimating provision contained in section *thirty* of the Code for the reasons set out in grounds of appeal 1 (*c*), 1 (*d*) and 1 (*e*), would have the effect of bastardizing Zintombi for no good reason and would thus be contrary to the principles of public policy, see Mantjoze *v.* Jaze, 1914, A.D. 144, at page 152 and sub-section (1) of section *eleven* of the Native Administration Act, 1927. Accordingly those grounds of appeal fail. Here it may be mentioned that the anomaly which, from a standpoint of uncodified Native Custom, arises in the instant case as a result of sections *thirty* and *eighty-nine* of the Code, viz., that Zintombi should be legitimated by the customary union between her parents nothwithstanding that her mother, Mkono's, *lobolo* in respect of that union was payable to the late Sikonkwana's family and not to the plaintiff, was not inherent in Zulu Law as it obtained prior to its modification by the Natal Administration, for that law then followed the basic rule of Native Law that *lobolo* accrued only to the father of the woman for whom it was paid or in the event of his death to his heir

> "It is in the last degree improbable that the legislature would overthrow fundamental principles, infringe rights or depart from the general system of law, without expressing its intention with irresistible clearness".

It is a southern Bantu maxim that "*cattle beget children*", *vide* Sila *v.* Masuku, 1937, N.A.C. (T. & N.), 121. The Code does not use this term nor does it include in the essentials of a Native customary union that *lobolo* must be paid but if we refer to section *fifty-nine* (1) (*a*) of the Code it will be found that one of the essentials of a customary union is the consent of the father or guardian of the intended wife which may not be withheld unreasonably. This aspect will be dealt with later on. The next step is that if a customary union takes place the cattle which the bridegroom pays or has agreed to pay beget the children his wife bears. If the man and woman live together as man and wife without the consent of the father, in which case no customary union takes place, then any children she bears belong to her father and he is entitled to their *lobolo* rights as he had not personally given consent to the customary union between his daughter and the natural father of the children.

Here it must be mentioned that in a customary union, as opposed to a civil marriage between majors, there are three persons concerned and they must all be consenting parties to the union. I refer to the father or guardian of the bride, the bridegroom and the bride and if the consent of either of these three is lacking there can be no customary union. The father of the bride had already acquired vested rights or to emphasize it clearly, property rights in the illegitimate child his daughter had borne during her spinsterhood. He can only forego those rights if he consents to a customary union between his daughter and the natural father of the illegitimate child she had borne. Where section *thirty* of the Code mentions a "subsequent customary union" it can only mean a union entered into with the consent of the bride's father as he is the only person at that stage to lose the property rights in the illegitimate child and he knows by giving consent he loses those rights. No third person can by giving consent deprive another person of certain vested rights. After all, a customary union is a contract between three persons and as no person other than the contracting parties may deprive any one of them of rights already vested, although not yet accrued, for the same reasons the consent, to a customary union with the widow, although given by a preson who has the right to do so, cannot possibly affect the rights of the father who had acquired certain rights to the illegitimate child.

We are not dealing with legitimacy or illegitimacy of the child. Nowhere in section *thirty* or in any other provision of the Code is the word "legitimacy" mentioned. The question to be decided is whether the child born becomes a member of the house of the second customary union entered into by plaintiff's daughter. These are the words used in secion *thirty* and we must not confuse those specific words with "illegitimacy" which is a handicap peculiarly applicable to the child and not to the parents.

It is therefore apparent that what is meant in section *thirty* is a customary union entered into with the consent of the father or in case he is no longer alive, then his heir, the bride and the bridegroom if he is over 21 years of age.

It is well known and an established principle of Native Law as applied in Natal that the consent of the father of the bride is synonymous to saying that he had received the *lobolo* or proper arrangements had been made for the payment thereof. It would have been a superfluity of words to mention that one of the essentials is the passing of cattle when it is well known that no consent would be forthcoming unless cattle had passed and therefore the absence of the words "payment of *lobolo*"

does not in any way affect or abolish the well known Native maxim that "cattle beget children". This is an important underlying principle of universal application by Natives in the Union of South Africa and must be applied in all cases concerning *lobolo* and property rights in children. In fact section *one hundred and forty-four* (3) of the Code empowers the Court to take cognisance of a Native custom not defined and dealt with under the Code.

It is not out of place to mention at this juncture that there is a custom amongst many tribes, notably in the Cape, that the natural father of an illegitimate child acquires the property rights in that child provided he has paid damages to the father of the girl he had seduced. The damages are considerably more than in Natal but what I wish to emphasize is that there is no question of the child becoming legitimate when the natural father obtained the property rights. The child remains illegitimate but the property rights are transferred from that of the father of the seduced girl to the natural father of the child born.

Even in cases where it is sought to legitimise a child the Courts should take into consideration the rights of other persons. In the case of Henkel *v.* Coomer, 1929, T.P.D. 992, the Court in making an order of legitimacy added that such order is to be without prejudice to the rights of persons not parties to the proceedings. It follows that if a customary union gives the natural father of the child, previously born, the property rights in that child, then that customary union should have been entered into with the consent of the person who up to that date had vested interests in the property rights of that child otherwise he does not lose his rights. I do not see how without his consent he can possibly be deprived of the rights which he acquired at the birth of the child and which were confirmed and finally determined when the daughter entered into a union with a man other than the natural father of her illegitimate child.

It may well be, and this cannot be ruled out altogether, that the father of a girl who has borne an illegitimate child and whose chances in the marriage market are considerably reduced, will accept a much smaller *lobolo* for her from a man other than the seducer well knowing and relying on the fact that the property rights in the child she had given birth to, belong to him and whatever he loses on the daughter's *lobolo* will be compensated for out of the property rights he has acquired in the child.

Defendant's concern is not so much with any stigma that might be attached to the child, but his interests are purely mercenary, and now after many years when the child is about eighteen years of age and ready for the marriage market, he, by means of a subterfuge and by paying not more than five head of cattle, which are the *lobolo* fixed for a widow, acquires a potential *lobolo* value of eleven head of cattle. Surely it could not have been the intention of the legislature to lend colour to such a proposition and I am satisfied that what section *thirty* means by a "subsequent customary union" is a union entered into with the consent of the father of the girl and not with the consent of some other person who had only acquired that right by the happening of certain events, viz. the death of the first husband and the remarriage of the widow to her first lover.

I regret I cannot agree with the judgment of the majority of the Court and, in my opinion, the appeal should be allowed with costs and the Native Commissioner's judgment altered to one for plaintiff as prayed with costs.

For Appellant: Mr. H. L. Bulcock.

For Respondent: Advocate J. H. Niehaus instructed by Messrs. C. C. C. Raulstone & Co.

in the instant case in view of the fact that the appeal has been allowed in part and the Native Commissioner's judgment altered partly in favour of the plaintiff.

The grounds of appeal are:—

"1. That the learned Native Commissioner was wrong in taking judicial cognisance of non-established facts and to draw conclusions thereon.

2. That in any event the said judgment is against evidence and bad in law."

The facts are that plaintiff did not receive occupation of the property and while the agreement does not specifically state that he was entitled to receive occupation Counsel for respondent has conceded that clauses 7, 8 and 9 of the agreement made immediate occupation imperative. There were other tenants on the property and until they were ejected plaintiff could not occupy it. An attempt was made by plaintiff through process of Court to evict the tenants but as neither he or defendant had title to the property he was unsuccessful.

Plaintiff paid the £12 deposit and one instalment of £5 on account of the purchase price, but as he did not receive occupation of the property he ceased to pay any further instalments.

Wessels in Law of Contract in South Africa on page 474 (1937 Edition), Vol. I, states that the Court has to determine from the construction of the contract and the surrounding circumstances whether the parties intended the promises to be independent or concurrent conditions.

From the terms of the agreement I have no doubt these were concurrent obligations by both plaintiff and defendant. The agreement consists of mutual promises and it is so worded that the performance of his promise by the plaintiff is a condition precedent to the performance by the defendant. Defendant's promise is that he will give occupation to plaintiff and only if the latter obtains such occupation is he obliged to pay the instalments of £5 every three months to the defendant.

There has been considerable delay on the part of plaintiff to assert his rights in a Court of Law but this delay is fully explained when it is considered that he took unsuccessful steps to eject the tenants and thereafter he had to await their eviction by the defendant which in turn had to await the transfer of the property to the latter. On 12th July, 1948, plaintiff wrote to defendant's attorneys informing them that at any time or day defendant moves the tenants off the land plaintiff will forthwith continue with the instalments of the purchase price or even pay in full settlement. He also states in the letter that he had called on defendant several times but all he received were promises.

Clause 3036 on page 888 of Wessels Law of Contract (Vol. II), states that the Courts will always lean to the construction that mutual promises are concurrent, i.e., that they are to be performed *pari passu* and that neither party can enforce the contract against the other without showing a readiness or willingness to perform his own promise.

The way I read the evidence and the letter written by plaintiff to defendant's attorneys he is at all times ready and willing to resume the payment of the instalments when he is given occupation of the ground and I cannot subscribe to the submission by Counsel for respondent that plaintiff should have continued with the instalments irrespective of whether or not he had received occupation.

These being my views I hold that plaintiff is entitled to specific performance.

The main claim for damages, i.e., disbursements is not adequately proved in that the costs in the previous action which form part of this claim, were according to the plaintiff's evidence not taxed and the evidence as regards the balance of this claim is far too meagre to substantiate it; this also applies to the damages on the alternative claim.

To my mind therefore an absolution judgment should be entered in respect of these claims.

In the result I am of opinion that the appeal should be allowed in part with costs and the Native Commissioner's judgment altered to read:—

"It is ordered that the defendant shall permit the plaintiff to take undisturbed possession of certain land, being portion of Va Woody Glen in extent five (5) acres as shown on the sale plan of the said property and situate at Georgedale in the District of Camperdown, Province of Natal, as from the 1st day of February, 1953, on condition that the plaintiff shall pay to the defendant the balance of twenty-three pounds on the purchase price of the said land in four instalments of £5 each and the last instalment of £3, the first of these instalments to be paid by the 1st day of May, 1953, and each subsequent instalment not later than three months after the last preceding one.

Except for the foregoing modification in the time for payment of the instalments of the balance of the purchase price, all the conditions embodied in the relative deed of sale, a copy of which formed an exhibit in this case, to continue to obtain.

Absolution from the instance in respect of the balance of the main claim other than costs and on the whole of alternative claim.

The defendant to pay the costs of this action."

Balk (Permanent Member): I concur.
McCabe (Member): I concur.

For Appellant: Mr. B. Davies of Messrs. J. Fraser & Co.

For Respondent: Adv. D. Shearer instructed by Messrs. Cowley & Cowley.

NORTH EASTERN NATIVE APPEAL COURT.

NDHLOVU AND ANOTHER *v.* HLONGWA.

N.A.C. CASE No. 94 OF 1952.

PIETERMARITZBURG: 23rd January, 1953. Before Steenkamp, President, Balk and McCabe, Members of the Court.

ZULU CUSTOM.

Damages—Grass fires—Negligence—Liability of kraal head—Servant, who is negligent, as well as the employer, may be sued.

Summary: Defendants were sued by plaintiff for damages he suffered by the loss of fifteen piglets destroyed during a grass fire kindled by defendant No. 1. Defendant No. 2 was sued in his capacity as kraal head of defendant No. 1.

Held: That the failure by defendant No. 1 to warn the owners of those particular kraals which were in line of the fire confirms that he was negligent and cannot escape liability.

Held further: Defendant No. 2, as kraal head of defendant No. 1, is also liable for the damages suffered by plaintiff.

Held further: That either the servant or the employer or both are liable for the damage caused in the instant case.

There is one aspect that militates strongly against the defendant's case and that is the fact as to whether the defendant had warned the occupants of those kraals that he was going to burn a fire belt. Defendant No. 1 in his evidence states he did warn those people in the morning as instructed by his employer, but not one of plaintiff's witnesses were questioned about this and it was only when defendant and his employer gave evidence that this fact was mentioned. Plaintiff's witnesses should have been cros-examined and as this Act No. 13 of 1941 specifically provides that the adjoining owners should be notified that it is intended to burn a fire belt, this obligation does not fall away, notwithstanding the fact that a case for damages is eventually brought under Native Law and Custom. From the evidence I am satisfied that defendant No. 1 never warned the owners of those particular kraals which were in line of the fire and therefore this omission in itself confirms that he has been negligent and he cannot escape liability.

Counsel for appellant has argued that only the employer of defendant (appellant) could be held liable seeing that he gave instructions to defendant to burn the grass. He has quoted McKerron (4th Edition) page 119, in which the case of Marona *v.* Blackbeard 21 S.C. 436 is mentioned as having laid down that an agent will not be liable if he acted in pusuance of his principal's instructions and had no reason to suspect that the act was unlawful.

Even following Native Law, it is unlawful to set fire to grass if damage may result to some other person. The defendants must therefore have been well aware that the employer's instructions were unlawful and they cannot shield behind those instructions.

In Blackbeard's case de Villiers, C. J., is reported to have stated—

> "Where the servant acts within the scope of his authority the master is liable, but the fact that the master is liable does not free the servant from liability. He can only lawfully obey the lawful commands of his master, and even if he commits an act which is in its very nature a tort or a delict against a particular person, he is equally liable for damages to such person. The principles laid down by Voet (17, 1, 6), as to mandatories are equally applicable to servants."

It is therefore perfectly clear that either the servant or the employer or both are liable for the damage caused.

In my opinion the appeal should be dismissed with costs.

Balk (Permanent Member):—

I agree that this appeal should be dismissed with costs for the reasons that follow.

It is not disputed that the plaintiff was a lawful tenant on the farm in question when his piglets were destroyed by the grass fire thereon (hereinafter referred to as "the fire") within about fifty yards of his kraal on that part of the farm, so that the presumption is that he had the right to run those piglets there at that time; and this presumption was not rebutted.

It is common cause that the first defendant started the fire and it was therefore his duty under Native Law to have apprised the head of the plaintiff's kraal, in this instance the plaintiff himself, thereof timeously beforehand so that the latter could have taken the necessary precautions to safeguard his property.

It is manifest from the evidence that—

(*a*) the plaintiff normally slept at his kraal during the period in question;

(*b*) he was available at his kraal before he left for work in the morning of the day on which the fire occurred;

(*c*) he had no knowledge that the fire was contemplated; and

(*d*) that he was away at work when the fire took place in the afternoon.

As the plaintiff was available and as there is nothing to indicate that the first defendant notified him of the proposed fire, it seems to me that the inference that there was negligence on the first defendant's part is inescapable. It also seems to me that this position is not affected by the fact that, according to the evidence of the first defendant's employer, the latter may have given the first defendant the instruction to warn the kraals concerned of the fire, shortly before the first defendant was to start it; nor by the first defendant's allegation in his evidence that he warned the plaintiff's sister and the girl, Otilia, before he started the fire. For, as pointed out above, it was the first defendant's duty to have given the plaintiff timeous notice of the fire that was contemplated and the alleged notice to the girls concerned earlier in the afternoon of the fire cannot be said to be proper notice to the plaintiff seeing that the latter himself was available in the mornings and evenings during that period and that neither the plaintiff's sister nor the other girl could therefor be regarded as being in charge of the plaintiff's kraal when the first defendant, according to his testimony, warned them of the fire; and as the responsibility for giving the plaintiff due notice of the fire rested on the first defendant, he cannot escape liability even if his employer did not give him sufficient notice to enable him to apprise the plaintiff thereof timeously.

It follows that, even assuming that the first defendant's version of the circumstances in which the piglets were destroyed by the fire is the correct one, their destruction was nevertheless due to the first defendant's negligence. That being so, the first defendant is liable for the damages claimed in terms of section *one hundred and thirty-five* of the Natal Code of Native Law, published under Proclamation No. 168 of 1932, and the second defendant is liable for those damages in terms of section *one hundred and forty-one* of that Code.

McCabe (Member):—

I concur in the judgment of my brother, Balk.

For Appellant: Adv. J. H. Niehaus, instructed by Mr. H. L. Bulcock of Ixopo.

For Respondent: Adv. J. J. Boshoff, instructed by Mr. G. S. Clulow of Ixopo.

NORTH EASTERN NATIVE APPEAL COURT.

YENI *v.* **JACA.**

N.A.C. CASE No. 97 OF 1952.

PIETERMARITZBURG: 23rd January, 1953. Before Steenkamp, President, Balk and McCabe, Members.

LAW OF PROCEDURE.

Practice and Procedure: Chief's Courts have no jurisdiction in regard to actions for damages for adultery where the relative marriage is by civil rites. Section eleven *of Natal Law No.* 46 *of* 1887 *and section* eighty *of Natal Law No.* 49 *of* 1898 *tacitly repealed. Costs: Point on which appeal turns not taken by parties in either this Court, the Chief's Court or in the Native Commissioner's Court.*

Summary: In a Chief's Court a claim was instituted for damages for adultery. The Chief gave judgment for plaintiff for five head of cattle and costs, but on appeal to the Native Commissioner's Court, the judgment was altered to one of absolution from the instance with costs. Plaintiff is married by civil rites to the woman concerned in the adultery.

Held: That the plaintiff, by contracting a marriage according to Christian rites, has, as far as his marital rights are concerned, ceased to follow Native Custom and his action for damages for adultery must be dealt with according to Common Law.

Held further: That a Chief has no jurisdiction to try a case of this nature as his jurisdiction is limited to matters arising out of Native Law and Custom, and marriage by civil rites being a Common Law institution, the marital rights of the husband fall to be determined under Common Law.

Held further: That section *eleven* of Natal Law No. 46 of 1887 and section *eighty* of Natal Law No. 49 of 1898 are tacitly repealed by virtue of the provisions of section *thirty-six* of Act No. 38 of 1927.

Held further: That as the point on which the case turned was not taken by the parties in either this Court, the Native Commissioner's Court or the Chief's Court, no order is made in regard to costs.

Cases referred to:—

Nazo *v.* Lubisi, 1946, N.A.C. (C. & O.), 18 followed with approval.

Keswa *v.* Mabanga, 1933, N.A.C. (T. & N.), 33 not followed.

Mvelase *v.* Mbhele, 1946, N.A.C. (T. & N.), 94.

Statutes, etc., referred to:—

Section *eleven* of Natal Law No. 46 of 1887.

Sections *thirteen* and *eighty* of Natal Law No. 49 of 1898.

Sections *eleven, twelve, twenty-two* (6) and *thirty-six* of Act No. 38 of 1927.

Appeal from the Court of the Native Commissioner, Ixopo.

Steenkamp (President):—

In the Chief's Court the plaintiff (now appellant) sued the defendant (now respondent) for seven head of cattle being damages suffered by the plaintiff as a result of defendant having committed adultery with plaintiff's wife.

The Chief gave judgment for plaintiff for five head of cattle and costs, but an appeal to the Native Commissioner was sustained and the Chief's judgment altered to one of absolution from the instance with costs.

An appeal has been noted to this Court but in view of the fact that in my opinion the Chief had no jurisdiction to try the case owing to the fact that plaintiff and his wife were married by civil rites, there is no necessity to consider the merits of the case.

In his evidence plaintiff states "I married Agnes Ngcobo by Christian rites during 1945".

The question of the Chief's jurisdiction was not raised in the Court *a quo* either by Counsel or by the Court *mero motu.*

This Court has, however, raised this important aspect of the case and both Counsel were called upon to argue thereon.

The Chief derives his jurisdiction from section *twelve* (1) of Act No. 38 of 1927, which reads to the effect that the Minister may authorise any Native Chief or Headman to hear and determine civil claims *arising out of Native Law and Custom.* Now can it be said that the parties in a civil marriage may still follow Native Custom in so far as the husband's marital rights are concerned. In the case of Nazo *v.* Lubisi, 1946, N.A.C. (C.O.), 18, Sleigh (P) is reported to have stated—

> "It has frequently been held that a plaintiff by contracting a marraige according to Christian rites has as far as his marital rights are concerned, ceased to follow Native Custom, and his action for damages for adultery must be dealt with according to Common Law."

This is sound reasoning and no fault can be found therewith but I am faced with the case of Keswa *v.* Mabanga, 1933 N.A.C. (T. & N.), 33, which is a Natal case decided at Durban on an appeal from the Court of the Native Commissioner at Nongoma, in which it was held that as plaintiff was not exempt from Native Law, although he was married according to Christian rites his claim for damages for adultery, having regard to the provisions of section *eleven* of Law No. 46 of 1887 and of section *eighty* of Act No. 49 of 1898, must be dealt with under Native Custom.

Subsequently in the case of Mvelase *v.* Mbhele, 1946, N.A.C. (T. & N.), 94, it was held that section *eleven* of Law No. 46 of 1887 (Natal) had been tacitly repealed by Act No. 38 of 1927 and superseded by section *twenty-two* (6) of this Act. I agree with that judgment but there still remains the question as to whether section *eighty* of Act No. 49 of 1898 had also been tacitly repealed.

Act No. 49 of 1898 is called Courts (Native). Certain provisions of that Act were specifically repealed by Act No. 38 of 1927 but section *eighty* was not so repealed. The section reads to the effect that all civil Native cases shall be tried according to Native Laws, Customs and Usages. There are exceptions, but for the purpose of this case it is not necessary to set them out. Suffice to state that it is not mentioned in that section that a marriage by civil rites removes the marital rights of the husband from Native Custom to Common Law.

Act No. 49 of 1898 creates various Courts for the administration of justice as between Native and Native and also creates a Criminal Court for the trial of Natives who have committed a crime.

In civil cases those Courts created have been abolished by Act No. 38 of 1927 and the Native High Court, the Magistrate's Court of Natal which was the Court created by that Act to try civil cases between Natives, and the Chief's Courts became ineffective and in their places were created the Native Appeal, Court, a Native Commissioner's Court and a Chief's Court.

It follows that all the powers those Courts possessed and the directions and functions given to them by that Law must cease, but in their place other Courts were created and these were given certain powers and functions.

The Native Appeal Court, the Native Commissioners' Courts and the Chiefs' Courts were given certain powers which vary in some respects from those given by Law No. 49 of 1898 (Natal). In emphasizing this it stands to reason that those powers and functions were substituted and it would not be competent to hold that notwithstanding the 1927 enactment some of the powers previously held still form part of the present day law.

Section *twelve* of Act No. 38 of 1927 already referred to gives the Chief jurisdiction to hear and determine civil claims arising out of Native Law and Custom. Compare this to section *eighty* of Act No. 49 of 1898 and we find "All civil cases shall be tried according to Native Laws, etc.". There is a vast difference between the wording of the two. The first limits the Chief to claims arising out of Native Law and Custom whereas the latter gives him jurisdiction over all civil cases. The emphasis here is on "all" whereas in the later enactment it is on "*arising out of Native Law and Custom*". The two are inconsistent with each and according to section *thirty-six* of Act No. 38 of 1927, any other law inconsistent with its provisions is repealed.

If we require further proof that section *eighty* of Law No. 49 of 1898 is tacitly repealed then reference to section *eleven* of Act No. 38 of 1927 even makes it more clear that this is the case. It would be absurd to hold that section *eighty* of Law No. 49 of 1898 is tacitly repealed in so far as the functions of a Native Commissioner's Court are concerned and not so repealed concerning the functions of a Chief's Court. Section *eleven* of Act No. 38 of 1927 opens with the words "Notwithstanding the provisions of any other law". The legislature probably had in mind the old Natal Laws as well as old Transkeian Proclamations when this section was drafted.

My conclusion is that a Chief has no jurisdiction to try a case of this nature as his jurisdiction is limited to matters arising out of Native Law and Custom and marriage by civil rites being a Common Law institution, the marital rights of the husband fall to be determined under Common Law.

The result is that the appeal is dismissed with no order as to costs and the Native Commissioner's judgment is altered to read:—

> "Appeal allowed with no order as to costs and the Chief's judgment is altered to read: 'Claim dismissed. No order as to costs'."

As the point on which the case turned was not taken by the parties in this Court, the Native Commissioner's Court or the Chief's Court, no order is made in regard to costs.

Balk (Permanent Member):—

As the present claim for damages for adultery is based on a civil marriage, which is an institution unknown to Native Law, this claim cannot be said to have arisen out of Native Law and Custom; and as, in terms of paragraph (*a*) of sub-section (1) of section *twelve* of the Native Administration Act, 1927, as amended, a Chief may hear and determine only such civil claims as arise out of Native Law and Custom, the Chief concerned had no jurisdiction to try the instant case. This position is, to my mind, not affected either by the provisions of section *eleven* of Natal Act No. 46 of 1887 or by those of section *eighty* of Natal Act No. 49 of 1898, since apart from the question of the repeal of those sections, neither of them provide that a marriage between Natives shall be regarded as a customary union. It is true that section *eleven* of Natal Act No. 46 of 1887 provides that no marriage shall when the male spouse is subject to Native Law, remove either of the parties to such marriage from the operation of Native Law either in their persons or their property except as provided in that Act. But those provisions do not convert such a marriage into a customary union as is clear from section *thirteen* of the last-mentioned Act which prohibits polygamy by the male spouse of such a marriage whereas in the case of a customary union polygamy by the male partner is permissible.

As regards section *eighty* of Natal Act No. 49 of 1898, all all that it lays down is that civil Native cases (with certain exceptions) shall be tried according to Native Law; in other words that section lays down the system of law to be applied but does not affect the nature of the basis of claim which, as pointed out above, is the criterion in determining a Chief's civil jurisdiction in so far as causes of action are concerned.

I therefore agree that the appeal to this Court should be dismissed with no order as to costs and that the Native Commissioner's judgment should be altered as indicated in the learned President's judgment.

McCabe (Member): I concur.

For Appellant:

Adv. J. H. Niehaus i/b H. L. Bulcock of Ixopo.
Adv. J. J. Boshoff i/b G. S. Clulow of Ixopo.

NORTH EASTERN NATIVE APPEAL COURT.

SHABALALA *v.* SHABALALA.

N.A.C. Case No. 104 of 1952.

Pietermaritzburg: 23rd January, 1953. Before Steenkamp, President, Balk and McCabe, Members of the Court.

ZULU CUSTOM.

Lobolo: Loan by one house *for lobolo of son of another* house.

Customary Union—Registration of—Object to lend protection to all interested parties.

Summary: Plaintiff sued defendant in a Chief's Court for three head of cattle which he alleges were advanced from plaintiff's *house* to defendant towards the latter's *lobolo.*

Held: That according to the Natal Code of Native Law and Native Custom cattle advanced from one *house* towards the *lobolo* of a son of another *house* are refundable.

Held further: That although a certificate of registration of a customary union cannot bind a person who was not a party thereto, it gives a fair indication of the facts as they existed at the time and as reported to the official witness.

Held further: That the object of registration of customary unions is to lend protection to all interested parties and it is the duty of all persons concerned to see that the necessary particulars and information are embodied in the register.

Cases referred to:

Nzuza *v.* Ngema, 1 N.A.C. (N.E.), 98.

Status, etc., referred to:

Section 65 (2) of the Natal Code of Native Law.

Appeal from the Court of the Native Commissioner, Estcourt.

Steenkamp (President):—

In the Chief's Court plaintiff claimed from defendant three head of cattle which were advanced from plaintiff's *house* to defendant towards the latter's *lobolo.*

The Chief gave judgment in favour of defendant with costs but the appeal to the Native Commissioner was allowed and the Chief's judgment altered to one "For plaintiff for two head of cattle (or value £10) and £4 and costs".

An appeal has now been noted to this Court on the following grounds:—

"1. That the plaintiff has failed to prove that he is entitled to the three head of cattle claimed.

2. That on the evidence before the Court the probabilities are not in favour of plaintiff, whose evidence is denied by equally strong evidence for the defence and the onus being on the plaintiff judgment should have been for defendant.

3. That where means exist for a declaration to be recorded, in the marriage register, too great weight should not be attached to what defendant's father is supposed to have said long ago 'because the witness might have misunderstood the speaker or unintentionally altered a word and thus give a statement completely at variance with what the party really did say'."

The facts are that defendant is the general heir to the late Muntobumvu, his mother having been affiliated to the *indhlunkulu* after the wife in that *house* had died leaving no male issue. The plaintiff is the heir to the second *house* established by the deceased. There is a dispute as to whether the deceased father of the parties actually entered into a customary union with plaintiff's mother but the evidence is overwhelming in favour thereof.

In plaintiff's *house* there was a daughter named Timba. She got married and eleven head of cattle were paid for her as *lobolo*. Her customary union took place before defendant had entered into any customary union. Plaintiff now alleges that three head of the cattle paid for Timba were used by their late father towards the *lobolo* paid for defendant's wife. If this is the truth then according to the Code and Native Custom the cattle are refundable to the *house* in which plaintiff is the heir.

The Native Commissioner found proved as a fact that two head of cattle and £4, being assets in the second *house*, were used to pay part of the *lobolo* for defendant's customary union, but in his reasons for judgment after dealing with the evidence the Native Commissioner remarks as follows:—

> "I must rather reluctantly accept that the record of the facts found proved, and consequently my judgment, is wrong, in other words that the property in plaintiff's house was not loaned to or for defendant to assist in payment of his *lobolo*."

A certified copy of the registration of the customary union between defendant and his wife Mcingi was handed in. This shows that the union was registered on 18.4.1946 and that the actual number of *lobolo* cattle or their equivalent was ten head and the *ngqutu* beast and that all had been paid. Item 17 "Source from which *lobolo* obtained" reads "Father and own". There is no entry against item 18 "If liability incurred in securing such *lobolo*, manner of repayment and to whom due".

Plaintiff was not a party to the registration of the customary union and the following passage in Nzuza *v.* Ngema, 1 N.A.C. (N.E.), 98, on page 99 is therefore apposite in the instant case:—

> "This Court concedes that the document (meaning the registration of the customary union) cannot bind the respondent as he was not a party thereto, but it gives a fair indication of the facts as they existed at the time and as reported to the official witness."

Plaintiff in his evidence states that his father gave the cattle, viz. a greyish cow, a black tollie and £4 cash, to the defendant in the presence of men and that he borrowed them from him and said defendant would return them if his father should die before returning them.

Plaintiff called a man by the name of Muziwake, who is at present the official witness for that area. He was, however, not the official witness at the time of defendant's customary union. This witness' brother is married to plaintiff's full sister and his evidence should therefore be treated with reserve. His testimony is to the effect that he was present when after defendant's marriage the father of the parties called them and informed them that a grey cow, its tollie and £4 were being paid for defendant's *lobolo* and that defendant would return them even after his (father's) death. This was in the presence of plaintiff, defendant and a man by name of Dingidawo. This man was not called as a witness. Plaintiff therefore relies only on his evidence and that of Muziwake concerning the advance of the *lobolo* from his *house*.

Defendant called the official witness, Petrus Kumalo, whose name is given in the registration referred to above as Solomon Kumalo. This witness definitely states that he asked the father of the parties whether the cattle were refundable and the reply was in the negative. He admits plaintiff was not present when this statement was made by their father.

Defendant adduced other evidence that no cattle were advanced and there is no reason why this evidence should not be accepted.

The registration of customary unions has been in force in Natal for many years and there is no excuse for any person who advances *lobolo* or for the heir of any *house* from whom cattle are taken for *lobolo* in another house, not to take steps with a view to protecting the interests of the *house* making the advance. The whole object of the registration of customary unions is to lend protection to all interested parties and it is the duty of all persons concerned to see that the necessary particulars and information are embodied in the register. Any dilatoriness on the part of an interested person must recoil against him if he at a later period finds himself in the position that it is difficult to prove the advance made by his *house*.

Counsel for respondent contended that the registration of the customary union in question was invalid because the fathers of the respective parties to that union were not present at such registration and their absence is not covered by Section 65 (2) of the Code. This submission is not acceptable in that the plaintiff should have applied to have the registration in question set aside by the Court before bringing the present action if he considered it invalid.

It seems a pity that the Native Commissioner did not thoroughly apply his mind to the case before he entered a judgment which he now admits was wrong.

Plaintiff has not proved his case and in my opinion the appeal should be allowed with costs and the Native Commissioner's judgment altered to read:—

"Appeal from the Chief's Court is dismissed with costs."

Balk (Permanent Member): I concur.

McCabe (Member): I concur.

For Appellant: Adv. J. H. Niehaus, instructed by Hellet & De Waal of Estcourt.

For Respondent: Adv. O. A. Croft-Lever, instructed by J. M. K. Chadwick of Ladysmith.

NORTH EASTERN NATIVE APPEAL COURT.

DLAMINI *v.* **MBELE.**

N.A.C. Case No. 107 of 1952.

Pietermaritzburg: 23rd January, 1953. Before Steenkamp, President, Balk and McCabe, Members of the Court.

LAW OF PROCEDURE.

Practice and Procedure—Admission in evidence of document not in official language without a translation thereof—Assistance to parties in Court by Presiding Judicial Officer—Calling of witness by Court—Native Commissioners' Courts Rule 53.

Summary: A document in a Native language was handed in in evidence as an exhibit but no translation thereof was filed of record. The presiding Native Commissioner, during the trial assisted the parties by cross-examining witnesses and by calling a witness not called by either party.

Held: That in no circumstances should Presiding Officers admit any document not written in either of the official languages unless a translation is attached.

Held further: That there is nothing in law against the Presiding Officer rendering proper assistance to a litigant who is unrepresented.

Held further: That as it is the Presiding Officer's paramount duty to arrive at a just decision, and if the evidence adduced does not enable him to do so, he may put questions to the witnesses to elucidate or supplement the evidence, even where legal representatives appear for the parties.

Held further: That Rule 53 of the Native Commissioners' Courts Rules gives the Presiding Officer wide powers and in no way can it be said that he exceeded those powers in the instant case.

Cases referred to:

Zwane *v.* Ngidi, 1, N.A.C. (N.E.), 346.
Zulu *v.* Sibiya, 1, N.A.C. (N.E.), 363.
Hagile *v.* Solani & Ano., 1942, N.A.C. (C.O.), 26.

Statutes etc.:

Section 12 (5) of Act No. 38 of 1927.

Rule 35 of the Rules for Native Commissioners' Courts.

Rule 12 (4) of the Rules for Chiefs' and Headmen's Civil Courts.

Appeal from the Court of the Native Commissioner, Estcourt.

For the purposes of this report that portion of the judgment dealing with issues of fact is omitted.

Steenkamp (President):—

Before dealing with the appeal as such I wish to place on record that in the record there is an exhibit marked "A", which is a letter written by defendant to the plaintiff. This letter is in the Native language but no translation thereof is filed of record.

This Court in the cases of *Zwane* v. *Ngidi*, 1, N.A.C. (N.E.), 346 and *Zulu* v. *Sibiya* 1, N.A.C. (N.E.), 363 laid down in no uncertain terms that in no circumstances should Presiding Officers admit any document not written in any of the official languages unless a translation is attached.

The last-mentioned case was an appeal from the same judicial officer who presided in the case now on appeal before this Court. It seems to me that the judicial officer concerned does not read the decisions of this Court nor does he seem sufficiently interested to read the decisions of a Higher Court in appeals from cases over which he had presided in the Lower Court. This is a sorry state of affairs and it is a matter for regret that this judicial officer should apparently be so indifferent.

In the Chief's Court the plaintiff sued the defendant for £13 damages for seduction and pregnancy of his ward, Philomina.

The Chief dismissed the case but the Native Commissioner on appeal to his Court allowed the appeal and altered the Chief's judgment to one of for plaintiff for the *ngqutu* and *mvimba* beasts or their value £11. and costs.

The defendant (now appellant) has noted an appeal to this Court on the following grounds:—

"1. The Native Commissioner erred in conducting the case for the plaintiff and putting every question for plaintiff, to his witnesses and filling in what plaintiff left out in cross-examination of defendant.

2. That the Native Commissioner erred in calling evidence of virginity after defendant's case was closed.

3. That the evidence of the witness Ben Cebeculu as to what he says happened in 1950 is no corroboration of seduction alleged to have taken place in 1949.

4. That the Native Commissioner erred in holding that he is entitled to assume that the witness must have meant 1949.
5. That as the Native Chief held that Cebeculu's evidence did not corroborate plaintiff's case and gave absolution from the instance, the Native Commissioner should not have entertained an appeal unless fresh evidence was called".

Grounds 1 and 2 may conveniently be dealt with together. Counsel for appellant has intimated to this Court that he is not associating himself with these two grounds. The Attorney for appellant has evidently overlooked a fundamental principle of justice that it becomes the duty of the judicial officer to assist Natives who are not legally represented.

In the case of Hagile *v.* Solani and Another 1942 N.A.C. (C.O.), 26, Scott (A.P.) is reported to have stated as follows:—

> "A perusal of the record, however, leaves the impression that the judicial officers who dealt with the case in its various stages have allowed the Attorney for plaintiff to dictate the procedure to be adopted in the Court of the Native Commissioner. It is to be remembered that second defendant was not legally represented and care should have been taken to see that his interests were protected."

There is nothing in law against the presiding officer rendering proper assistance to a litigant who is unrepresented. Even if legal representatives appear for both parties the presiding officer's paramount duty is to arrive at a just decision in the case and if the evidence adduced does not enable him to do so he may put questions to the witnesses to elucidate or supplement the evidence.

Cockle on Law of Evidence on page 278 (3rd edition) states:—

> "The judge may, however, put further questions himself or allow witnesses to be recalled".

Powell on Evidence on page 471 (10th Edition) states:—

> "The judge has a right to interpose at any stage of the proceedings to ask a witness in the box any question which he thinks necessary, but he usually reserves such questions until both Counsel have concluded the examination of the witness."

In Scoble's Law of Evidence on page 330 (2nd Edition) it is stated that both the Court and the jury have the right to put questions to the witness to elucidate matters raised in examination.

Rule 53 of the Native Commissioners' Courts Rules reads as follows:—

> "Any witness may be examined by the Court as well as by the parties and the Court may of its own motion call a witness not called by either party if it thinks his evidence is necessary in order to elucidate the truth or for the solution of the question before it."

This rule gives to the presiding officer wide powers and in no way can it be said that he exceeded those powers in the instant case.

Grounds 1 and 2 are therefore without substance and it is a matter for regret that the Attorney for appellant should have seen fit to raise such frivolous grounds.

Balk (Permanent Member) and McCabe (Member): Concurred.

For Appellant: Adv. J. H. Niehaus instructed by Messrs. Hellet and de Waal of Estcourt.

For Respondent: Adv. O. A. Croft-Lever instructed by Mr. C. H. Jerome of Estcourt.

CENTRAL NATIVE APPEAL COURT.

MASEKO *v.* MHLONGO.

N.A.C. Case No. 1 of 1953.

Johannesburg: 26th January, 1953. Before Warner, Acting President, Cooke and Alfers, Members of the Court.

ZULU CUSTOM.

Native Customary Union: Claim for Dissolution.

Summary: Plaintiff sued for return of his wife by customary union, failing which, for (*a*) dissolution of the customary, marriage, (*b*) refund of £32 less any deduction allowed; (*c*) custody of the children. After trial of the case, in the course of which defendant's daughter stated that she would not return to the plaintiff, the Native Commissioner gave judgment disolving the customary union between plaintiff and defendant's daughter and ordering refund of £20 to plaintiff and granting plaintiff custody of the minor children.

Held: That judgment should be for return of woman within a specified time, failing which, for dissolution of the customary union, refund of *lobolo* and custody of children.

Statutes referred to: Section 137 of Natal Native Code.

Appeal from the Court of the Native Commissioner, Springs.

Warner, Acting President (delivering judgment of the Court):—

In this case defendant states that he practises Zulu Custom. Plaintiff states that his home is in Natal. The case is considered, therefore, according to Zulu Custom.

Plaintiff sued defendant for the return of defendant's daughter to him together with the children, failing which (*a*) an order for the dissolution of the Native customary marriage; (*b*) refund of £32 less any deductions allowed by the Court; (*c*) custody of the the minor children.

In his particulars of claim he alleged that he was married during 1946 by Native Custom to defendant's daughter Jane, having paid the sum of £32 as *lobolo* to defendant; that there were two minor children born of the said marriage, Alison, a boy aged five years, and Busisiwe, a girl aged two years and that in December, 1950, defendant's daughter wrongfully and unlawfully deserted plaintiff and also removed the children from the custody of plaintiff and, despite demand, defendant had failed to return his daughter to plaintiff.

In his plea, defendant denied that plaintiff and Jane were married by Native Custom during 1946 or at any other time. He also denied that plaintiff paid the sum of £32 or any amount whatsoever as *lobolo*. He stated that Jane gave birth to four illegitimate children of whom plaintiff was the father and two of the children survived. He also stated that plaintiff paid £20 by way of damages for impregnating Jane. He denied that Jane deserted plaintiff and stated that plaintiff was not entitled to the custody of the children. He counterclaimed for an order against plaintiff for maintenance in respect of the two children at the rate of £1 per month per child.

After hearing evidence the Native Commissioner gave the following judgment:—

> "The customary union subsisting between plaintiff and Jane is hereby dissolved. Defendant to refund to plaintiff sum of £20 being £32 less £12 for children born. Plaintiff to have custody of the two minor children. Defendant to pay the costs of this action.

Defendant has appealed against the judgment on the following grounds:—

(*a*) The judgment is against the evidence and the weight of the evidence, more particularly for the following reasons:—

(i) The Commissioner erred in accepting the evidence of the plaintiff.

(ii) The Commissioner erred in rejecting the evidence of the defendant for the reasons stated by him.

(*b*) The Commissioner erred in granting judgment in favour of the plaintiff for the dissolution of the customary union, since in his facts found to be proved, the Commissioner failed to find the following as proved:—

(i) That a customary union did in fact exist.

(ii) That *lobolo* had passed between plaintiff and defendant.

(iii) That there was any agreement whatsoever between the plaintiff and defendant as regards *lobolo*.

(iv) That there was any marriage ceremony or handing over of defendant's daughter to plaintiff.

(*c*) The Commissioner failed to find as a fact that the defendant's daughter deserted the plaintiff, and should therefore have granted judgment for defendant, alternatively, absolution from the instance, with costs to defendant.

(*d*) On the facts found proved the Commissioner should have held that the plaintiff had failed to discharge the onus of proving that a customary union did exist and should have entered judgment for the defendant with costs or should have granted absolution from the instance with costs.

(*e*) Alternatively, the Commissioner erred in granting judgment for plaintiff for the dissolution of the customary union, custody of the children and refund of *lobolo* since plaintiff's claim was for the return of defendant's daughter, failing which for dissolution, custody, etc. The Commissioner should accordingly have granted judgment in the alternative, as prayed for.

(*f*) The Commissioner erred in granting for plaintiff (defendant in reconvention) on the counterclaim or should have entered judgment for defendant (plaintiff in reconvention) as prayed with costs.

Plaintiff states that he met Jane in 1941, that they lived together as man and wife, that Jane gave birth to two children who died, that in 1946 she gave birth to another child who is still alive, that he then paid an amount of £8 as damages and then paid £20 as *lobolo* following this by a further payment of £12 when defendant made a feast and slaughtered two sheep. He states that he agreed to pay £50 as *lobolo* but defendant did not provide a wedding-outfit so he has not paid the balance. He also states that, after the ceremony Jane lived with him at Orlando for three months and he then took her to his mother in Natal; that she ran away but he found her with her parents and took her back to Orlando; that he sent her to his home in Natal where she gave birth to another child but ran away in 1950. Plaintiff's evidence is supported by that of Frans Mhlongo who states that he was present when all three payments were made. Climate Mhlongo is stated to have been present also but has died.

Plaintiff has not made any claim in respect of the £8 alleged to have been paid as damages, although, according to Zulu Custom as set out in Section 137 (1) of the Natal Native Code, payments other than the *ngqutu* beast made in respect of a woman's seduction are regarded as forming part of the *lobolo* if the seducer marries the woman.

Defendant admits that plaintiff paid him £20. He states that this payment was in respect of damages for two children born. He denies that any other payments were made or that he had made a feast and slaughtered two sheep. He does not deny that Jane lived with plaintiff for nine years and gave birth to four children by him. He also states that he suggested to plaintiff that he should pay *lobolo* and he could take his wife. Jane denies that she contracted a customary union with Plaintiff but admits that she was associated with him from 1941 until 1951 and gave birth to four children by him, two of whom have died. She also admits that in 1950 plaintiff took her with him to show his children to his mother in Natal and she remained there for five months.

According to Zulu Custom, as laid down in Section 137 (1) of the Natal Native Code, the father of a girl who has been seduced is entitled to claim from her seducer a *Ngqutu* beast for the seduction and a further beast for each child born. Defendant states that he demanded four head of cattle from plaintiff because his daughter had given birth to two children but according to the Code he would have been entitled to claim three head of cattle. Payment in cash was made in the Transvaal where the value of cattle is reckoned at £3 per beast. This means that, if a claim had been made against plaintiff for damages, he could have settled such claim by a payment of £9. As plaintiff had been living with the woman as his wife and had had children by her, and wanted to marry her, it seems unlikely that he would have agreed that the payment of £20 should represent damages.

In view of the evidence for plaintiff, the probabilities of the case and the admissions made by defendant and his daughter, I consider that the Native Commissioner was correct in finding that a customary union was contracted between plaintiff and defendant's daughter, Jane.

In his reasons for judgment, the Native Commissioner, under the heading of "facts found proved" has not stated whether he found that a customary union was contracted between plaintiff and defendant's daughter. In his reasons explaining the grounds on which he found facts proved, he has stated, however, "He (plaintiff) paid *thirty-two* pounds *lobolo* and Jane was handed to him as his wife and they were married by Native Law and Custom".

Plaintiff sued for, *inter alia*, the return of Defendant's daughter to him, failing which, an order for the dissolution of the Native customary union. The Native Commissioner gave judgment dissolving the customary union subsisting between plaintiff and Jane. Apparently he took this step because Jane stated that she was not prepared to return to plaintiff but, in doing so, he went beyond the terms of the claim.

In dissolving the customary union without ordering defendant to return plaintiff's wife to him, the Native Commissioner has given a judgment which is not in conformity with the claim in the summons.

It becomes necessary to alter the judgment of the Native Commissioner in accordance with plaintiff's claim but the question of the costs of the appeal then arises.

Defendant has failed to establish his main ground of appeal, namely, that the Native Commissioner erred in finding that a customary union was contracted between plaintiff and defendant's daughter. He also failed to establish that the Native Commissioner erred in not giving judgment for him on the counterclaim, which is not in accordance with Native Custom, under which this case was tried.

For these reasons, I consider that Defendant is not entitled to costs of appeal.

The appeal is dismissed with costs and the Native Commissioner's judgment is sustained except that the first two sentences thereof are altered to read:—

"For plaintiff for return of his wife not later than the 31st March, 1953, failing which, it is ordered that the customary union subsisting between them be disolved and that defendant refund to plaintiff the sum of £20, being £32 *lobolo* less £12 for children born."

Cook and Alfers, Members, concurred.

For Appellant: Mr. S. Judes of Springs.

Respondent in default.

SOUTHERN NATIVE APPEAL COURT.

MBOYI *v.* DUMENI.

N.A.C. Case No. 2 of 1953.

Port St. Johns: 26th January, 1953. Before Sleigh, President, Wilbraham and Midgley, Members of the Court.

PONDO CUSTOM.

Pondo Custom—Institution of wife as seedbearer in great house.

Plaintiff (now respondent), a Native minor, duly assisted, sued defendant (now appellant) unsuccessfully in the Court of the Paramount Chief, Botha Sigcau, *inter alia* for an order declaring him to be the heir in the first house of his grandfather the late Mboyi Nontshakaza. Against the judgment in favour of the defendant, an appeal was noted to the court of the Native Commissioner which allowed the appeal. The Native Commissioner's judgment now comes on appeal to this Court.

The facts of the case are set out in the judgment.

Held: That whilst it is permissible for a man to marry a seedbearer to replace a woman who has died without male issue, it is not permitted under Pondo Custom to marry a seedbearer to a wife who is alive even if she is barren.

The appeal accordingly succeeds.

Cases referred to:

(1) Sigidi *v.* Lindinxiwe (1, N.A.C., 55).
(2) Masipula *v.* Masipula (4, N.A.C., 373).
(3) Dumalisile *v.* Dumalisile [1, N.A.C. (S), 7].
(4) Maliwa *v.* Maliwa (2, N.A.C., 193).
(5) Hloboyiya *v.* Kulakade (3, N.A.C., 269).
(6) Makoba *v.* Mntopayo (5, N.A.C. 153).
(7) Manjezi *v.* Manjezi [1942, N.A.C. (C. & O.), 49].
(8) Nomandi *v.* Ntlangeni [1936, N.A.C. (C. & O.), 112.]

Works referred to:

"Reaction to Conquest"—M. Hunter.

Appeal from the Court of the Native Commissioner, Flagstaff.

Sleigh (President):—

Plaintiff, a minor, duly assisted, sued defendant in the duly constituted court of Paramount Chief Botha Sigcau for—

(*a*) an order declaring him to be the heir in the first house of his grandfather, the late Mboyi Montshakaza;

(*b*) delivery of the property appertaining to that house or payment of its value; and

(*c*) a statement of account of the increase of stock and delivery of such increase or payment of their value.

The Chief's Court held that defendant was the heir in the first hut of the late Mboyi and gave judgment for him. From this judgment plaintiff appealed to the Native Commissioner's Court which allowed the appeal and entered judgment for plaintiff in terms of prayers (*a*) and (*c*) and for some of the stock and other assets claimed in prayer (*b*). I need not detail the difference between the stock claimed and the number awarded as it is common cause that whoever is heir is entitled to the stock belonging to the first hut. The Native Commissioner's judgment now comes on appeal to this Court.

It is common cause that the late Mboyi married five wives in the following order: (1) Maluyenge, the daughter of Luyenge; (2) Maqinebe; (3) Maheleni; (4) Mampinge; and (5) Maluyenge, the sister of No. 1, and that Nos. 1 and 2 died without issue.

Plaintiff's case is that he is the eldest son of the late Dumeni who was the eldest son of Mboyi's third wife (Maheleni), and therefore he (plaintiff) is the heir, according to Pondo Custom, in Mboyi's great house. On the other hand, defendant, who is the eldest son of the fifth wife (Maluyenge No. 2) asserts that his mother was married as seed bearer to Maluyenge No. 1, and, consequently, he is the heir in the first hut.

The Native Commissioner found that the third wife, Maheleni, and her sons were not present when the status of Maluyenge No. 2 was announced, and that it was not competent for Mboyi to marry a seedbearer to his first wife as he had sons in his third hut. The questions for decision are whether these findings are correct.

The Native Commissioner rightly states that the institution of a wife as seed bearer must be made with the full knowledge of the family group and publicly announced at the wedding. I refer to his finding that Maheleni and her sons were not present when the status of Maluyenge No. 2 was announced. This finding is not supported by the evidence. The absence of the children is explained by the fact that they were at the time of the marriage all small and would not be present when the announcement was made. As to Maheleni, Manyosi, the present head of the family, says she was present. The only other witness who was questioned on this point is Nosibuwesi who lives at Luyenge's kraal and probably did not know Mboyi's other wives well. He first says that he did not see Maheleni when the announcement was made, but goes on to say that he saw Mampinge and the one who died. As Maheleni is the only wife who has died since the marriage of Maluyenge No. 2, it is clear that he was referring to her. Moreover the announcement was made at the kraal where Maheleni was living. It is therefore improbable that the announcement was made in her absence.

The Native Commissioner gives no specific finding on the question whether Maluyenge No. 2 was in fact married as seed bearer. It is therefore necessary to deal with this question first and in my opinion the evidence of Manyosi on this point must be accepted. He is the brother of Mboyi and the head of their clan. It is his duty to settle family disputes and see that justice is done. No reason has been advanced why he should favour defendant.

Manyosi states that Maluyenge No. 1 died shortly after marriage and while his father, Montshakaza, was still alive. In law, as it then existed, Mboyi was entitled to a refund of the dowry paid, for her, but the family decided that instead of asking for a refund Luyenge be requested to replace the deceased wife with another daughter. This Luyenge agreed to do, but his daughter was then still a child. About two years later Mboyi married Maqinebe who also died shortly after marriage and part of her dowry was refunded. Thereafter he married Maheleni and later Mampinge. About this time Manyosi and Mxabaniso went to Luyenge's kraal to ascertain whether the girl, Maluyenge No. 2, was old enough to be married. Manyosi says Luyenge promised to send her to Mboyi's kraal and later she arrived with a *duli* party. He says that Mboyi reported her arrival to Chief

Marelani, who sent a representative to the wedding. It is clear that at the wedding it was announced that Maluyenge No. 2 was to take the place of her deceased sister and that she was to be the senior wife. This announcement was made by Mboyi and the Chief's *Nduna*. The evidence that she was married as seedbearer is supported by the fact that Marelani sent an *induna* to represent him. He would not have done this if it were an ordinary marriage.

It is also quite clear that Maluyenge No. 2 was regarded by the family as the senior wife. Up to the time of this marriage Mboyi lived at his mother's kraal. After the marriage he removed to his grandmother's kraal taking with him his mother, Mampinge, Maluyenge No. 2 and all the stock, leaving Maheleni at his mother's kraal. It was at the new kraal where the stock was kept and where Mboyi was buried. It was defendant who dug the first sod for the grave and was the first among the men to throw earth into the grave and it was Maluyenge who was the first of the deceased's wives to do so. Plaintiff's own witness, Banjiwe, says that of the two wives alive at the time he gave evidence, he regarded Maluyenge No. 2 as the great wife.

The fact that Mboyi, who was a wealthy man, paid only four cattle and one horse for Maluyenge No. 2, affords additional proof that she was not an ordinary wife.

It remains to be considered whether it was competent for Mboyi to marry a seed bearer when there were sons in his third hut. It is established Native Law that the wives of a man obtain their status and rank from the chronological order in which they were married and it is not legally competent for a husband (unless he be a paramount chief) to nominate the status of a wife when such nomination has the effect of altering the status of his other wives [in so far as Pondoland is concerned, see the cases of Sigidi *v.* Lindinxiwa (1, N.A.C., 55); Masipula *v.* Masipula (4, N.A.C., 373)]; but there is a vast difference between nominating a wife and marrying a seed bearer. The former prevents a commoner from assigning to a newly married wife any status superior to and independent of that of his existing wives. A seed bearer is married into an existing house in which there is no heir. It was stated in Dumalisile *v.* Dumalisile [1, N.A.C. (S), 7], that in its pure form the custom of marrying a seed bearer could be resorted to only when the principal wife has died without male issue or is barren, or whose male children have died and she is past child bearing. It appears, however, from the opinions expressed by the Pondo assessors in the undermentioned cases that Pondo Custom does not permit the marrying of a seed bearer to a woman who is still alive, unless the union of the first woman has been dissolved. In Maliwa *v.* Maliwa (2, N.A.C., 193), the assessors stated that a man could marry a seed bearer to a wife (1) who had died, even if she left male issue; (2) who had no male issue and failing male issue by the first wife, the son of the seed bearer would inherit the estate; (3) if she had deserted her husband and the union had been dissolved; and (4) if the husband himself had dissolved the union by driving away his wife. The assessors were, however, emphatic that a husband could not marry a seed bearer to a wife who was alive and had issue. In Hloboyiya *v.* Kulakade (3, N.A.C., 269), the assessors expressed the opinion that a man could marry a seed bearer to a wife who had deserted even if the latter had had male issue; but in Nakoba *v.* Mntopayo (5, N.A.C., at p. 153), which was a case in which a man whose wife in the first hut was still alive but whose sons in that hut had all died, purported to marry a seed bearer to his first wife notwithstanding the existence of sons in the second hut, the assessors unanimously stated that a Native with an heir in his second house could not marry a seed bearer to raise an heir to the first house. In Manjezi *v.* Manjezi [1942, N.A.C. (C. & O.), 49], assessor N. Jiyajiya stated that there could be no woman married as a seed bearer into the great house when all three wives were alive and there were no heirs in the great and right hand house. In the

present case the majority of the assessors state that while it is permissible for a man to marry a seed bearer to replace a woman who has died without male issue, it is not in accordance with Pondo Custom for a man to marry a seed bearer to a wife who is alive, even if she is barren.

This expression of opinion explains the apparent difference in the opinions given in the cases of Maliwa and Makoba (supra). The Native Commissioner who relies on the decision of Makoba's case has apparently overlooked the fact that in that case the wife was still alive when her seed bearer was married, whereas in the present case the evidence is conclusive that Maluyenge No. 1 died childless long before her sister was married as her seed bearer. It is clear from the authorities that it was competent for Mboyi to have married a seed bearer to his first hut. Assessor T. Mangala's statement that it is not usual to marry a seed bearer to a woman who has left a son, but when this is done she is only a nurse, agrees with the opinion of the assessors in Nomandi *v.* Ntlangeni [1936, N.A.C. (C. & O.), 112]. See also "*Reaction to Conquest*" by Hunter, at page 120-121, where the learned author also states in effect that a seed bearer is married into the hut of a deceased wife who left no male issue.

The appeal is consequently allowed with costs and the judgment of the Court below is altered to read: "The appeal from the Chief's Court is dismissed with costs".

Wilbraham and Midgley (m.m.): We concur.

ASSESSORS' OPINIONS.

Questions put to Assessors:—

(1) Tolikana Mangala.
(2) Nombekile Libode.
(3) Mdabuka Mqikela.
(4) Lumaya Langa.
(5) Madlanya Tantsi.

The facts of the case having been put to the assessors:—

Question:

Having regard to the fact that there were three sons in the third hut, was it competent to marry a seed bearer to the first hut?

Answer:

(Per L. Langa): It is a difficult point. It is clear that the custom was once practised but it was taken from the Xesibes and is not Pondo Custom.

(Per M. Tantsi): I agree.

(Per T. Mangala): I do not agree. The custom is recognised by the Pondos and I am surprised to hear it said that there is no such custom. (Quotes two cases where sons of seed bearers have been recognised as heirs to man of rank and adds that he could quote many more). It is particularly so where the first wife has died childless and has been replaced by her sister. But if the first wife left male children the new wife is only a nurse and when the children are grown she must return to her proper hut. If the first wife had only daughters, then the son of the new wife is the heir, even if minor wives had sons. Here the 4 cattle and one horse paid for the fifth wive is no dowry and shows she was a replacement. I say the Pondo Custom is "ngeniswa" which means the replacement of a dead wife. We do not practice "isinye" which is the replacement of a barren wife. It is not Pondo Custom to replace a woman who has deserted or who has been driven away.

(Per Mdabuka Mqikela and Nombekile): We agree.

(Per M. Tantsi): I do not agree. It used to be the custom but has been abolished.

For Appellant: Mr. C. Stanford, Lusikisiki.

For Respondent: Mr. Birkett, Port St. Johns.

SOUTHERN NATIVE APPEAL COURT.

NOMFIXI *v.* SIMAU.

N.A.C. CASE No. 3 OF 1953.

PORT ST. JOHNS: 27th January, 1953. Before Sleigh, President, Wilbraham and Midgley, Members of the Court.

PONDO CUSTOM.

Customary union—Pondo Custom—Issue of illegitimate son not illegitimate if born during subsistence of customary union.

The facts of the case are set out in the first paragraph of the written judgment.

Held:

(1) That the children of a woman legally married either by Christian Rites or Native Custom to a man who is illegitimate, are themselves not illegitimate and suffer no disability in respect of their father's estate.

(2) That as appellant is entitled to his father's estate he is entitled to his sister's dowry.

THE APPEAL SUCCEEDS.

Cases referred to:

Ndema *v.* Ndema, 1936, N.A.C. (C. & O.), 15.

Works referred to:

Reaction to Conquest—Hunter.

Appeal from the Court of the Native Commissioner, Port St. Johns.

Sleigh (President):—

The facts in the case, as far as they go, are not in dispute. Respondent (plaintiff in the Court below) is the son and heir of the late Simau who had a sister Nqomfe. The latter had an illegitimate son, Nomfixi, in respect of whom no fine was paid. Apparently Nomfixi grew up at the kraal of Simau who paid dowry for him. He thereafter established his own kraal. Nomfixi had two children before he died, namely Stembele (appellant) and a girl Tilata. Tilata was married twice. In respect of the first marriage, which was childless, the equivalent of nine cattle was paid as dowry to respondent. After the death of the first husband Tilata was given in marriage to Tshata who paid 5 cattle and a horse as dowry to appellant. Respondent claimed these cattle in the Court of the Chief's deputy, James Ndabeni and obtained judgment. An appeal by appellant to the Native Commissioner's Court was unsuccessful and the matter now comes on appeal to this Court.

The grounds of appeal are as follows:—

"That the judgment is:

1. Contrary to Native Custom.
2. Contrary to public policy. Sitembele is the offspring of a marriage by Native Custom. Because his father was illegitimate is no legal ground for declaring him (Sitembele) and his (Sitembele's) offspring, and all succeeding generations of Sitembele, illegitimate."

The Native Commissioner's reasons for confirming the Chief's judgment are as follows:—

"There seems to be no doubt that an illegitimate son may legitimise himself at any stage. In other words the late Nomfixi could have legitimised himself at any time, and had

he done so his descendants would have been under no disability. The question arises, can he be legitimised after his death?

To hold that he cannot, would, it is submitted, be contrary to public policy as it would place untold future descendants under disability.

To hold that it can be done would have the effect of safeguarding the descendants from disability provided that the " heir (or his representative) were paid the damage which, according to native custom, he has suffered through his ward producing an illegitimate child.

It is true that the heir might be called upon to wait many years and then be paid only the customary number of cattle but time does not enter into the scheme of things so far as such Native Custom are concerned and Natives also understand that animals paid under Custom do not increase.

The Court accordingly decided in favour of the plaintiff and ruled that as no legitimisation had taken place, Mbuzeni was entitled to the stock ".

An illegitimate son of a spinster for whom no fine has been paid belongs to his mother's family and is regarded in Native Law as a junior son in his grandmother's house (see *Hunter's " Reaction to Conquest "* p. 47 and the opinion of the assessors in the present case). He, however, acquires no heritable rights in that house as, according to Native Custom, no one can succeed through a female [Ndema *v.* Ndema, 1936, N.A.C. (C. & O.), 15]. It is true that in Pondo Custom he can transfer himself to the family of his natural father by paying the customary fine to his mother's guardian, but this must be done with the concurrence of his father's family (see assessors' opinion annexed). The Custom among other Xhosa-speaking tribes is virtually the same since the natural father can always redeem his illegitimate child by paying the customary fine. The issue in the present case has however nothing to do with the legitimisation of an illegitimate child.

The basis of respondent's claim in the Chief's Court is not clear. The Chief's deputy says in his reasons that Simau paid dowry for Nomfixi's wife and respondent paid dowry for appellant's wife. His judgment, however, was not based on the ground that respondent was entitled to a refund of the dowry so paid, but because the witnesses all stated that Simau was the heir of Nomfixi. This view was upheld by the Native Commissioner who seems to have been under the impression that because Nomfixi was illegitimate all his descendants are also illegitimate, and suffer a perpetual disability in respect of their parents' estates. If this view were correct a preposterous and unsupportable position would arise. It would mean that a descendant of the illegitimate child, born in lawful wedlock, cannot succeed to his father's estate, and this would be so, even if his parents had been married according to Christian Rites, because in the vast majority of cases the deceased father's estate would devolve according to Native Custom (see Government Notice No. 1664 of 1929).

The view is of course, entirely fallacious. If a woman has been legally married either according to Native Custom or by Christian Rites to a man who is illegitimate her children by her husband are not illegitimate and suffer no disability whatsoever in respect of their father's estate. The only disability they suffer is that they cannot inherit anything through their grandmother (the seduced girl). Appellant and his unmarried sister of course, belong to Simau as also the children of respondent and his other brothers. In Native Law all the descendants of Simau are regarded as his children but this does not mean that the eldest sons of respondent and his brothers are not entitled to succeed to the estates of their respective fathers. Appellant, by virtue of his

parents' marriage according to Native Custom is in no worse position. He is entitled to Nomfixi's estate and it follows that he is entitled to the dowry of his sister.

It is possible that respondent has a claim to Tilata's dowry on other grounds, but these were not canvassed in the court below, and do not now come up for descision.

The appeal is allowed with costs and the judgment of the Court below is altered to read:—

"The appeal is allowed with costs and the judgment of the Chief's Court is altered to one for defendant."

Wilbraham and Midgley (m.m.): We concur.

ASSESSORS' OPINIONS.

Questions put to Native Assessors:—

(*a*) Tolikana Mangala.
(*b*) Nombekile Libode.
(*c*) Mdabuka Mqikela.
(*d*) Lumaya Langa.
(*e*) Madlanya Tantsi.

Question:

A man has an unmarried daughter who gives birth to a son for whom no fine is paid. What is the status of this son?

Answer:

Per Nombekile: He is regarded as a junior son in the house of his grandmother.

The others agree.

Question:

Your unmarried daughter has a son Tafeni, for whom no fine was paid by the natural father Mboyi. To whom does Tafeni belong?

Answer:

Per Nombekile: He is a junior son of the house of his grandmother.

Per Tolikana: He is my son in that house and when I die he becomes the son of my heir because my heir takes my place as far as Tafeni is concerned. My other sons remain the brothers of my heir.

The others agree.

Question:

Can Tafeni release himself by paying you the fine Mboyi should have paid?

Answer:

Per Tolikana: No. He has no property of his own, being my son until his fine is paid. He can only be released by some one from Mboyi's kraal who is driving cattle.

The others agree.

Question:

Tafeni is not released and you provide dowry for him. To whom do his children belong; who will get the dowry of his daughter?

Answer:

Per Tolikana: Those children are mine and so is the dowry of the daughter because Tafeni is my son. If I am dead my heir is in my place, and he can therefore claim the daughter's dowry, but he will not take it all.

The others agree.

For Appellant: Mr. Birkett, Port St. Johns.

For Respondent: Mr. Mvabaza, Libode.

SOUTHERN NATIVE APPEAL COURT.

MAVILWANA *v.* BAMBA.

N.A.C. Case No. 4 of 1953.

Port St. Johns: 27th January, 1953. Before Sleigh, President, Wilbraham and Midgley, Members of the Court.

NATIVE LAW AND CUSTOM.

Adultery—Mishandling received by person caught in adultery may form subject of complaint if force use is manifestly unreasonable—Husband of woman caught in adultery entitled to use force commensurate with circumstances of individual case in arresting adulterer.

Plaintiff (now respondent) successfully sued defendant (now appellant) for the payment of three head of cattle or their value £24 as damages for adultery committed by appellant with respondent's customary wife. Appellant denied the charge and counterclaimed unsuccessfully for £200 as damages for assault. Appellant appealed against both judgments but later withdrew the appeal against the judgment on his claim in convention.

In regard to the claim in reconvention respondent admits felling a person who tried to escape from his (respondent's) wife's hut at about midnight on his (respondent's) arrival on 30th June, 1951. He then struck a match, saw appellant lying on the ground unconscious and struck further blows. The District Surgeon's report on the injuries and the fact that appellant was detained in Kokstad Hospital for 3½ weeks testify to the serious nature of the assault.

Held: That whilst the Court will not meticulously weigh the amount of force necessary to effect the arrest of an adulterer, the husband or his near male relatives are, in Native Law, entitled to use such force as the circumstances of each case demand, but if such force is manifestly unreasonable and serious injuries are inflicted on the adulterer, the assailant will be liable in damages.

The appeal succeeds on the counterclaim in an amount of £25 and costs.

Cases referred to:

Mkatali v. Mjwacu & Ors, 1939, N.A.C. (C. & O.), 54.

Appeal from the Court of the Native Commissioner, Bizana.

Sleigh (President):—

Plaintiff (now respondent) sued defendant (now appellant) for the payment of three head of cattle or their value £24 as damages for adultery committed by appellant with respondent's customary wife, Makubeni. Appellant denied the charge and counterclaimed for £200 as damages for assault. The Native Commissioner entered judgment for repondent with costs on the claim in convention and dismissed the counterclaim with costs. From these judgments appellant appealed, but the appeal against the judgment on the claim in convention has been withdrawn.

In regard to the claim in reconvention, respondent himself states that when he arrived at his wife's hut about midnight on 30th June, 1951, a person tried to get out. He struck the person with his stick and felled him. He then struck a match and found appellant lying on the ground unconcious. He then struck appellant further blows.

Appellant was examined on the 2nd July, 1951, by the District Surgeon, Bizana, who found the following wounds, viz., (1) a lacerated wound one inch long above the left eye, (2) a lacerated wound on right side of the head, (3) an abrasion at back of neck three inches long and two inches wide, (4) an abrasion at back of left shoulder three inches by three inches, (5) an abrasion three inches by three inches on right side of the back, (6) an abrasion four inches by three inches on the back, (7) an abrasion on left shoulder, (8) a lacerated wound on the lobe of the left ear, and (9) a punctured wound on the right knee.

The doctor found that both eyes were black, the left eye was red and swollen, clotted blood was found in both nostrils and both ears, being indications of a fractured skull. Respondent himself says that appellant was still unconscious when he was taken to the headman's kraal on the afternoon of 1st July and appellant says that he recovered consciousness in the Kokstad Hospital where he was detained for three and a half weeks.

Now in Mkatali *v.* Mjwacu & Others, 1939, N.A.C. (C. & O.), 54, it was stated that mishandling received by a person caught in adultery cannot form the subject of complaint, when it is not of a serious or grievous nature. I prefer to put this principle in a different way. If a woman is caught in adultery her husband or his near male relatives are, in Native Law, entitled to arrest the adulterer and, in order to effect the arrest, they are entitled to use such force as the occasion requires depending on the circumstances of each case. The Court will not attempt to weigh meticulously the amount of force necessary to effect the arrest, but if the force used is manifestly unreasonable, or if a dangerous weapon has been used and the injuries inflicted are of a serious nature, then the assailant will be liable for damages.

In the present case, the respondent continued to batter the unconscious appellant while the latter was lying helpless on the ground and the District Surgeon says that it was a serious assault as indeed the evidence shows. In my opinion it was quite unnecessary, in order to effect the arrest, to strike appellant when he was unable to resist arrest. The Native Commissioner should, therefore, not have dismissed the counterclaim.

Appellant states that as a result of the assault his hearing and eyesight have been affected. The District Surgeon could find no impairment of appellant's eyesight and the bruises and cuts are all healed, but he considers that appellant has suffered 90 per cent loss of hearing. The Native Commissioner, however, says that appellant had no difficulty in hearing the interpreter and considers that the District Surgeon had been tricked. I accepted the Native Commissioner's finding that appellant has not suffered any permanent disability nor is there any evidence of loss of earnings. It is, however, not disputed that appellant's medical and transport expenses in connection with his injuries amounted to £8. 16s. and he must have suffered considerable physical pain. In my opinion, an award of £25 will meet the case.

The appeal is allowed with costs and the judgment on the counterclaim is altered to read " For defendant (plaintiff in re-convention) for £25 and costs ".

Wilbraham and Midgley (Members of the Court): We concur.

For Appellant: Mr. Birkett, Port St. Johns.

For Respondent: Mr. C. Stanford, Lusikisiki.

NORTH EASTERN NATIVE APPEAL COURT.

MTEMBU AND ANOTHER *v.* ZUNGU.

N.A.C. Case No. 88 of 1952.

Eshowe: 28th January, 1953. Before Steenkamp, President, Balk and Craig, Members.

Practice and Procedure—Noting of appeal—Security for respondent's costs of appeal to be given within period prescribed under Native Appeal Court Rule 4.

Summary: An appeal against a judgment of a Native Commissioner's Court was lodged within the period prescribed by Native Appeal Court Rule 4 but the security required in terms of Rule 5 (3) was only given after the expiration of that period. No application for late noting of appeal was made.

Held: That the provisions of sub-rule 5 (1) must be read with those contained in sub-rule 5 (3).

Held further: That the provisions of sub-rule 5 (3) are peremptory.

Held further: That as the prescribed security in full was given after the period prescribed by Rule 4, the appeal is out of time notwithstanding that a notice of appeal complying with Rule 7 was lodged within that period.

Held further: That as no application for condonation of the late noting thereof has been made, the appeal should be struck off the roll with costs.

Statutes etc., referred to:

Native Appeal Court Rules Nos. 4, 5 (1), 5 (3) and 7.

Appeal from the Court of the Native Commissioner, Mtubatuba.

Balk (Permanent Member):—

The rules hereinafter referred to are those for Native Appeal Courts, published under Government Notice No. 2887 of 1951.

In the instant case, the notice of appeal was delivered to the Clerk of the Native Commissioner's Court concerned within the period prescribed by rule *four* but the full security for the payment of the respondent's costs of appeal, required in terms of sub-rule 5 (3), was not lodged with the Clerk of that Court until after the expiration of that period.

Counsel for appellants contended that, in terms of sub-rule 5 (1) read with rule *four*, the proper noting of an appeal was completed by delivery to the Clerk of the Native Commissioner's Court timeously of a notice complying with the requirements of rule *seven* and that security for the payment of the costs of appeal of the other party, could be lodged with the Clerk of that Court at any time prior to the hearing of the appeal. But sub-rule 5 (1) must be read with sub-rule 5 (3), which provides that the party noting an appeal or cross-appeal *shall, when delivering the notice of appeal, give security for the payment of the costs of appeal of the other party.* The language of the last-mentioned sub-rule indicates that the provisions thereof are peremptory and the reason therefor is not far to seek. For if an appellant were permitted to lodge the security in question at any time prior to the hearing of the appeal, it would lay the respondent open to incurring costs of appeal before security for the payment thereof had been furnished, with the resultant risk that the respondent may not be able to recover those costs should the appellant at the last moment fail to furnish the security and abandon the appeal.

It follows that if the prescribed security in full is given to the Clerk of the Native Commissioner's Court after the expiration of the period prescribed by rule *four*, the appeal is out of time notwithstanding that a notice of appeal complying with rule *seven* was lodged within that period. Accordingly the instant appeal has not been noted timeously and as application has not been made for condonation of the late noting thereof, it should be struck off the roll with costs.

It is of course open to the appellants to make formal application to this Court for re-instatement of this case on the roll and for condonation of the late noting of the appeal; should should they do so, those matters will be duly considered.

Steenkamp (President): I concur.

Oftebro (Member): I concur.

For Appellant: Mr. H. H. Kent of Eshowe.

Respondent in person.

NORTH EASTERN NATIVE APPEAL COURT.

NXUMALO *v.* NXUMALO.

N.A.C. Case No. 91 of 1952.

Eshowe: 28th January, 1953. Before Steenkamp, President, Balk and Oftebro, Members of the Court.

LAW OF SUCCESSION.

Estate: Holding of enquiry necessary where persons other than the parties have an interest in the devolution of estate.

Costs: Neither of the parties took point on which appeal turns.

Summary: Plaintiff claimed the assets and property (unspecified) in the estate of his deceased grandfather. A dispute as to the heirship arose.

Held: That as persons other than the parties in the instant case have an interest in the devolution of the estate in question, it is clear the subject matter of the claim cannot be properly disposed of by a judgment in the instant case but only by means of an estate enquiry.

Held further: That as neither of the parties took the point on which the appeal turns, there should be no order as to costs in this Court and in both Courts below.

Cases referred to: Kholane *v.* Manete 1948, N.A.C. (T. & N.), 24.

Appeal from the Court of the Native Commissioner, Mahlabatini.

Oftebro (Member):—

This is an appeal from the judgment of a Native Commissioner's Court allowing with costs an appeal against the judgment of a Chief's Court.

In allowing the appeal the Native Commissioner's Court altered the Chief's judgment for defendant with costs to one for plaintiff with costs.

The claim in the Chief's Court was in respect of the assets and property (unspecified) in the estate of the late Mabamule Nxumalo.

The grounds of appeal to this Court are:—

1. That the judgment is against the evidence and the weight of the evidence.

2. That the learned Native Commissioner erred in holding that the defendant had failed to prove his heirship.

As it emerges from the evidence that persons other than the parties in this case have an interest in the devolution of the estate in question, it is clear that the subject matter of the claim cannot be properly disposed of by a judgment in the instant case but only by means of an Estate Enquiry, see Kholane *v.* Manete, 1948, N.A.C. (T. & N.), 24, and it follows that whilst the Native Commissioner's judgment falls to be varied accordingly, the grounds of appeal to this Court fail as they are based on the merits of the case; and, as neither of the parties took the point on which this case turns, there should be no order as to costs in this Court and in both Courts below.

I am therefore of opinion that the appeal should be dismissed with no order as to costs but that the Native Commissioner's judgment should be altered to read—

"Appeal is dismissed with no order as to costs but the Chief's judgment is altered to read 'Claim dismissed with no order as to costs'."

Steenkamp (President):—

I concur. I wish to draw the Native Commissioner's attention to the fact that in this case and in all other appeals from his judgments the date on which he gave judgment is not entered on the cover N.A. 253.

Balk (Permanent Member): I concur.

For Appellant: Mr. W. E. White of Eshowe.

For Respondent: Mr. S. H. Brien of Messrs. Wynne & Wynne, Eshowe.

NORTH EASTERN NATIVE APPEAL COURT.

NTULI *v.* **DHLAMINI.**

N.A.C. CASE No. 83/52.

ESHOWE: 29th January, 1953. Before Steenkamp, President, Balk and Oftebro, Members of the Court.

ZULU CUSTOM.

Native customary union—Dispute as to whether customary union existed—Judgment granted against defendant in previous action by plaintiff for payment of lobolo postulates a finding by that Court that that customary union was a valid one.

Summary: In 1939 plaintiff successfully sued defendant for thirteen head of cattle as dowry for plaintiff's sister Zincantu. In the present action plaintiff alleges that defendant never at any time discharged that judgment and as no *lobolo* had actually been paid he claims to be entitled to the children borne by Zincantu.

Held: That the fact that plaintiff sued defendant for *lobolo* in 1939, goes to prove that a customary union was in existence and that plaintiff acknowledged that fact, and that the judgment of the Court in the previous action between the same parties in which the present plaintiff was awarded

thirteen head of cattle in respect of *lobolo* for his sister as a result of her customary union with present defendant, postulates a finding by that Court that that customary union was a valid one.

Held further: That plaintiff cannot now be heard to say that there was in fact no customary union.

Appeal from the Court of the Native Commissioner, Mtunzini.

Steenkamp (President):—

This case originates from Zululand.

Defendant and plaintiff's sister, Zincantu, lived together for many years as husband and wife and are still doing so. Seven children were born to them. Plaintiff sued defendant before the Chief for thirteen head of cattle as and for *lobolo* for his sister. He obtained judgment for this number of cattle. He now alleges that defendant never at any time discharged the judgment debt and therefore as no *lobolo* had actually been paid he is entitled to the children borne by Zincantu his sister.

He sued defendant before the Chief for a declaration of rights to the four surviving children. The Chief gave judgment for plaintiff but on appeal to the Native Commissioner the defendant was successful, his appeal allowed and the Chief's judgment altered to one for defendant with costs.

Plaintiff has now lodged an appeal to this Court on the following grounds:—

"1. (Appellant) Fakudhliwe Dhlamini was not married to my sister Zincantu Ntuli, no marriage ceremonies were observed, no registration of any customary union was made, nor did (Appellant) go through a form of any other marriage with my sister. No *lobolo* cattle were paid, or pointed or delivered to me.

2. Plaintiff (Respondent) claims property rights of the children born to his sister Zincantu Ntuli by the said Appellant Fakudhliwe Dhlamini. There were seven children born of which four are still alive."

The mere fact that plaintiff sued defendant for the *lobolo* in 1939, goes to prove that a customary union was in existence and that he acknowledged that fact. The judgment debt was a novation of the claim he had against the defendant and the only remedy plaintiff has is to execute on the judgment he obtained in 1939. There is a dispute as to whether that judgment debt had been liquidated but this is not relevant in the present issue.

The *lobolo* rights in the daughters born to defendant and plaintiff's sister must be worth considerably more than the *lobolo* plaintiff was entitled to for his sister, and his present action can only be described as an avaricious attempt to become unduly enriched at the expense of the defendant.

The appeal is dismissed with costs.

Balk (Permanent Member):—

To my mind the judgment of the Court in the previous action between the same parties, in which the present plaintiff was awarded thirteen head of cattle in respect of *lobolo* for his sister as a result of her customary union with the present defendant, postulates a finding by that Court that that customary union was a valid one and the plaintiff can therefore not be heard to say in the instant case that there was in fact no such customary union.

I therefore agree that appeal should be dismissed with costs.

Oftebro (Member): I concur.

For Appellant: Mr. H. H. Kent of Eshowe.

Respondent in person.

NORTH EASTERN NATIVE APPEAL COURT.

BIYELA *v.* **MTETWA.**

N.A.C. Case No. 105 of 1952.

Eshowe: 29th January, 1953. Before Steenkamp, President, Balk and Oftebro, Members of the Court.

COMMON LAW.

Damages: Done by animals to standing crops: Quantum of damages not proved. Animals placed in plaintiff's kraal by plaintiff before damage was done.

Practice and Procedure: Rule 12 (1) of Rules for Chiefs' Courts: On appeal amendment of the claim is not competent where defendant is the appellant.

Summary: In the Chief's Court plaintiff claimed £25 as damages for destruction of his crops by sheep of defendant. After appeal had been noted by defendant, plaintiff filed an amendment to his claim to the effect that he claimed £25 for the annoying act of defendant in removing defendant's sheep without the consent of plaintiff.

Held: That the filing of the statement amplifying the claim was not competent as it is only if the appellant was the plaintiff in the Chief's Court that such an amplifying statement may be filed.

Held further: That such restatement was in any event incompetent in that it does not form an amplification of the claim in the Chief's Court but constitutes an entirely new cause of action.

Held further: That the only damage, if any, that might have been suffered by plaintiff is that to his crops and then that damage must have been done by the sheep after plaintiff exercised control over them.

Statutes referred to:

Rule No. 12 (1) of the Rules for Chiefs' Courts.

Sections *one, sixteen* and *seventeen* (2) and (3) of Ordinance No. 32 of 1947 (Natal).

Appeal from the Court of the Native Commissioner, Empangeni.

Steenkamp (President):—

In the Chief's Court, according to the notice of appeal to the Native Commissioner, the plaintiff's claim reads as follows:—

> "Claimed £25 by reason that defendant's sheep were lost and came to his (plaintiff's) kraal and he looked after them and they destroyed his kaffircorn and beans."

Defendant's reply was "Admitted that the sheep were lost and found at plaintiff's kraal".

The Chief gave judgment for plaintiff for £15 with costs. His reasons are that defendant did not report to the Chief that the sheep were lost whilst plaintiff reported that there were sheep in his kraal he did not know and destroyed his crops.

Defendant noted an appeal to the Native Commissioner but before the case was heard the plaintiff filed a statement which is headed "Plaintiff's statement in terms of Rule 12 (1) Government Notice No. 2885".

Such a statement was not competent as according to Rule 12 (1) of the regulations for Chiefs' and Headmen's Civil Courts, published under Government Notice No. 2885 of 1951 it is only if the appellant was the plaintiff in the Chief's Court that a statement amplifying his claim in the Chief's Court, may be filed.

In the amplified statement the plaintiff states he sued the defendant for the sum of £25 and this amount was damages for defendant's annoying act.

After plaintiff had given evidence the Presiding Officer pointed out to defendant's attorney that the plea filed on behalf of defendant does not cover applicant's (meaning plaintiff's) case. The Court adjourned to enable defendant to file a proper plea which was duly done. This amended plea is headed—

> "Filed as a result of the particulars disclosed in the plaintiff's statement and in the course of the plaintiff's evidence."

This amended plea, in my opinion, is competent as defendant may at any time amend his plea and I hold this view notwithstanding that plaintiff had filed an amplified claim.

In the particulars of claim before the Chief the plaintiff's claim seems to be based on the allegation that defendant's sheep had destroyed his kaffircorn and beans whereas in the amplified claim the damages are based on the averment that damages were suffered owing to defendant's annoying act in removing the sheep from the custody of the plaintiff.

Plaintiff cannot have it both ways and in deciding the appeal this Court will confine its judgment to the question of damages suffered by plaintiff for the destruction of his crops.

The Native Commissioner dismissed with costs the appeal from the Chief's Court but altered the judgment to read "For plaintiff in £5 and costs".

Defendant (now appellant) has lodged an appeal to this Court on the following grounds:—

1. Although the appellant admitted spoliating the sheep in question from the control of the respondent, such spoliation was not accompanied by contumelia nor under circumstances giving rise to a claim for personal damages.
2. Alternatively, the damages awarded, namely five pounds (£5) are excessive under the circumstances of this particular case.
3. The appellant, having succeeded in reducing the Chief's award from fifteen pounds (£15) to five pounds (£5) should have been awarded the costs in the Native Commissioner's Court.

The Native Commissioner found the following facts proved:—

1. Five sheep in the custody of defendant trespassed on plaintiff's fields.
2. Plaintiff could not ascertain who the owner of the sheep was and reported the matter to the Chief.
3. Defendant later came and claimed the sheep and was advised that they had caused damage to crops.
4. Defendant removed the sheep from plaintiff's premises without plaintiff's permission and without paying damages.

In his reasons for judgment the Native Commissioner makes it clear that he awarded £5 damages to the plaintiff (now respondent) to cover the affront received by plaintiff. It was not competent for the Native Commissioner to have awarded damages based on contumelia as his claim before the Chief was for damages done to his crops. I will, however, in the course of my remarks deal with the question as to whether plaintiff suffered any damages for which defendant may be held liable.

I have no quarrel with facts 2, 3 and 4 as these are more or or less common cause, but there is no evidence to support the fact found proved that the five sheep were in the custody of the defendant when they trespassed on plaintiff's fields.

Plaintiff's evidence is hearsay in this connection. He states "When the sheep were first found a report was made to me by my wife that the sheep had destroyed beans and mealies".

The only witness called by plaintiff was his wife and there is not a tittle of evidence in her testimony that any damage had been done by the sheep before they were taken into custody. On the contrary the evidence seems to indicate that no damage had been done by the sheep up to the time they were discovered at plaintiff's kraal. This is borne out by plaintiff's evidence where he states "About six months ago on a Sunday at dusk five sheep were discovered in my kraal. They were rounded up and put in an enclosure. I left early in the morning.". Plaintiff states that when his wife made a report that the sheep had destroyed beans and mealies he went to inspect the field and found patches as big as the Court-room had been destroyed. The sheep were not discovered in the lands but at the kraal and it must be accepted that until their discovery no one had seen them doing any damage in the lands.

Plaintiff estimates the damage at £28. 10s. being the value of the crops destroyed. In his evidence he does not claim this and if this had been the damages it is most unlikely that he would before the Chief have claimed a lesser amount. In fact plaintiff does not know what he wants, but this Court should not go further than his evidence in which he states—

> "I estimated my damage for coming to my kraal and opening the gate and taking the sheep away."

Such a damage is much too remote for a Court of law to countenance it. We are not dealing with a spoliatory or vindicatory action and in any case the defendant was only taking possession of his own stock which had strayed from his kraal.

The only damage, if any, that might have been suffered by the plaintiff is that to his crops and then that damage must have been done by the sheep before plaintiff exercised control over them.

There is another aspect that weighs very heavily against the plaintiff and which the Court *a quo* has not taken into consideration and that is the statutory provision, viz., the Pound Ordinance, No. 32 of 1947. According to section *sixteen* read with section *seventeen* (2) and (3) and the definition in section *one* of "owner" in relation to land, it was the duty of the plaintiff, when the strange sheep were discovered on his land, to have impounded them within 48 hours.

If he omits to impound them as prescribed, and damage is done to crops by those animals, then I do not sese how the defendant can be held liable.

The result is that the appeal should be allowed with costs and the Native Commissioner's judgment altered to read:—

> "Appeal from the Chief's Court is allowed with costs and judgment altered to read—
>
> 'For defendant with costs'."

Balk (Permanent Member).

Apart from the fact that in the instant case it was not competent in terms of sub-section (1) of section 12 of the regulations for Chiefs' and Headmen's Courts, published under Government Notice No. 2885 of 1951, for the plaintiff to have restated his claim in the Native Commissioner's Court as the defendant and not he was the appellant in that Court, that restatement was in any event incompetent in that it does not form an amplification of his claim in the Chief's Court but constitutes an entirely new cause of action.

It is manifest from the Native Commissioner's reasons that he founded his judgment on the claim as restated in his Court, which, for the reasons given above, it was not competent for him to do. But as to my mind the evidence does not support a finding in favour of the plaintiff on the claim as formulated in the Chief's Court and as it seems to me that the plaintiff's unexplained *volte face* as regards his cause of action indicates that his claim in the Chief's Court was not a bona fide one, I agree that the appeal should be allowed with costs and the Native Commissioner's judgment altered to one allowing the appeal from the Chief's Court with costs and altering the judgment of that Court to one for defendant with costs.

Oftebro (Member): I concur.

For Appellant: Mr. S. H. Brien, instructed by Mr. G. D. E. Davidson.

Respondent in default.

CENTRAL NATIVE APPEAL COURT.

HLOBO *v.* **MAKOMA.**

N.A.C. Case No. 6 of 1953.

Johannesburg: 30th January, 1953. Before Warner, Acting President, Cooke and Alfers, Members of the Court.

STATUTE LAW.

Landlord and Tenant—Rents Act.

Summary: Plaintiff gave notice to defendant, his tenant, to vacate a room occupied by him on the ground that the premises were reasonably required by plaintiff for the personal occupation of his children. Defendant refused to vacate the room, and plaintiff sued for an order of ejectment Plaintiff owed an amount of £1,303 in respect of the property owned by him and the bondholder had taken judgment against him but had agreed not to execute the judgment if plaintiff paid instalments of £15 per month. Rents for rooms on the premises, fixed by the Rent Board, amounted to £7 per month. Plaintiff was 67 years of age and in receipt of a small wage. His married daughter, with her husband and child, shared a room with an unmarried friend on other premises. This daughter and her husband had undertaken that, if they could occupy the room let to defendant, they would assist plaintiff in meeting his obligations to the bondholder in lieu of paying rent. Plaintiff had been married in the Transvaal before the commencement of Act No. 38 of 1927, so that his daughter would be one of the heirs to his estate if he should die intestate.

Held: That plaintiff had established that he reasonably required the room occupied by defendant for occupation by his daughter and her husband and had thus complied with the requirements of section *twenty-one* (1) (*c*) of the Rents *Act.*

Cases referred to:

Paterson *v.* Koonin, 1947 (2), S.A. 337 (C).

statutes, etc., referred to:

Act No. 45 of 1950.

Appeal from the Court of the Native Commissioner, Johannesburg.

Warner (Acting President), delivering the judgment of the Court:—

Plaintiff is the owner of certain premises known as No. 30, Best Street, Sophiatown, Johannesburg. Defendant is a tenant of one of the rooms, known as Room No. 8, on those premises.

On the 22nd June, 1951, Plaintiff gave Defendant notice to vacate the room occupied by him, not later than the 30th September, 1951, on the ground that the premises were reasonably required by plaintiff for the personal occupation of his children.

Defendant refused to vacate the room occupied by him and plaintiff sued for an order of ejectment. In his plea, defendant denied that plaintiff reasonably required the said room for personal occupation of his children.

After hearing evidence the Native Commissioner gave judgment of "summons dismissed with costs" and defendant has appealed on the following grounds:—

A. (*a*) That the judgment was against the evidence and weight of evidence.

(*b*) That that Magistrate erred in finding that—

(i) there was no evidence before the Court that the children of the plaintiff would assist their father if they were given occupation of the rooms;

(ii) the plaintiff did not reasonably require the room as stipulated in terms of section *twenty-one* (1) (*c*) of Act No. 45 of 1950, as amended.

B. The Magistrate erred in law in holding—

(*a*) that it was necessary for the Court to decide in this case whether the plaintiff required the premises because his children needed accommodation; the Court was required to find—

(i) whether plaintiff reasonably required the premises in this case in order that his child may take occupation in order to assist him to pay his bond; and/or

(ii) whether the plaintiff reasonably required the premises for the personal occupation of his daughter Mary Ngubeni, because she needed premises;

(*b*) that it was necessary for Mary Ngubeni's husband to give evidence to the effect that he wishes to change his accommodation or that he is dissatisfied with his present accommodation and required other accommodation.

Plaintiff brought evidence to show that the property is bonded to an extent of £1,200 and with interest, municipal charges and other charges he owed an amount of £1,303. 8s. 4d. in respect of the property as at 31 December 1951. In June, 1951, the bondholder took out judgment in the Supreme Court for £1,227. 4s. 7d. plus interest. The Supreme Court declared the property to be executable. Plaintiff is employed as a domestic servant at Millsite Compound where he resides, but visits the property periodically when he shares a room occupied by his son. Rents for rooms on the premises have been fixed by the Rent Board and are paid direct to a firm of attorneys. These rents amount to about £7 per month which is insufficient to pay the interest on the bond. The bondholder has agreed that if £15 per month is paid he will not execute the judgment. Plaintiff is 67 years of age and is in receipt of a small wage so that he is unable to meet this obligation. His children have agreed that, if they can occupy the property, they will contribute to the amount required to be paid to the bondholder in lieu of paying rent. Plaintiff has stated that it is desired that his daughter Mary, who is married to Mpiko Ngubeni, and has one child, should occupy room No. 8 (the room occupied by the defendant). Mary Ngubeni gave evidence to the effect that since her marriage

she and her husband have been residing at Sophiatown but do not have their own accommodation and share a room with her husband's friend. She also stated that she wants to occupy room No. 8 and if she does so she will assist her father to pay the amount due on the bond.

Defendant merely gave evidence to the effect that he has occupied the room for 18 years and is not prepared to vacate the room as there is no other place which he could occupy.

Plaintiff and his witnesses were subjected to lengthy cross-examination on matters which are not relevant to the issue. The question to be decided was whether plaintiff reasonably required room No. 8 for personal occupation of his daughter Mary and her family.

The Native Commissioner states that Mary's husband should have testified that he was dissatisfied with his present accommodation and required other accommodation. But Mary's statement that she and her husband and child are sharing a room with an unmarried friend has not been denied and in these circumstances, her desire to have a room of their own on her father's premises does not seem to us to be unreasonable. Defendant's statement that he is not prepared to vacate the room because there is no other room which he could occupy indicate that there is a great scarcity of accommodation.

The following passages occur on pages 342 and 343 in the judgment in the case of Paterson *v.* Koonin, 1947 (2), S.A. 337 (C.P.D.):—

> "The Court here has to decide whether in all the circumstances this requirement is "reasonable" from the point of view of the lessor, and it is her needs and circumstances and not those of the lessee which are relevant to this enquiry.
>
> The question is not, who will suffer the greater hardship, the applicant if the respondent is not ejected; or the respondent if he is ejected; the question is simply whether the applicant has shown that it reasonably requires the leased premises for its own use.
>
> The applicant needs rooms and as suitable ones exist in her own premises, *prima facie* it is reasonable that she should claim to occupy them.
>
> I do not think it can be said that it is unreasonable for a person who is the owner of suitable premises to prefer to occupy them and not go elsewhere."

Plaintiff produced his marriage certificate in Court. It has not been filed with the record but according to notes made, he was married at Heidelberg, Transvaal, on the 9th September, 1924. As he was married before the commencement of Act No. 38 of 1927, the marriage must have been either by antenuptial contract or in community of property. This means that if he should die intestate, his daughter Mary will be one of the heirs to his estate. The house at No. 30, Best Street, Sophiatown is an asset in the estate and it is in Mary's interest that it should be retained and not sold in execution.

Mary states that her husband earns wages of £6. 15s. per week. She admits that they have not helped plaintiff in paying the amount due on the bond but states that they will do so if they occupy a room on the premises.

It seems to me that plaintiff's requirements that his daughter Mary and her husband should occupy this room is a reasonable one because it would mean that Mary and her husband would have an incentive for assisting plaintiff with payments due on the bond. They would know that, if these payments are not kept up to date, there is not only the danger of losing their inheritance, but the house may be sold to someone who requires it for his personal occupation and they would then be without accommodation.

Plaintiff's desire that his daughter and her husband should live on his premises where they can have a room to themselves rather than that they should continue to share a room with an unmarried friend, also seems to be reasonable.

I consider that plaintiff has established that he reasonably requires room No. 8 on the premises for occupation by his daughter and her husband. This means that he has complied with the requirements of section *twenty-one* (1) (*c*) of the Rents Act, which is the issue in the case.

The Native Commissioner has expressed a doubt as to whether Mary is plaintiff's child, owing to the lightness of her appearance. Both plaintiff and his wife, however, have stated in evidence that Mary is their child. This evidence has not been contradicted and there does not seem to be any reason why it should not be accepted.

The appeal should be allowed with costs and the judgment of the Native Commissioner altered to read "For plaintiff as prayed with costs".

Cooke (Member): I concur.

Alfers (Member): I concur.

For Appellant: Mr. J. Rabinowitz of Messrs. Harold Braude & Braude, of Johannesburg.

For Respondent: Mr. B. A. S. Smits of Johannesburg.

CENTRAL NATIVE APPEAL COURT.

MALULEKA *v.* **THIPE.**

N.A.C. Case No. 7 of 1953.

Johannesburg: 30th January, 1953. Before Warner, Acting President, Cooke and Alfers, Members of the Court.

COMMON LAW.

Damages—Seduction—Child—Maintenance.

Summary: Plaintiff was seduced by defendant in June, 1950. They had intercourse on subsequent occasions as a result of which she became pregnant. Plaintiff was a probationer-nurse in receipt of a salary of £6. 11s. per month; she states it is costing her £5 per month to support the child born to her by defendant and defendant did not deny that this was a reasonable amount.

Held: That plaintiff should be awarded £30 as damages for seduction and lying-in expenses.

Held further: That under the Common Law, a Native mother is the proper person to sue for maintenance of her illegitimate child.

Held further: That defendant should be ordered to contribute £3 per month towards the maintenance of the child.

Cases referred to:

Maruda *v.* Langa, 1949, N.A.C. (N.E.D.), 106.

Nzimande *v.* Phungula, 1951, N.A.C. (N.E.D.), 386.

Statutes, etc. referred to:

Act No. 38 of 1927.

Maasdorps Institute of South African Law (volume 1) (seventh edition).

Appeal from the Court of the Native Commissioner, Alexandra Township.

Warner, (Acting President), delivering judgment of the Court:—

Plaintiff alleged that in June, 1950, defendant promised to marry her and seduced her; that on subsequent occasions he had sexual intercourse with her as a result of which, on the 3rd May, 1951, she gave birth to a child of which defendant is the father. She therefore claimed from defendant—

(*a*) payment of the sum of £100, being for damages for breach of promise of marriage;

(*b*) payment of the sum of £200, being damages for seduction and lying-in expenses;

(*c*) maintenance for the minor child born of the plaintiff of which defendant is the father at the rate of £5 per month as from the 31st May, 1951;

(*d*) alternative relief;

(*e*) costs of suit.

Defendant's plea was a denial of these allegations.

After hearing evidence the Native Commissioner entered the following judgment:—

(*a*) Withdrawn by plaintiff.

(*b*) For plaintiff for £30 damages for seduction.

(*c*) For plaintiff for the payment of maintenance for the child as from 1st April, 1951, at the rate of £2 (two pounds) per month. This amount may be varied on application by either party.

Plaintiff to pay one-third the costs and defendant two-thirds.

Defendant has noted an appeal in the following terms:—

"Be pleased to take notice that appeal is hereby noted against the judgment granted in the above matter on 9th May, 1952, whereby judgment was granted on two claims for plaintiff with costs. The appeal is made on the grounds that the judgment was bad in law for the following reasons:—

(*a*) The learned Commissioner in arriving at a finding, took into account evidence of statements and actions by the family of the defendant, who were not called as witnesses and which evidence was accordingly inadmissable.

(*b*) The judgment is also bad for the reason that the learned Commissioner erred in finding—

(i) that the plaintiff had established sufficient evidence to corroborate her own evidence regarding claims;

(ii) that the learned Commissioner erred in finding that the evidence of plaintiff was more acceptable than the evidence of the defendant."

Defendant has also filed the following notice:—

"Be pleased to take notice that at the hearing of the Notice of Appeal in the above matter, application will be made to amend the defendant's Notice of Appeal by the deletion of the grounds of appeal and the substitution of the following grounds of appeal:—

"The appeal is made on the grounds:—

(1) That the judgment is against the evidence and weight of evidence.

(2) The judgment is bad in law for the following reasons:—

(*a*) The learned Commissioner in giving his finding took into account evidence of statements and actions by relatives of the defendant, who were called as witnesses and which evidence is accordingly inadmissible.

(*b*) That the plaintiff has not produced sufficient evidence to corroborate her own evidence as required by law.

(*c*) That the learned Commissioner erred in discarding the evidence of plaintiff ".

Plaintiff has noted a cross-appeal in the following terms:—

" Be pleased to take notice that plaintiff hereby notes a cross-appeal against the judgment granted in the above matter on the 9th day of May, 1952, on the grounds that—

(*a*) the amount of £30 (thirty pounds) awarded by the learned Commissioner as damages for the seduction was insufficient having regard to all the facts and circumstances disclosed in the evidence; and

(*b*) the amount awarded for the maintenance of the child was insufficient having regard to all the facts and circumstances disclosed in the evidence."

The Notice of Appeal and Notice of Cross-appeal are both invalid as they do not comply with the provisions of Section 7 of Government Notice No. 2887 of 1951, for in neither of them is stated whether the whole or part of the judgment is appealed against, and, if part only, then what part.

We have decided, however, to hear the appeals.

Plaintiff's statement that she was seduced and made pregnant is corroborated by the birth of a child to her and the question to be decided is whether defendant is the person who caused her pregnancy.

Plaintiff states that on the 24th June, 1950, she and defendant visited the bioscope and, on their return home he seduced her. She produced a letter from defendant in which he stated: " I have fallen deeply in love with you ever since that unforgetable day—the 24th June, when we had ' little heaven ' ". In his evidence defendant admits that they visited the bioscope together and that he accompanied her to her home but denies that he seduced her. He states that the picture they saw was " Little Heaven " but he does not explain why the day was " unforgetable " and his explanation that he used the words " we had little heaven " instead of " we saw little heaven " because they fell in love that day is unconvincing.

Plaintiff's father gave evidence to the effect that defendant's paternal uncle made admissions to him and asked for time so that defendant could marry plaintiff. In his reasons for judgment, the Native Commissioner states that the steps taken by his relatives and by himself were of such a nature as to show very clearly that he (defendant) had a guilty conscience and that he knew that he seduced plaintiff and that he believed or suspected the child was his.

Defendant admits that he sought the advice of his paternal uncle but there is no evidence that he authorised the latter to make admissions on his behalf so that such admissions cannot be regarded as evidence against defendant. But even if these admissions are disregarded, there is sufficient evidence to establish the allegation that defendant seduced plaintiff and made her pregnant. He admits that he wrote passionate love-letters to plaintiff. He states that he pretended to be madly in love with her but does not explain his reason for doing so.

Defendant endeavoured to show that plaintiff had another lover but the evidence in regard to this is very vague.

In my view, the evidence for plaintiff and the admission made by defendant are sufficient to justify the Native Commissioner's finding that defendant is the person who caused plaintiff's pregnancy.

It follows, therefore, that the appeal must be dismissed with costs.

The cross-appeal is against the amounts awarded for damages and maintenance only.

Damages.—Plaintiff was a probationer nurse at Baragwanath Hospital. She is a person of some standing and the defendant, who is a teacher at Alexandra Township, holding the degree of Bachelor of Arts, is also of some standing, but plaintiff's morals have not been exemplary. She states that defendant seduced her at her home in June, 1950, that she had intercourse with him at his cousin's place in Alexandra Township in July, 1950, and that in August, 1950, they again had intercourse at the Zoo gardens, as a result of which she became pregnant. Her salary was £6. 11s. per month plus free board and lodging. She states that she was about to write her final examination in March, 1951, and, if she had been successful, her salary would have been raised to £15 per month but the matron would not allow her to write the examination owing to her pregnancy. Subsequently she obtained employment at Middelburg Hospital at a salary of £5. 2s. 6d. per month. She has not furnished particulars of the cost of her confinement or the length of time during which she was unable to undertake remunerative employment owing to her pregnancy.

These facts are similar to those in the case of Maruda *v.* Langa [1949, N.A.C. (N.E.D.), 106], wherein it was decided that plaintiff should be awarded an amount of £10 as damages for seduction and an amount computed at salary for three months as lying-in expenses. Applying those principles to the present case we find that the award of £30 for damages and lying-in expenses was correct.

Maintenance.—In the case of Marula *v.* Langa (*supra*) it was held that the Native mother of an illegitimate child could not sue for its maintenance as this was the prerogative of the mother's father, who is the guardian of the child in Native Law. This decision was, however, over-ruled in the case of Nzimande *v.* Phungula [1951, N.A.C. (N.E.D.), 386], wherein it was stated that, if Common Law be applied to the action, the capacity of the parties would also fall to be determined according to that system of law and in that event the mother of the illegitimate child would be the proper person to sue for the child's maintenance. With respect, I agree with this decision. In the present case, the girl seduced has brought an action in her own name. This means that Common Law must be applied. Section *eleven* (3) of Act No. 38 of 1927 provides that the capacity of a Native to enter into any transaction or to enforce or defend his rights in any court of law shall, subject to any statutory provision affecting any such capacity of a Native be determined as if he were a European. It is only when the existence or extent of the right held depends upon Native Law that the capacity of the Native concerned is determined according to Native Law. Plaintiff is suing for the maintenance of her illegitimate child. The claim is brought under the Common Law and plaintiff sues in her capacity as guardian of her illegitimate child. It follows, therefore, that her capacity must be determined as if she were a European, and under Common Law, a mother is the natural guardian of her illegitimate child (Maasdorp, Volume I, seventh edition, page 291).

Plaintiff states that it is costing her £5 per month to maintain the child. Defendant does not deny that this amount is reasonable. The Native Commissioner appears to have accepted plaintiff's statement but states that she is also co-responsible for the maintenance of her child. He has not explained, however, why he has ordered defendant to contribute a smaller amount than plaintiff pays, when his earnings are greater than hers. It seems to me a more reasonable amount for defendant to contribute, would be £3 per month.

The consequence is that the cross-appeal against the amount awarded as damages is dismissed, but allowed as against the amount awarded as maintenance, this amount being increased from £2 to £3 per month.

As the cross-appeal has been partially successful, there will be no order as to costs in regard to it.

Cooke (Member): I concur.

Alfers (Member): I concur.

For Appellant: Mr. R. Michel of Messrs. Helman & Michel of Johannesburg.

For Respondent: Advocate Welsch, instructed by Messrs. Van Jaarsveld, Vickers & Foord of Roodepoort.

NORTH EASTERN NATIVE APPEAL COURT.

MPANZA *v.* MPANZA d.a.

N.A.C. Case No. 90 of 1952.

Durban: 2nd February, 1953. Before Steenkamp, President Balk and Watson, Members.

LAW OF PROCEDURE.

Practice and procedure—Appeal from Native Commissioner's Court—Unstamped notice of appeal—Subsequent stamping does not validate with retro-active effect—Native Appeal Court Rule 4.

Summary: The notice of appeal was lodged timeously in terms of Rule 4 of the Native Appeal Court Rules but was unstamped. This fact was brought to the notice of appellant's attorney, and the notice was then duly stamped and returned to the Clerk of the Court, by whom it was received after expiration of the required period laid down in Rule 4.

Held: That the subsequent stamping of the notice of appeal did not validate it with retro-active effect.

Held further: That it was the duty of the attorney for appellant to have acquainted himself with the relative rules of Court and to have made sure that the notice of appeal was properly stamped before he posted it to the Clerk of the Court in the first instance.

Cases referred to:

Meer *v.* Lockhat Bros. & Co., Ltd., 1932, N.P.D., 144.
Badat *v.* Corondimas, 1947 (2) S.A. 170 (D. & C.L.D.).
De Villiers *v.* De Villiers, 1947 (1), S.A. 365 (A.D.).
Mkize *v.* Mkize, 1, N.A.C. (N.E.), 360.

Statutes etc. referred to:

Native Appeal Court Rules 4 and 31 (2).

Section *twenty-two* of Act No. 30 of 1911.

Appeal from the Court of the Native Commissioner, Mapumulo.

Balk (Permanent Member):—

This is an application for a ruling that the noting of an appeal from portion of the judgment of a Native Commissioner's Court in a divorce action, was not out of time; alternatively for condonation of the late noting of that appeal.

The judgment in question was given on the 21st August, 1952, so that, in terms of Rule 4 read with Sub-rule 31 (2) of the rules for this Court, published under Government Notice No. 2887 of 1951, the appeal in the instant case had to be noted by the 16th September, 1952, to be in time.

The relative notice of appeal was not stamped by the last-mentioned date, so that the appeal was out of time, see Meer *v.* Lockhat Bros. & Co., Ltd., 1932, N.P.D., 144. In this connection it must be added that Counsel for the applicant contended that the eventual stamping of that document validated it with retro-active effect. In support of this contention he quoted Badat *v.* Corondimas, 1947 (2), S.A. 170 (D. & C.L.D.), at pages 176 and 177. But the relevant ruling in that case has no application in the present instance, as the instrument there concerned was one which it was desired to have admitted in evidence and was therefore covered by the proviso to sub-section (1) of section *twenty-two* of the Stamp Duties and Fees Act, 1911; whereas the instrument in the instant case is not covered by that proviso in that it is not a document which it is desired to have admitted in evidence.

The applicant's attorney in the affidavit furnished by him in support of the application, ascribes the late noting of the appeal to delay on the part of the Clerk of the Native Commissioner's Court concerned, stating *inter alia* therein that—

(*a*) he posted the relative notice of appeal together with the prescribed security for the payment of the respondent's costs of appeal, to the Clerk of that Court on the 8th September, 1952;

(*b*) those papers should have reached the Clerk at the latest by the 11th September, 1952;

(*c*) it was the duty of the Clerk to have notified him immediately that the notice of appeal required to be stamped;

(*d*) had the Clerk done so, it would have been possible to effect the stamping timeously;

(*e*) the Clerk did not notify him that the notice of appeal required to be stamped until the lapse of eleven or twelve days after its presumed receipt by him (with the result that that document could not be stamped timeously); and

(*f*) that the required stamp was provided immediately upon receipt of the Clerk's notification.

The applicant's attorney only surmises that the notice of appeal reached the Clerk of the Court concerned at latest by the 11th September, 1952. It may be that those papers were delayed in the post and reached the Clerk at a later date or there may be some other equally good explanation for the delay in his notifying the attorney that the notice of appeal required to be stamped. Be that as it may, it was the duty of the attorney to have acquainted himself with the relevant rules of Court and to have made sure that the notice of appeal was properly stamped before he posted it to the Clerk of the Court in the first instance. But it is unnecessary to consider this aspect further as to my mind it is quite clear that the applicant has no prospect of success on appeal, see De Villiers *v.* De Villiers, 1947 (1), S.A. 635 (A.D.); for the order awarding the plaintiff the custody of the children of the customary union concerned, which is the only part of the Native Commissioner's judgment under appeal, is fully supported by the evidence as being in the best interests of those children, see Mkize *v.* Mkize, 1, N.A.C. (N.E.), 360, at page 361.

I am therefore of the opinion that the main and alternative application should be refused with costs.

Steenkamp (President): I concur.

Watson (Member): I concur.

For Appellant: Adv. D. A. C. Haines, instructed by L. T. Buss, Kranskop.

Respondent in person.

SOUTHERN NATIVE APPEAL COURT.

MBELE *v.* MZANGWENI.

NATIVE APPEAL COURT CASE NO. 5 OF 1953.

KOKSTAD: 9th February, 1953. Before Sleigh, President, Wakeford and Wilkins, Members of the Court.

LAW OF PROCEDURE.

Practice and Procedure—Evidence—No proper proof of statement made in former case—Court entitled to disregard trial Court's findings on fact—Depositary—Onus on depositor to prove that loss not due to his negligence.

Appellant alleges he is the owner of a filly which he, by agreement with respondent, left in the latter's possession to be served by his stallion, and that respondent negligently allowed the filly to stray. It is common cause that the animal has disappeared. The Assistant Native Commissioner in entering an absolution judgment states *inter alia* that an adverse inference as to appellant's credibility was drawn from the fact that appellant and his witnesses made statements which were in direct conflict with the evidence given by them in the criminal case, the record of which was put in by the Clerk of the Court. The making of the previous statements was not proved in accordance with accepted procedure and the Assistant Native Commissioner was accordingly not entitled to draw the adverse inference which he did.

Held:

(1) That this court is entitled to disregard the Assistant Native Commissioner's findings on fact and to come to its own conclusion on the evidence before it.

(2) That as the agreement between the parties was not entirely for the benefit of the appellant, respondent was placed in the position of a depositary.

(3) That the onus of proving to the depositor that the loss was not due to his negligence was on the depositary.

The appeal is allowed and the judgment of the Court below is altered to one for plaintiff as prayed with costs.

Cases referred to:

(1) Rex *v.* Dhlumayo and Ano., 1948 (2) S.A. 706 (A.D.).

(2) Pretoria Light Aircraft Co. Ltd., *v.* Midland Aviation Co., (Pty.) Ltd., 1950 (2) S.A. 656 (N).

Work referred to:

Scoble on Evidence 2nd Edition pp. 317/8.

Appeal from the Court of the Native Commissioner, Umzimkulu.

Sleigh (President):—

This is an appeal against a judgment of absolution in an action in which appellant claims delivery of a certain filly or its value £16.

Appellant alleges that he is the owner of the filly which, by agreement with respondent, he left in the latter's possession so that it could be served by respondent's stallion, and that respondent negligently allowed the filly to stray.

Respondent denies the alleged agreement and that he negligently allowed the filly to stray. It is common cause that the animal has disappeared.

Appellant purchased the filly on 6th October, 1951 and the next day he and his son took it to respondent's kraal. He states that he found respondent at home that the latter agreed to the filly being covered by the stallion and ordered that it be put in the paddock in which the stallion was kept. Appellant states that it was agreed that the filly should remain with respondent for a month unless it was served sooner. He goes on to say that he then left for work at Ixopo and on his return found that the filly had disappeared.

Appellant's son says that on respondent's instruction he and respondent's son put the filly in the paddock with the stallion.

Appellant's daughter says that on her father's instruction she asked respondent to return the filly and that he promised to do so.

Appellant's last witness is Pasomani, a neighbour of the parties, but his kraal is out of sight of their kraals. He states that he saw the filly on the 7th October with the stallion in the paddock and thereafter saw it grazing with respondent's horses on the mountain. He goes on to say that when he saw the filly respondent was at home because he had seen him at beer drinks at certain kraals for two weeks after the filly had been delivered to him.

Respondent denies the agreement and states that he was in Matatiele district and only heard from his wife, on his return, that the filly had been at his kraal. He denies that his wife has any authority to receive mares for service. He says that he was criminally charged with the theft of the filly and was acquitted at the close of the Crown case.

His wife corroborates his evidence. She says that during her husband's absence appellant brought the filly to her kraal, and that she told him that she could not accept the filly as her husband was away and the paddock was not in good order, but that appellant stated that he had seen respondent, that he would leave the filly in the paddock and that if it broke out he would return it. She goes on to say that the following morning the filly was still in the paddock but was missing the next morning. She did not report the loss to appellant as she assumed that it had strayed back to appellant's kraal who had promised to return it. For some inexplicable reason respondent's son, who was admittedly present when the filly arrived, was not called.

The Assistant Native Commissioner has made no attempt to analyse the evidence. He merely states that appellant has failed to prove the agreement and circumstances from which negligence could be inferred, and that an adverse inference as to credibility was drawn from the fact that appellant and his witnesses made statements which were in direct conflict with the evidence given by them in the criminal case, the record of which was put in by the clerk of the court.

Now, of course, if a witness makes a statement in conflict with his evidence in a previous case, the inference may be drawn that he is not a truthful witness, but it must be proved that he did make the previous statement. This is not established by the mere production by the clerk of the court of the record in the previous case, unless of course that officer recorded the evidence. When it is desired to challenge the credibility of a witness by showing that he had made a different statement in a previous case, the correct procedure is to draw the witness' attention to this statement. If he admits making the statement no further proof is required but if he denies it his denial must be accepted until it is proved that his denial is false. This is done by calling the officer who recorded the evidence, or the interpreter

or any person who can testify to the fact that the record correctly reflects what the witness said in that case. (See *Scoble on Evidence* 2nd edition pp. 317/8). This has not been done in the present case. Appellant admits that he stated in the criminal case that it was arranged with respondent that the filly should stay with him a week, whereas in the present case he states that the arrangement was for a month. Now this discrepancy does not warrant the inference that appellant is not a truthful witness. The filly was taken to respondent's kraal to be served whether it took a week or a month.

Appellant denies in the present case that he said in the previous case that "We took the mare to the paddock". He says that his son and respondent's son took the filly to the paddock and this is apparently also what respondent's wife says. The Assistant Native Commissioner was therefore not entitled to draw the adverse inference which he did. This court is therefore entitled to disregard his findings on fact and to come to its own conclusion on the evidence before it. [See Rex. *v.* Dhlumayo & Ano., 1948 (2), S.A. (A.D.) at p. 706.]

The Assistant Native Commissioner has given no reason why the evidence of Pasomani should be rejected and I can find none. He is an unrelated and disinterested witness and states definitely that he saw respondent in the location for about 14 days after the filly was delivered to him. He thus corroborates the evidence of appellant and his son. On the other hand respondent's statement that he never saw appellant and his family (presumably in regard to the horse) since his return from Matatiele is palpably false, because appellant would hardly complain to the police without first demanding his animal from respondent. Moreover, the statement by respondent's wife that any horse could get out of the paddock if it wanted to is not convincing because if the fence is in such bad condition there would be no purpose in locking the gate. In my opinion respondent's denial that he personally received the horse from appellant must be rejected and appellant's evidence of the agreement must be accepted.

Now the agreement between the parties was not entirely for the benefit of appellant, because respondent admits that he charges a stud fee of £2 per service. When, therefore, he accepted the filly for service he undertook to see that the filly was served by his stallion and return it in terms of the agreement or upon demand. He was in the position of a depositary. It is clear from the decision in Pretoria Light Aircraft Co. Ltd. *v.* Midland Aviation Co. (Pty.) Ltd. 1950 (2) S.A. 656 (N), and the cases quoted on page 660 that the onus is upon the depositary, who is unable to restore the thing to the depositor, to prove that the loss was not due to his negligence. Respondent has brought no evidence at all as to how the filly disappeared except his wife's statement that it was missing from the paddock. Respondent must have been well aware that the filly would stray if it were let out of the paddock because he says "When I happen to buy a new horse then if it is a mare it is put in the paddock, but if a gelding it is tethered at night time and not put in the paddock. It is tethered until it is used to my kraal". As a reasonable man he should have taken the same precautions in regard to the filly and if it broke out of the paddock he should have searched for it and notified appellant. He has not done this and is therefore liable for the loss. The value of the filly is not in dispute.

The appeal is allowed with costs and the judgment of the court below is altered to one for plaintiff as prayed with costs.

Wakeford and Wilkins (m.m.): Concurred.

For Appellant: Mr. Walker, Kokstad.

For Respondent: Mr. Eagle, Kokstad.

SOUTHERN NATIVE APPEAL COURT.

MZIZI *v.* PAMLA.

N.A.C. Case No. 6 of 1953.

Kokstad: 11th February, 1953. Before Wakeford, Acting President, Cockcroft and Wilkins, Members of the Court.

Native Appeal Case: Native Divorce Court Order—Decree of divorce on grounds of adultery is judgment in rem*—Estoppel—Refund of dowry—Deductions from—Baca Custom distinguished—"Imvuma" beast.*

Appellant (plaintiff in the lower Court) sued respondent for return of the dowry paid by appellant for his wife Elsie. Appellant claimed that by virtue of the decree of divorce granted him on the ground of Elsie's adultery he was entitled to the return of the dowry paid. Respondent in his plea admitted that the decree of divorce had been granted but denied that Elsie had committed adultery, to which appellant averred that as the final decree of divorce which was a judgment *in rem* was based on the ground of Elsie's adultery, the question of Elsie's adultery was *res judicata* and that Respondent was consequently estopped from denying Elsie's adultery. The Assistant Native Commissioner, however, held that the adultery was not *res judicata* and that plaintiff had failed to establish that his marriage to Elsie had been dissolved on the grounds of her adultery, and entered judgment for respondent (defendant) as prayed with costs.

Against this judgment an appeal was noted *inter alia* on the following grounds:—

(*a*) That the decree of divorce granted on the grounds of Elsie's adultery is a judgment *in rem* and that defendant (respondent) is therefore estopped from denying the adultery.

(*b*) That the judgment dissolving the marriage is binding upon Elsie and her privies which includes respondent in his capacity as dowry holder.

Held:

(1) That the "decree of divorce on the ground of adultery" granted by the Native Divorce Court, is a judgment *in rem* which is conclusive not merely as to the point actually decided, viz., the granting of the divorce order, but also as to the matter which it was necessary to decide and which was actually decided as the groundwork of the decision itself, viz., that plaintiff's wife had committed adultery. Defendant is consequently estopped from denying the adultery.

(2) That, as the termination of the marriage had been proved, and as defendant had not proved that plaintiff had forfeited his right to a refund of the *lobolo* because of some recognised native custom, plaintiff was entitled to restoration of the lobolo paid less any deduction allowed by the customs of his tribe.

(3) That as plaintiff dissolved the marriage on the grounds of defendant's adultery resulting in the birth of a child, his actions indicate a repudiation of the alleged adulterine child and defendant would not therefore be entitled to deduct the customary beast from the *lobolo* paid in respect of this child.

(4) That the deduction of a beast from the *lobolo* for the services of the woman does not form part of Baca custom.

(5) That it is a custom generally recognised by all Transkei tribes to allow some compensation for a wedding outfit supplied.

Appeal succeeds.

Cases referred to:

(1) Thlophane *v.* Motsepe [1932, N.A.C. (T. & N.), 35].
(2) Christie *v.* Christie (1922, W.L.D., 109).
(3) Cohn *v.* Rand Rietfontein Estates (1939, T.P.D., 319).
(4) Priestman *v.* Thomas (P.D., 210).
(5) Rex *v.* Duchess of Kingston (20 How. St. Tr., 538).
(6) (Reg. *v.* Hartington (4, E. & B., p. 794).
(7) Reg. *v.* Wye (7, A. & E., p. 770).
(8) Rex *v.* Hutchings (6, Q.B.D., p. 300).
(9) Merriman *v.* Williams (1880, F. 172).
(10) Fitzgerald *v.* Green (1911, E.D.L., 432).
(11) G. W. Qotyana *v.* Mkhari [1938, N.A.C. (T. & N.), 192].
(12) African Guarantee & Indemnity, Co., *v.* Couldridge (1922, E.D.L., 132).
(13) S. & H. Raphuti *v.* W. Mametsi [1946, N.A.C. (T. & N.), 19].
(14) Maartens Chabane *v.* Mascoba Sietse [1946, N.A.C. (C. & O.), 55]
(15) Baumann *v.* Thomas (1920, A.D., 428).
(16) Spring *v.* Rayton Diamonds, Ltd. (1926, W.L.D., 23).
(17) Gomani *v.* Baqwa (3, N.A.C., 71).
(18) Mphako *v.* Vava (3, N.A.C., 198).
(19) A. Fuzile *v.* Thomas Ntloko [1944, N.A.C. (C. & O.), 2].
(20) Andries *v.* Mayekiso [1932, N.A.C. (C. & O.), 7].
(21) Sisilana *v.* Galo (6, N.A.C., 12).
(22) Myaka *v.* Xinti (4, N.A.C., 196).
(23) Mayekiso *v.* Quwe [1942, N.A.C. (C. & O.), 38].
(24) Tonono *v.* Qobo (3, N.A.C., 120).
(25) Nomadudwana *v.* Tshotsholo [1938, N.A.C. (C. & O.), 43].
(26) Cobo *v.* Mgqitywa (3, N.A.C., 296).
(27) Piet Mokoena *v.* Sanna Mofokeng [1945, N.A.C. (C. & O.), 89].

Works referred to:

(1) Scoble's Law of Evidence in South Africa, Second Edition.
(2) Law of Evidence—Phipson (Second Edition).
(3) Best on Evidence (Ninth Edition).
(4) Law of *Res Judicata*—Chand.
(5) Digest of the Law of Evidence—Stephens.
(6) Taylor on Evidence.
(7) S.A. Cases on Evidence—Scholsberg (First Edition).
(8) Powell on Evidence.

Cockcroft (Member):—

Appellant, plaintiff in the lower Court, sued respondent, the brother and guardian according to Native Custom of his wife Elsie Mzizi, to whom plaintiff was formerly married by Christian rites, for return of the dowry paid.

In his particulars of claim plaintiff alleges, *inter alia*:—

"5. On 5th June, 1951, the Native Divorce Court (Southern Division) sitting at Kokstad granted plaintiff a final decree of Divorce dissolving the said marriage between Elsie Mzizi and the plaintiff on the grounds of Elsie's adultery.

6. By virtue of the foregoing, plaintiff is entitled to a refund of the said dowry paid by him, but which despite due demand, defendant either refuses or neglects to return."

Defendant entered appearance to defend the action and the following paragraphs are included in his plea:—

"5. Save that Defendant admits that on 5th June, 1951, the Native Divorce Court (Southern Division), sitting at Kokstad, granted plaintiff a final decree of divorce dissolving the marriage between Elsie Mzizi and the plaintiff, paragraph No. 5 of the particulars of claim is denied and the defendant further pleads that an action for the return of dowry cannot be based only on a decree of divorce as alleged by plaintiff.

6. Defendant denies that Elsie Mzizi has ever committed adultery with any person or persons."

Plaintiff filed a reply to paragraph 6 of defendant's plea stating that the final decree of divorce dissolving the marriage between Elsie Mzizi and himself was based on the grounds of the said Elsie's adultery that the judgment granting the said decree is a judgment *in rem*, and that the question of Elsie's adultery is thus *res judicata* and that defendant is consequently estopped from denying her said adultery.

After hearing the evidence tendered by both parties, the Assistant Native Commissioner, holding that the adultery of Elsie was not *res judicata* or matter of estoppel against defendant and that plaintiff had failed to establish that his marriage to Elsie had been dissolved on the ground of her adultery, entered judgment for defendant as prayed, with costs.

Plaintiff has appealed against the whole of this judgment on the following grounds:—

"1. That the decree of divorce granted to plaintiff on the grounds of his wife Elsie's adultery is a judgment *in rem* and as such is *res judicata* and binding on all persons not only as regards the status of the parties but also as regards the question of the said Elsie's adultery. The Assistant Native Commissioner consequently erred in holding that the defendant is not estopped from denying the said Elsie's adultery.

2. That in any event the judgment is against the weight of evidence."

In limine, Mr. Zietsman made application to file the following additional ground of appeal:—

"1. (*bis.*) That the judgment dissolving the marriage between appellant and the said Elsie on the grounds of the said Elsie's misconduct is in any event binding upon her and her privies which includes respondent in his capacity as her dowry holder."

Mr. Elliot, for respondent, raised no objection, and the application was granted.

In the case of Thlophane *v.* Motsepe, 1932, N.A.C. (T. & N.), 35), it was held that a dowry holder is not a privy of the divorced wife, but on the views I am about to express on appellant's first ground of appeal, it is unnecessary for me to express an opinion on the correctness or otherwise of this decision.

In view of the points of law in paragraph 5 of the plea and paragraph 1 of the reply to the plea, it is necessary to consider the legal issues involved.

All judgments are conclusive evidence of their existence, as distinguished from their truth, that is to say every judgment is conclusive evidence for or against all persons, whether parties or strangers, of its own existence, date and legal effect, as distinguished from the accuracy of the decision recorded. (Christie *v.* Christie, 1922, W.L.D., 109) (*Scoble's Law of Evidence in South Africa*, 2nd edition at page 152.)

A judgment *in rem* is an adjudication or pronouncement upon the status of some particular subject matter, either a thing or a person, and is conclusive evidence (for or against all parties) of the matters actually decided therein. Cohn *v.* Rand Rietfontein Estates, 1939, T.P.D., 319.) It operates as an estoppel against the whole world on the matter actually decided.

On the other hand judgment *in personam* are all ordinary judgments between persons not affecting status. They are conclusive proof both of the matters actually dicided, and of the grounds of the decision where these again come into dispute between the same parties or their privies (Priestman *v.* Thomas, P. D., 210).

But judgments *in personam* do not bind strangers, for it is unjust that a man should be affected or bound by, proceedings in which he has no opportunity of making a defence or of availing himself of cross-examination or of instituting an appeal (Rex *v.* Duchess of Kingston, 20 How. St. Tr., 538), *vide* Scoble *supra* at page 153.

The decree of divorce granted by the Native Divorce Court (Southern Division) is a judgment affecting the status of the parties thereto. It is therefore a judgment *in rem.* It operates as an estoppel against the whole world on the matter actually decided, namely that the marriage of the parties has been dissolved.

I wish also to refer to some of the English Law text-book writers. Powell on Evidence, 9th edition at page 451 says: "Judgments *in rem* are binding not only on the parties to the proceedings but upon all the world, and not only on the tribunals of the country where pronounced but on the tribunals of other countries: but such a judgment must not have been obtained by fraud, must not carry a manifest error on its face, and must not be contrary to natural justice." and at page 67 "Moreover, judgments *in rem* are conclusive 'not merely as to the point actually decided, but as to a matter which it was necessary to decide, and which was actually decided as the groundwork of the decision itself though not then directly the point at issue' but is must clearly appear that a decision on such matter was actually necessary to the judgment" quoting Coleridge, J. in R. *v.* Hartington, 4, E. & B. at page 794. Phipson at page 407, 6th edition says: " . . . a domestic judgment *in rem* is in civil proceedings conclusive evidence for or against all persons, whether parties, privies or strangers, of all the *matters actually decided* . . . it is also, as between parties and privies, conclusive of the grounds of the decision where these have been put in issue and actually decided by the Court; but as between strangers, or a party and a stranger, it is no evidence of the truth of such grounds except upon questions of *prize*, where it is conclusive if the ground of condemnation is clearly stated, and admissible if not; orders of removal of paupers have been considered to form a second exception—R. *v.* Wye, 7, A. & E., 770; R. *v.* Hartington, 4, E. & B., 780; though the latter case was doubted in R. *v.* Hutchings, 6, Q.B.D., 300".

At page 408 he states: "As applied to judgments the terms "*in rem*" and "*in personam*", which are adopted from, though not belonging to, the Roman Law, have never been clearly defined in reference to our own or any other system . . . such judgments (*in rem*) however, only operate *in rem* if they alter status".

The following are extracts from English decided cases:—

In the Duchess of Kingston's case, 20, Howells State Trials, 355, 537, quoted in Cockles Cases and Statutes on the law of evidence, 4th edition, at page 41 under Estoppel By Record, Sir William de Grey, C. J. is reported to have stated: "As a general principle, a transaction between two parties in judicial proceedings, ought not to be binding upon a third; for it would be unjust to bind any person who could not be admitted to make

a defence, or to examine witnesses, or to appeal from a judgment he might think erroneous; and therefore, the depositions of witnesses in another cause in proof of a fact, the verdict of a jury finding the fact, and the judgment of the Court upon the facts found, although evidence against the parties and all claiming under them, are not, in general, to be used to the prejudice of strangers.".

In the Queen *v.* The Inhabitants of Wye, 7 Ad. & E, 761, Lord Denham is reported to have said: ". . . it might have seemed, according to the judgment of De Grey, C. J., in the House of Lords on the trial of the Duchess of Kingston, that the order was no evidence with regard to it in any future proceeding, yet numerous cases have been decided that orders of removal unappealed against or confirmed on appeal, are not only evidence, but conclusive, as to all the facts mentioned in them and which are necessary steps to the decision."

In the subsequent case of The Queen *v.* the Inhabitants of Hartington, 4, E. & B., 780, at page 794, Coleridge, J., held that the judgments *in rem* are conclusive "not merely as to the point actually decided, but as to a matter which it was necessary to decide, and which was actually decided as the groundwork of the decision itself, though then not directly in issue".

I have been unable to find in the old Roman and Roman-Dutch Law, authorities that are available at this centre, any reference to whether the conclusiveness of a judgment *in rem* is confined to its legal effect, in this case the dissolution of the marriage, or whether it also includes the matter that it was necessary to decide before granting dissolution of the marriage, namely that adultery had been committed.

I turn now to the decisions of the South African Supreme Courts. In Merriman *v.* Williams, 1880, F.172, De Villiers, C.J., said: "It is by no means clear to me that the principles of the English Law relating to estoppel are applicable without any modification to the law of this Colony".

Kotzé, J.P., in considering *inter alia* the English cases quoted above, in Fitzgerald *v.* Green, 1911, E.D.L., 432, at pages 449-451, states at page 451: "But the decisions do not appear to be quite clear and consistent as to the precise extent or scope of the effect of a judgment *in rem,* and whether, for instance, a decree of divorce granted by a competent Court is conclusive proof of the divorce merely, or whether it goes beyond that, and embraces also the fact of the marriage which was dissolved and its legality on the ground that these were essential matters which had to be established and adjudicated upon before the sentence of divorce could be pronounced. Thus in Concha *v.* Concha, 11, App.Ca., 541, at page 552, Lord Herschel, L.C., said: "The mere granting of probate by a Judge of the Court of Probate does not conclusively determine the domicil of the testator . . . For my part I think it would be impossible to hold that a question of that sort is conclusively determined because the learned Judge has expressed his opinion upon a matter of fact, when that matter of fact was not essential to his decision. All that is essential to the decision that the plaintiffs were entitled to probate may be taken, *perhaps,* to be conclusively determined." And it is said that there are cases which go to show that the conclusive character of a judgment *in rem* as regards third parties only extends to the actual decision itself, and not also to whatever was essential to such decision. Against this it may be urged that a decree of divorce on the ground of adultery is nothing else than a dissolution *vinculi matrimonii*—a judgment dissolving the marriage. The very essence or ground-work of the suit is a legal marriage, without which there can be no husband and wife, and no adultery. So that the conclusive effect of the judgment of the Circuit Court would extend also to the finding that there was a legal marriage between Patrick Fitzgerald and Wilhelmina Hotz, for that was a necessary ingredient in the decision (*Best on Evidence,* 9th edition, sec. 589). To this

it may be answered that the argument here goes too far, for a decree of divorce only terminates the legal relationship between husband and wife, and to that extent is binding on everyone; but not also that strangers are concluded by the finding of the Court that a valid marriage had existed between the divorced parties, nor that adultery was really committed. There is a judgment of Sir Barnes Peacock, C.J., in the Calcutta High Court, which takes this view (Chand, *Law of Res Judicata,* sec. 199, page 504)".

Having discussed the two contrary views in the English decisions, Kotze, J. P., does not express a preference for either of the views set out. He found it unnecessary to come to a decision on these conflicting views, as he decided that the children of Wilhelmina Fitzgerald could not be regarded as strangers, but as they claimed the inheritance as legal heirs *ab intestato* of their mother, and were therefore privies.

I turn now to the decisions of the Native Appeal Courts. In Abel Thlophane *v.* Nkali Motsepe (1932, N.A.C.) (T. & N.), 35, the plaintiff was granted a decree of divorce against his wife, defendant's daughter, on the grounds of her malicious desertion, and he thereupon sued defendant, *inter alia,* for return of the lobolo paid. Defendant denied the desertion in his plea and on behalf of plaintiff exception was taken to the plea, on the grounds that the effect of the Supreme Court Judgment granting a divorce was to estop defendant from such denial. This exception was overruled and at page 40 the judgment of the court is to the following effect:—

> "All judgments whatever are conclusive proof as against all persons of the existence of that state of things which they actually affect when the existence of the state of things so affected is a fact in issue or is deemed to be relevant to the issue (*Stephens Digest of the Law of Evidence,* article No. 40); and every judgment is conclusive proof as against parties and privies of facts directly in issue in the case, actually decided by the Court, appearing from the judgment itself to be the ground on which it was based (*Stephens Digest of the Law of Evidence,* article 41); but a judgment is not as between a party and a stranger evidence of the fact upon which it is founded (*vide* Taylor, S., 1667); *Phipson on Evidence,* page 392; *Stephens Digest of the Law of Evidence,* articles 42 and 44). In the opinion of this court the respondent was neither party nor privy but a stranger to the divorce proceedings between plaintiff and his wife and the judgment of the Supreme Court in those proceedings was for the purposes of the present case, not only admissible but conclusive evidence of the fact that the plaintiff had obtained a decree of divorce against his wife with forfeiture of benefits of the marriage in comunity and custody of the child. It was not, however, evidence as against the defendant that that divorce had been obtained on account of the wife's desertion."

In Geoffrey Wilson Qotyana *v.* Galvin Nkhari, 1938, N.A.C. (T. & N.), 192, McLoughlin, P., agreed in general with the views expressed in Thlophane *v.* Motsepe, *supra,* but dissented from the decision of the Court in that case that "for the purposes of the action he, i.e. the plaintiff, need not establish desertion at all, but he would under Native Law and Custom be entitled to the return of the lobolo or a proportion thereof, merely by reason of the fact that he has obtained a divorce against his wife".

At page 193 McLoughlin, P., states "The record of the divorce case is proof only of the facts that a decree has been granted. That fact stands, but the facts on which the judgment is based, i.e. the divorce order, are not facts which are *res judicata,* or matter of estoppel against the wife's father who was not a party to that action, and the evidence must be repeated. Scholsberg, 1st edition, p. 481.

The reference to the page in Scholsberg appears to be incorrect and should presumably read "182", where that author quotes African Guarantee and Indemnity Company *v.* Couldridge, 1922, E.D.L., 132, as authority for his conclusion.

In Sarona Raphuti and Hosia Raphuti *v.* William Mametsi, 1946, N.A.C. (T. & N.), 19, plaintiff had been granted a divorce after a restitution order had been made against his wife, and thereafter sued for the return of the *lobolo* paid. At page 20, McLoughlin, P., stated: "The plaintiff is in the circumstances perfect correct in quoting the divorce as his authority for seeking the recovery of his *lobolo* . . . The only matter to be decided by the Native Commissioner is whether or not the husband has forfeited his right to recovering his *lobolo* or whether by custom he is not entitled to recover any or all of his *lobolo* . . . All he need allege, which he has done, is that the union has been terminated by the decree of divorce granted in the Native Divorce Court."

In this case McLoughlin, P., appears in effect to have whittled down his view expressed in Qotyana's case, *supra*, that the fact of desertion was not *res judicata* against the wife's father, and must be repeated. If that is the effect, the view expressed in Thlopane's case, *supra*, is re-instated, namely that for the purposes of the action he, i.e. the plaintiff, need not establish desertion at all, but he would under Native Law and Custom be entitled to return of the *lobolo*, or a portion thereof, merely by reason of the fact that he has obtained a divorce against his wife.

In Maartens Chabane *v.* Mascoba Sietse, 1946, N.A.C. (C. & O.), Sleigh, P. at page 55 quoted with approval the passage from *Powell on Evidence* which has been quoted earlier in this judgment. He states that it is clear from the decision in Baumann *v.* Thomas, 1920, A.D., 428, and Sprinz *v.* Rayton Diamonds, Ltd., 1926, W.L.D., 23 that the English law of estoppel is as much a part of our law as it is of that of England. As pointed out by Schlosberg in *S.A. Cases on Evidence*, 1st edition, at page 45, these cases were on estoppel by representation, and the present case is an instance of estoppel by record.

In Chabane's case, *supra*, it was contended that, as the decree of divorce was a judgment *in rem*, the pronouncement on the question of desertion was also binding on all the world. After setting out the two steps necessary to obtain a decree of divorce on the ground of malicious desertion, Sleigh, P., held that while the final decree of divorce was a judgment *in rem*, the pronouncement on the question of desertion and the order to restore conjugal rights were pronouncements *in personam*, since they did not effect the status of the parties; consequently the plea of estoppel failed.

In the case now before us, the divorce order on which plaintiff based his claim, is headed "Decree of divorce on the ground of Adultery", and shows that plaintiff was granted a decree of divorce against his wife by reason of her adultery with a person unknown to plaintiff. For the divorce action to have succeeded, it was necessary for the plaintiff to satisfy the Divorce Court that his wife had committed adultery. Hence on the view expressed by Powell, *supra*, this judgment *in rem* is conclusive not merely as to the point actually decided, viz. the granting of the divorce order, but also as to the matter which it was necessary to decide and which was actually decided as the groundwork of the decision itself, namely that plaintiff's wife had committed adultery. This view that the Divorce Court's judgment dissolving the marriage is conclusive against the world not merely as to the dissolution of the marriage but also as to the adultery which it was necessary to decide as a groundwork to the order of dissolution, receives some support from the decisions from Thlopane's and Raphuti's cases, *supra*. In my view the defendant is estopped not only from denying the fact that the marriage has been dissolved but also the fact that the wife had committed adultery.

Even if I am wrong in this view, the present case can be decided purely on the principles of Native Law and Custom. This is an action for the return of the dowry paid. The marriage between plaintiff and his wife had been dissolved by a court of competent authority. Plaintiff has alleged in his summons that the marriage between himself and his wife has been terminated by the decree of divorce [Raphuti *v.* Mametsi (N.A.C.), 1946, (T. & N.), 19]. Having proved that the marriage between himself and his wife has been terminated by the decree of divorce, he is entitled to the restoration of the *lobolo* paid for his wife Gomeni *v.* Baqwa, 3, N.A.C., 71; Mpoko *v.* Vava, 3, N.A.C., 198; Anderson Fuzile *v.* Thomas Ntloko, 1944, N.A.C. (C. & O.), 2; and Andries *v.* Mayekiso, 1932, N.A.C. (C. & O.), 7.

How a Native Court would view the matter is shown by the following paragraph from the judgment in Thlophane's case, *supra*, at page 41:—

> "Under pure Native Law and Custom, it is open to the husband under a customary union to bring any complaint he may have against his wife before the chief and the tribal lekgotla and to claim a dissolution of the customary union. The matter is then enquired into and adjudicated upon by the chief and lekgotla and with certain native tribes whenever judgment is given in favour of the husband with a dissolution of the union against his wife, no matter on what grounds, whether by reason of her misconduct, desertion or for any other cause, he becomes *ipso facto* entitled to a refund of the *lobolo* or a proportion thereof."

When the plaintiff has proved the divorce by means of the order of divorce, the onus shifts to defendant to prove that plaintiff has forfeited his right to a refund of the lobolo paid because of some recognised Native Custom, and if he has not forfeited such right, to prove what deductions are allowed by the Customs of the tribe.

There is nothing in the evidence adduced by defendant to show that plaintiff has forfeited his right to recover the *lobolo* paid, less the customary deductions.

The Assistant Native Commissioner found, *inter alia*, as facts proved, that defendant was Elsie's guardian and received eight head of cattle, 11 sheep, £33 in cash and a saddle and bridle worth £5 from plaintiff or plaintiff's father as dowry for Elsie. He also gave a finding based on the pre-trial conference agreement, that the present-day value of a beast paid for customary purposes in the Umzimkulu District is £8 and of a sheep £1, and that defendant gave a beast as "Imvuma" in respect of the marriage of plaintiff and Elsie. Mr. Zietsman did not contest these findings of fact.

In his plea defendant contended that should plaintiff be entitled to a refund of dowry, he would be entitled to a refund of only eight head of cattle, 11 sheep and one saddle and bridle or their value plus the sum of £33 less the following deductions:—

(*a*) Two head of cattle for the children born of the marriage.
(*b*) One beast for the services of the woman Elsie.
(*c*) One beast paid as "Imvuma".
(*d*) A wedding outfit supplied by defendant costing £29. 14s. 3d.

Certain questions on Baca Custom were put to the Native assessors and those questions and the replies thereto form an annexure to this judgment. It will be observed from these replies that no deduction is made in respect of the adulterine child, for the services of the woman, for the so-called "Imvuma" beast and for the wedding outfit.

There were no Bacas among the Native assessors.

According to the decision in Sisilana *v.* Galo (6, N.A.C., 12), defendant is entitled to a deduction of one beast for each child born of the marriage, and according to Myaka *v.* Xinti (4, N.A.C., 196), one beast should be deducted for each child born during the subsistence of the marriage, whether the husband be the father or not.

In the present case in his reply to the plea plaintiff claims that defendant is entitled to deduct one beast only and that for the first child of the marriage.

Furthermore plaintiff has dissolved his marriage on the grounds of adultery resulting in the birth of the second child. His actions thus clearly indicate his repudiation of the alleged adulterine child, in which case this latter child, would belong to his wife's dowry-holder (Tonono *v.* Qobo, 3, N.A.C., 120). The plaintiff not desiring to acquire any rights in this child, the dowry-holder would not be entitled to claim a beast in respect of this child.

In Myaka's case, *supra,* it was held that no beast was allowable for the woman's services and in Mayekiso *v.* Quwe [1942, N.A.C. (C. & O.), 38 at page 39] it was pointed out that the Pondos are practically the only tribe amongst the Natives inhabiting the Transkei and the Ciskei which follows the Custom of deducting a beast from the dowry for the services of the woman

In the present case defendant states that he is a Hlubi, but he lives in a Baca locality and is looked upon as a Baca. Plaintiff is a Baca.

Plaintiff has conceded that defendant is entitled to deduct a beast for the services of the woman, and, while this will be allowed, it must not be assumed that I am accepting this as corret Baca Custom.

Plaintiff has also conceded that defendant is entitled to deduct the "imvuma" sheep slaughtered. This will also be allowed without deciding the Baca Custom on the point.

The final point for decision in respect of the deductions claimed is whether the defendant is entitled to claim the full cost of the wedding outfit supplied, or only a beast in respect thereof. It will be noted that the assessors say that no deduction whatever can be made for the wedding outfit. This may have been pure native custom, but I am of opinion that it is now the custom amongst all tribes in the Transkei to allow such a deduction. In any case there is no dispute that a wedding outfit was supplied and defendant not being entitled to recover it he should be compensated, but to the extent of one beast only. [Nomadudwana *v.* Tshotsholo, 1938, N.A.C. (C. & O.)], 43 and Cobo *v.* Mgqitywa (3, N.A.C., 296); Piet Mokoena *v.* Sanna Mofokeng, 1945, N.A.C. (C. & O.), 89.]

The appeal is accordingly allowed with costs, and the judgment in the Court below is altered to read:—

> "For plaintiff, with costs, for the return of eight cattle, 11 sheep, saddle and bridle or their value at £8, £1 and £5 respectively, and £33 cash, less the following deductions, viz. three cattle and one sheep."

Wakeford (Acting President) and Wilkins (Member) concurred.

For Appellant: Mr. Zietsman, Kokstad.

For Respondent: Mr. Walker, Kokstad.

Native Assessor's Opinions.

Assessors:—

1. Petros Jozana of Umzimkulu, Hlangwini.
2. Bishop Ntlabati of Umzimkulu, Hlangwini.
3. Merriman Lupindo of Matatiele, Hlubi.
4. Khorong Lebenya of Mount Fletcher, Basuto.
5. Diaho-Monaheng of Matatiele, Basuto.

Question: When a marriage has been dissolved is it customary amongst the Bacas to deduct a beast for the services of the woman?

Answer: Per Bishop Ntlabati: If marriage is dissolved there are cattle that remain behind. Where a woman has been driven away all the dowry remains at her father's kraal.

Question: There are two children born during the subsistence of the marriage—the first by the husband and the second during absence of the husband. Do the Bacas allow a deduction from the *lobolo* in respect of both these children? If so, how many cattle?

Answer: Per Bishop Ntlabati: Only one beast must be retained—that for the child born to the husband. This is Hlangwini custom but Bacas follow the same custom.

Per Petros Jozana: A beast is retained in respect of the husband's child only. This custom is practised by both Hlangwinis and Bacas.

Question: What is an "imvuma" beast?

Answer: Per Petros Jozana: It is a beast that is killed for the bridgroom by the bride's father or *vice versa*, if he likes to do so. It can also be a sheep or a goat. It is not compulsory. It is not deducted when the dowry is refunded.

Per Bishop Ntlabati: The beast is not compulsory. It may be killed by either side. It may be a sheep or a goat. I agree that it is not refunded.

Question: Do the Bacas make a deduction in respect of the wedding outfit?

Answer: Per Petros Jozana: There is no deduction for wedding outfit. The father must suffer. This is Hlangwini and Baca custom.

CENTRAL NATIVE APPEAL COURT.

LETEANE *v.* **MASADE.**

N.A.C. Case No. 5 of 1953.

Johannesburg: 17th February, 1953. Before Warner, Acting President, O'Driscoll and De Beer, Members of the Court.

LAW OF PROCEDURE.

Practice and Procedure—Onus.

Summary: Plaintiff lent a beast to defendant and while it was in the latter's possession it was lost. Plaintiff claimed delivery of the beast or payment of its value £18.

Held: That onus was on defendant to show that, while plaintiff's ox was in his possession, he looked after it as a prduent and careful person would and that its loss was not due to any negligence on his part. If defendant failed to discharge this onus, plaintiff was entitled to judgment.

Cases referred to:

Sutule *v.* Omar, 1909, T.S., 192.

Boshoff *v.* McDonald, 37, N.L.R., 414.

Statutes, etc., referred to:

Scoble's Law of Evidence in South Africa (Second Edition), page 70.

Appeal from the Court of the Native Commissioner, Zeerust.

Warner (Acting President), delivering judgment of the Court:—

In the Court of Chief Alfred Gopani, district of Marico, plaintiff obtained judgment against defendant for one beast or its value of £18.

Defendant appealed to the Native Commissioner, Zeerust, who, after hearing evidence as a Court of first instance, allowed the appeal, set aside the Chief's judgment and gave one for defendant with costs.

Plaintiff has appealed on the following grounds:—

(*a*) The judgment is against the weight of evidence which is overwhelmingly in favour of the appellant.

(*b*) The judgment is bad in law in that, in the circumstances disclosed by the evidence, the Native Commissioner has held that there was no onus placed on the respondent to exercise special care in respect of the animal in question, that appellant had to show negligence on the part of the Respondent, and that the appellant had to show that the animal was lost owing to the respondent's negligence.

It appears that plaintiff's and defendant's cattle graze on a common grazing ground. Plaintiff's son is employed by defendant as a herd and he found one of defendant's oxen lying dead in the veld. He reported to plaintiff who instructed that the carcase should be conveyed to defendant's kraal by sledge. Defendant had eleven oxen so plaintiff added one of his own oxen to make up a team. Defendant received the ox and then some oxen including this one became lost when grazing in the veld. Defendant searched for them and found his oxen but has been unable to find the ox belonging to plaintiff.

It is the custom of the tribe of which parties are members, that if a beast is found dead in the veld, and the owner is unknown, the carcase shoud be conveyed to the Chief's kraal. In accordance with this custom a carcase was conveyed to the Chief's kraal by one Mopi Senosi and his description of the dead beast tallies with that of plaintiff's lost ox as given by other witnessess. Plaintiff says that he saw the skin of the dead beast and it was not that of his lost ox and was not of the same description but does not give any reason why Mopi Senosi should give false evidence. In his reasons for judgment, however, the Native Commissioner has not stated whether he found as a fact that the carcase found by Mopi Senosi was that of plaintiff's beast or whether it died of natural causes.

Plaintiff states that, when he lent the ox to Defendant for the purpose of carting the carcase of a beast to his kraal, he gave instructions that it should be returned to him on the following day but that defendant used the ox for the purpose of carting grass. Defendant states that he received the ox on a Saturday and intended to return it on the Monday as members of the tribe have been forbidden to inspan oxen on Sundays and it became lost on the Sunday before he was able to return is. He denies that he used it for the purpose of carting grass. The Native Commissioner appears to have accepted defendant's evidence in preference to that of plaintiff and his witnesses but has not explained why he has done so nor why he has rejected the evidence of Chief Alfred Gopane who states that defendant admitted that he used the ox for carting grass. Be that as it may, defendant admits that he received the ox and kept it among his cattle. He thus assumed responsibility for the care of the ox until he should return it to plaintiff.

The Native Commissioner states that, in order to succeed, plaintiff must prove that defendant was negligent and that the beast was lost through his negligence. In this he has misdirected himself, for it is stated on page 70 of Scobles Law of Evidence in South Africa (Second Edition):—

> "In an action on *depositum* or loan, the *corpus* or subject matter of which has been lost or destroyed the burden of proof is on the defendant to show that he is not liable for the loss, and there is no necessity for the plaintiff to show or proof negligence (Lutuli *v.* Omar (1909), T.S. 192; Boshoff *v.* McDonald (37, N.L.R. 414)."

The onus in this case is, therefore, on defendant to show that, while plaintiff's ox was in his possession, he looked after it as a prudent and careful person would and that its loss was not due to any negligence on his part. If he fails to discharge this onus, judgment should be given for plaintiff.

This Court has been placed at a disadvantage by the fact that the Native Commissioner has failed to set out the facts he found to be proved and the grounds upon which he arrived at such finding. He has not commented on the demeanour of the witnesses. He should have given, with reasons,*inter alia*, his findings in regard to (*a*) what steps defendant took in looking after plaintiff's animal while in his possession; (*b*) whether the beast was lost owing to defendant's negligence; (*c*) whether the carcase found by Mopi Senosi was that of plaintiff's ox; and (*d*) if so, whether the ox had died from natural causes without negligence on the part of defendant.

As stated above, the onus is on defendant but, when the proceedings were commenced in the Native Commissioner's Court, attorney for plaintiff accepted the onus. This means that, not only has the Native Commissioner failed to furnish his findings on facts which are necessary for a just decision, in the case, but defendant has conducted his defence on the assumption that plaintiff would have to prove negligence before he could succeed.

I am of the opinion, therefore, that the judgment should be set aside and the case remitted to the Native Commissioner for a finding on the facts as indicated. The Native Commissioner should have the right to call any further evidence as may be necessary and should also allow both parties to bring further evidence and thereafter should give a fresh judgment, costs of appeal to be costs in the case.

O'Driscoll (Member): I concur.

De Beer (Member): I concur.

For Appellant: Mr. J. S. Coulson of Zeerust.

Respondent: In default.

CENTRAL NATIVE APPEAL COURT.

MABANGA *v.* **MSIDI.**

N.A.C. Case No. 9 of 1953.

Johannesburg: 18th February, 1953. Before Warner, Acting President, O'Driscoll and De Beer, Members of the Court.

LAW OF PROCEDURE.

Practice—Appeal—Condonation of late noting—Children—Maintenance.

Summary: Application was made for condonation of late noting of an appeal. Judgment was given on 16th July, 1952, and appeal was noted on 3rd December, 1952. Applicant stated that he was unaware that order made on 16th July, 1952, was appealable until he consulted an attorney.

On the 4th June, 1952, applicant had been ordered to pay £2 per month as maintenance for his child born to a woman named Maria. Subsequently Maria complained that she had given birth to another child by applicant and £2 per month was insufficient for the support of the two children.

Another enquiry was then held at which applicant was ordered to pay £5 per month as maintenance for each child, the order made on 4th June, 1952, being cancelled. At the first enquiry evidence was not led in regard to applicant's financial position but this was done at the second enquiry.

Held: That applicant had not shown just cause for condoning the late notice of appeal.

Held further: That in terms of section *three* (1) of Ordinance No. 44 of 1903 (Transvaal), read with section *ten bis* of Act No. 38 of 1927, before a Native Commissioner makes an order for maintenance he must be satisfied that the child is without means of support and that the father is able to maintain it or contribute towards its maintenance.

Held further: That although section *three* (2) of Ordinance No. 44 of 1903 (Transvaal), permits the variation of an order of maintenance only if the means of the party against whom it is made have altered in amount since the making of the order, it is in order for a Native Commissioner to make a new order and discharge the previous one in terms of section *three* (3) of the Ordinance.

Held further: That applicant had not suffered any prejudice.

Statutes referred to:

Act No. 38 of 1927.

Ordinance No. 44 of 1903 (Transvaal).

Appeal from the Court of the Native Commissioner, Boksburg.

Warner (Acting President), delivering judgment of the Court:—

This is an application for the condonation of the late noting of an appeal.

On the 16th July, 1952, the Native Commissioner, Boksburg, held an enquiry in terms of Ordinance No. 44 of 1903 (Transvaal), and ordered respondent (present applicant) to pay an amount of £5 per month per child for his two minor children with Maria Msidu, i.e., £10 per month, as maintenance, first payment to be made on 16th July, 1952, and subsequent payments on or before the 16th day of each month.

On 24 September, 1952, applicant applied for a review of the order but as he was unable to prove that his means had altered in amount since the making of the original order his application was dismissed.

Applicant then filed a notice of appeal against the order made on the 16th July, 1952. This notice is dated the 8th October, 1952, but was received by the Clerk of the Native Commissioner's Court, Boksburg, on the 3rd December, 1952.

Attached to the Notice of Appeal is an affidavit by the applicant. The only reason that he gives for the delay in noting the appeal is a statement that he was unaware that he could appeal against the order of the 16th July, 1952, until he saw an attorney who informed him that in fact the said order was appealable. He does not explain why he did not consult an attorney at an earlier date.

Applicant has not shown any just cause why the delay in noting the appeal should be condoned but in view of the interpretation which these Courts have placed upon section *fifteen* of Act No. 38 of 1927, it becomes necessary to examine the position with a view to ascertaining whether any prejudice has been caused to applicant.

It appears that applicant and a woman named Maria had contracted a Native Customary Union but in May, 1952, applicant contracted a civil marriage with another woman and ordered Maria to leave his home where she had been living for the past six years. At that time Maria had one child and she was pregnant with another.

Maria complained to the Native Commissioner that the child was without adequate means of support and the Native Commissioner, on the 4th June, 1952, held an enquiry in terms of Ordinance No. 44 of 1903 (Transvaal), and ordered applicant to pay £2 per month as maintenance for the child. At this enquiry applicant was represented by an attorney.

Subsequently, Maria complained that she had given birth to another child and that £2 per month was insufficient for the maintenance of the two children. The Native Commissioner then held a second enquiry on the 16th July, 1952, when he made a fresh order and cancelled the previous one.

Applicant was not represented legally at the second enquiry but appeared on his own behalf. He did not challenge Maria's statement that she cannot maintain a child on less than £5 per month nor did he attempt to show that she is in a position to contribute towards the maintenance of the children. He admitted that he owned shops at which six people are employed, a house, a motor-car and a share in a bus service in Natal but did not furnish a statement of his income.

At the first enquiry, evidence was not led in regard to applicant's financial position whereas section *three* (1) of Ordinance No. 44 of 1903, read with section *ten bis* of Act No. 38 of 1927, provides that, before a Native Commissioner makes an order, he must be satisfied that the child is without means of support and that the father is able to maintain it or contribute towards its maintenance. The order made at the first enquiry was based on inadequate evidence but it is not necessary to consider this aspect of the matter because the order concerned was subsequently cancelled.

It is stated in the Notice of Appeal that the ground of appeal is that it was not shown to the Court on the 16th July, 1952, that in terms of section *two* (2) [evidently intended for *three* (2)] of Part I of Ordinance No. 44 of 1903, the means of the applicant had altered in amount since the making of the order of the 4th June, 1952.

Section *three* (2) of Ordinance No. 44 of 1903 (Transvaal), empowers a Native Commissioner from time to time to vary an order on the application either of the person against whom or in whose favour it was made upon proof that the means of the party against whom it was made have altered in amount since the making of the original order or any subsequent order varying it.

It must be pointed out, however, that the order made on 16th July, 1952, did not vary the order made on 4th June, 1952. A fresh enquiry was held and the whole question as to whether applicant was liable for maintenance of Maria's children was considered anew and the previous order was cancelled. It has not been shown to us that such procedure was irregular. Section *three* (3) of Ordinance No. 44 of 1903 (Transvaal), allows a Native Commissioner to discharge an order on its being proved to his satisfaction that there are no longer any reasons for the order remaining in force. It seems to me that if a new order is made there are no longer any reasons for the previous order remaining in force so that it may be discharged.

As applicant has failed to show that there was any just cause for the delay in noting the appeal or that he has suffered any prejudice in the proceedings, the application for condonation of the late noting appeal must be refused with costs.

O'Driscoll (Member): I concur.

De Beer (Member): I concur.

For Appellant: Adv. J. Slovo, instructed by Messrs Lewis Baker of Benoni.

Respondent in default.

SOUTHERN NATIVE APPEAL COURT.

NYELEKA *v.* NYELEKA.

N.A.C. Case No. 7 of 1953.

Umtata: 19th February, 1953. Before Sleigh, President. Young and Kelly, Members of the Court.

LAW OF PROCEDURE.

Practice and Procedure—Attorney and client costs—When awarded Rule 2 Order XXXI of Proclamation 145 of 1923 refers to party and party costs.

(On the main ground of appeal on the facts, judgment in this matter was altered to one of absolution from the instance). Leave was however granted at the commencement of the hearing of appeal to argue an additional ground of appeal, viz. that the Assistant Native Commissioner erred in disallowing the claim of appellant's (plaintiff's) attorney for travelling costs on 24th July, 1952, on which date an application by defendant's attorney for a postponement, on the grounds of the illness of one of defendant's witnesses, was allowed. It was subsequently proved that the witness was in fact not ill but holding a beer drink at her kraal. Plaintiff's attorney made application for the sum of £6. 2s. as attorney and client costs against defendant, being £3. 12s. travelling (at 1s. per mile from Lady Frere to Cala and return) and a special fee of £2. 10s. for absence from his office. Defendant's attorney opposed the claim for £3. 12s. The following note appears on the record:—

> "Application by Mr. Tsotsi (Plaintiff's attorney) allowed. Ruling in regard to the amount to be allowed in respect of travelling expenses reserved until conclusion of defendant's case."

At the close of the case, the application for travelling expenses was refused but as the Native Commissioner did grant the application for attorney and client costs appellant got what he asked for.

Held:

(1) That as respondent wilfully misled his attorney and the Court resulting in unnecessary travelling being incurred by plaintiff's attorney, it is proper that attorney and client costs be awarded to plaintiff.

(2) That as appellant was granted attorney and client costs it is not the function of the Court but of the taxing officer to determine the amount of such costs. The appeal accordingly fails.

Statutes referred to: Proc. 145 of 1923.

Works of Reference: Jones and Buckle, 5th ed.

Appeal from the Court of the Native Commissioner, Cala.

Sleigh (President):—

The late Vakala Nyeleka died leaving a large number of livestock in his great house in which his son, the late Mpurwana was the heir. Plaintiff (now appellant), a minor duly assisted, claims to be the only surviving son of Mpurwana and, therefore, the heir of Vakala. Defendant (now respondent) is the son and heir in Vakala's right hand house.

Appellant claims from respondent delivery of the stock together with their increase or payment of their value. The defence is that appellant is illegitimate. The Assistant Native Commissioner found that Mpurwana left no legitimate issue and entered judgment for respondent. From this judgment appellant appeals.

It is common cause that appellant is the son of Mpurwana's widow, Notembile, and that he was born after Mpurwana's death. He would therefore be the heir if his mother was pregnant with him at the time of Mpurwana's death, or if he was born at the latter's kraal or at a kraal approved of by Mpurwana's male relatives (see Tshaka *v.* Betyi, 1, N.A.C., (5), 301, also Madyibi *v.* Nguva 1944 N.A.C., (C. & O.), (36). The burden of proof in these respects is on appellant.

Appellant's witnesses are agreed that Mpurwana died about 13 years ago. This evidence is supported by the headman who says that Mpurwana was already dead when he was appointed 10 years ago; and by respondent who says that Notembile left her late husband's kraal long before the eclipse (1940). Appellant's witnesses further say that at the time of his death Notembile was three month's pregnant with appellant. Ngcolo Sondlo says that she assisted with the confinement, and Nowandle, the widowed sister of Mpurwana, says that he died in winter and that appellant was born before Chrismas the same year. If this evidence is true then appellant should now be about 12 years of age. Respondent and his mother, however, say that Notembile was pregnant with appellant's sister, Mkabedi, when Mpurwana died. According to respondent appellant was still suckling when Notembile came to the office to claim Vakala's land, and this, according to the headman was in 1950. If this is so, appellant cannot be more than 6 years of age.

Of these two versions, respondent's is the more reliable. It is true that none of the members of Vakala's family except respondent's mother, supports respondent's case, and it is improbable that the family would permit appellant to succeed to Vakala's estate if he had been "picked up" by Notembile after she had deserted her late husband's kraal.

But Mfakadolo, witness for appellant, makes it clear that the family is not on good terms with respondent who confirms this. On the other hand, the headman, who must be regarded as a disinterested witness, says that he once saw the "little boy (appellant) in court" when he saw him for the first time in 1950. Moreover, it is inconceivable that the Native Commissioner who saw appellant in court, would have mistaken a boy of 12 for a child six years of age. It was open to appellant to call medical evidence of the ages of himself and his sister, and if this showed that he was about 12 years of age, it would have completely discredited respondent's case. I agree, therefore, with the Native Commissioner's conclusion that appellant has failed to prove that he is the posthumous child of Mpurwana.

I come now to the question whether appellant was born at Mpurwana's kraal. Notembile, Mfakadolo, Nowandle and Ngcolo testify to this fact. Respondent and his mother deny this and they are supported by appellant's own witness, Gcokotwana, who states that he was born at the kraal of Notembile's people. The Native Commissioner was therefore justified in accepting the latter version.

It remains to be considered whether Notembile was given permission to reside at her people's kraal. It is clear from the evidence that Notembile was mentally unbalanced and Gcokotwana and Mfakadolo state that they gave her permission to go to her people for treatment. Mfakadolo further states that he performed the customary ceremony in respect of appellant's birth and slaughtered a goat which was provided by Mpurwana's kraal. Respondent denies that permission was granted. He also denies that a ceremony was held. Now no permission

could have been given to Notembile to reside at her people's kraal without the consent of respondent who was also the proper person to perform the ceremony. Mfakadolo admits that Notembile travelled about with "doctors". It is clear that she was not at Mpurwana's kraal when Vakala's land was transferred about 1945, nor, according to her own evidence, was she at home when the cattle were transferred to the name of respondent's mother. Further, respondent states that when he went to *putuma* her the second time she was not at her people's kraal, but found her in another location. All this gives the impression that she was roaming about. Moreover, the evidence of appellant's witnesses is so conflicting and contradictory that little reliance can be placed on it. In the circumstances I am not satisfied that Notembile was given permission to reside at her people's kraal.

The Native Commissioner, however erred, in giving a full judgment for respondent, because medical evidence may support the evidence for appellant that he was in fact about 13 years of age. The Native Commissioner's judgment will therefore be altered to one of absolution from the instance.

At the commencement of the hearing of the appeal leave was granted to argue an additional ground of appeal, viz. that the Assistant Native Commissioner erred in disallowing the claim of plaintiff's (appellant's) attorney for travelling costs in respect of the hearing on 24th July, 1952.

This case comes from the Native Commissioner's court, Cala and it appears from the notes on the record that plaintiff's attorney has his office in Lady Frere. The case was postponed to 24th July, 1952. On this date defendant's attorney informed the court that his witness (Nojenti) was ill and applied for a postponement. Plaintiff's attorney did not oppose and the case was then postponed and defendant was ordered to pay the costs. At the resumed hearing the court was advised that Nojenti had not been ill at all. She had in fact a beer drink at her kraal. Plaintiff's attorney then applied for the sum of £6. 2s. as attorney and client costs against defendant in respect of the hearing on the 24th July, being £3. 12s. travelling 72 miles between Lady Frere and Cala at 1s. per mile and a special fee of £2. 10s. for absence from his office. Defendant's attorney opposed the claim for £3. 12s. The following note then appears on the record "Application by Mr. Tsotsi (plaintiff's attorney) allowed. Ruling in regard to the amount to be allowed in respect of travelling expenses reserved until conclusion of defendant's case." At the close of the case the application for travelling expense was refused.

The Native Commissioner says in his reasons that there are three firms of attorneys practising in Cala and, therefore, in view of the provisions of rule 2 (4) of Order XXXI of Proclamation No. 145 of 1923 (the case was commenced in 1950), plaintiff's attorney is not entitled to either travelling expenses or a special fee.

The Native Commissioner has misconstrued Rule 2 which deals with party and party and not with attorney and client costs. There is nothing to prevent a party from obtaining legal assistance from another centre and he is bound to pay his attorney the fee and expense agreed upon. This is called attorney and client costs and is not recoverable from the opposite party unless the court so orders. The ground for making such an order is gross misconduct by the opposite party (see *Jones and Buckle* 5th edition pp. 111 to 112), and is payable to the successful party, the object being to compensate him for additional costs incurred through the misconduct of the opposite party.

Now respondent has wilfully misled his attorney and the court resulting in unnecessary travelling expenses being incurred by plaintiff's attorney, which expenses appellant will presumably have to pay. This is, therefore, a proper case in which attorney and client costs should be awarded against respondent. It is, however, not the function of the court to determine the amount to be awarded. That is the function of the taxing officer and he will have to be satisfied that the additional expenses over and above the award of appearance costs on 24th July, 1952, were actually incurred. Since the Native Commissioner did grant the application for attorney and client costs, but reserved the question of the amount (which was not his function), appellant has got what he applied for. He has not shown that he is entitled to three pounds twelve shillings. Therefore, this ground of appeal must also fail. The taxing officer in taxing the bill of costs will no doubt bear in mind that defendant's (respondent's) attorney had agreed to the payment of a special fee of two pounds ten shillings. The amount allowed as additional costs should, therefore, be not less than two pounds ten shillings.

The appeal is dismissed with costs but the judgment of the court below is altered to one of "absolution from the instance with costs".

Young and Kelly (m.m.): Concurred.

For Appellant: Mr. Tsotsi, Lady Frere.

For Respondent: Mr. Muggleston, Umtata.

SOUTHERN NATIVE APPEAL COURT.

NDUDE *v.* NTEYI.

N.A.C. Case No. 8 of 1953.

Umtata: 23rd February, 1953. Before Sleigh, President, Young and Kelly, Members of the Court.

COMMON LAW.

Native Appeal Case—Possession—Ownership arising from—Presumption of rebuttable—Proof of facts in civil matters discharged by a preponderance of probabilities.

Plaintiff (appellant) claims to be the owner of a certain ox which was found in possession of respondent Appellant states that the ox was bred by him, that he earmarked it as a big calf, that he lent it to one Smallone for ploughing, that it was returned to him and shortly thereafter disappeared from the mountains where is was grazing. The loss was reported to the police and at the dipping tank. Three weeks later it was identified by the witnesses Smallone, and plaintiff's half-brother Pelile. The latter who is obviously very young made certain contradictory statements which as it later transpired were of little importance.

Respondent alleges that the beast was paid as dowry by one Sinxoko for respondent's ward, that it was lost from the kraal of Bokomfu where it was running and later strayed back to Sinxoko's kraal. He was unable to dispute that the beast was in appellant's possession before it strayed back. Respondent and his witnesses were, for the reasons set out in the written judgment unable to satisfy the Court that the beast was the one which he had lost, despite the fact that the beast now in dispute was found in his possession.

Held: That the presumption of ownership arsing from possession is rebuttable by a balance of probability and credibility.

The appeal accordingly succeeds.

Cases referred to:

(i) Rawazela *v.* Maliehe [1939, N.A.C. (C. & O.), 7].

(ii) Ley *v.* Ley's Executors & Ors. [1951 (3), S.A. 186 A.D.].

Appeal from the Court of the Native Commissioner, Engcobo.

Sleigh (President):—

This is an appeal against a judgment of absolution in an action in which plaintiff (now appellant) claims to be the owner of a certain ox which was found in possession of respondent.

The Additional Assistant Native Commissioner after referring to certain inconsistencies in the evidence of appellant and his witnesses, states in his reasons that because of these inconsistencies he could not place sufficient reliance on appellant's version to justify a judgment in his favour. He quotes Mc. Loughlin, (P), in Rawuzela *v.* Maliehe [1939, N.A.C. (C. & O.), 7] as follows: " . . . The strong presumption of ownership arising from this possession cannot lightly be disturbed by a mere balance of probabilities or of credibility. Plaintiff must show conclusively that he has a better right than the defendant." The learned President quotes no authority for this statement. It may be that he intended the word " lightly " to qualify what follows, but the word " conclusively " would seem to indicate contrary intention. If he meant that the presumption cannot be rebutted by a balance of probability or credibility then I must, with respect, disagree. There are, of course, certain presumptions of law which are irrebuttable, but the presumption of ownership arising from the possession of movables is not one of them, and I know of no authority for the proposition that it cannot be rebutted by " a balance of probability or credibility ". It is in conflict with the statement in Ley *v.* Ley's Executors & Ors. [1951 (3), S.A. 186 (A.D.) at page 192] that " no matter how serious an allegation of fact may be, the *onus* of proving the fact is, in civil cases, discharged on a preponderance of probabilities." The presumption of ownership is sometimes strong, depending on the length and circumstances of the possession. But sometimes it is so weak that the *onus* may be on the party in physical possession of the moveable to establish his ownership as Rawuzela's case (*supra*) illustrates. Thus if A says he has lost his beast and found it in the possession of B, and the latter says that he had previously lost the same beast and found it grazing with A's stock, B cannot rely on his possession as proof of his ownership, he must establish, at least by a preponderance of probability, that it is the same beast which he had lost.

I come now to the evidence in the present case. Appellant states that the beast which is in its sixth year was bred by him,, that its mother had died, that he earmarked it as a big calf, that in ploughing season 1950 he lent it to Smallone for ploughing, that it was returned to him and that shortly thereafter and in December, 1950, it disappeared from the mountains where it was grazing. He reported the lost at the dipping tank and the police. Three weeks later he found it in the possession of defendant. He identified the beast by its colour and the earmarks. His half-brother Pelile and his witness Smallone also identified the beast as appellant's. Smallone says that it was in his possession for about two months. Pelile first said that the ox was earmarked when it was a small calf but under cross examination he says that it was then a big calf. He also said it was lost after Christmas whereas the evidence goes to show that it was recovered in December after it had been lost for three weeks. He also says that the beast was with Smallone for a ful year but it is obvious from his evidence that he means full ploughing season. Now the Native Commissioner has criticised the evidence of Pelile as being inconsistent with the evidence of appellant. The age of this witness is not given but he must be quite young

because he says he was still a child when the ox was born. Now the contradictory statements made by this witness may be due entirely to nervousness and in any case the discrepancies, such as they are, are of no importance whatsoever. It is quite immaterial whether the beast was earmarked when it was a small or a big calf, as long as it was earmarked while it was still a calf.

Respondent's version is that the beast was paid as dowry by Sinxoko for respondent's ward and that it was lost from the kraal of Bokomfu where it was running and later strayed back to Sinxoko's kraal. He was unable to dispute the evidence that the beast was in appellant's possession before it strayed back. He must therefore satisfy the Court that this is the beast which he had lost.

Sinxoko was not available to give evidence but his two brothers, Mdutswana and Mkonyo, Bokomfu and respondent identified the beast as one that had been paid as dowry for the girl. Mdutswana and Mkonyo state that it was rising three years when it was paid but the witnesses are not agreed as to when it was paid. Mdutswana says that the girl has been at their kraal for five years and the beast was paid before she came to the kraal. This would be about 1947 and the beast should now be about 8 years of age. At the other extreme is Bokomfu, who says that the ox came to his kraal in green mealie season, was lost three or four months later during winter and was recovered before Christmas the same year. This, it is common cause, was in December, 1950. Payment must therefore have been made in 1950 and the beast should be about 5 years old. Then again respondent says that the beast had been recovered a week when it was claimed by appellant. Bokomfu says it was five weeks.

Further the witnesses disagree as to how long the beast had been lost. Bokomfu says it was out of his possession for about three months, but according to respondent it was lost before Christmas, 1949, and recovered a year later. Mdutswana also states that it was lost for a year but he states (giving evidence in October, 1952) "this is the second ploughing season since the beast arrived (strayed back to his kraal)." This of course is not correct because it is clear that the dispute arose in December, 1950. These discrepancies merely serve to illustrate how very unreliable native witnesses are when they testify as to time. In my opinion the discrepancies should not be taken seriously.

All the defence witnesses are agreed as to the description of the beast but this is not surprising since they have had ample opportunity of making a thorough examination of the animal. They are all agreed that the beast had not been earmarked when it was lost. Bokomfu and the two brothers are agreed that when it strayed back it had earmarks and these were fresh and had blood scabs on them. Bokomfu says the marks were fresh because the beast had been out of his possession for only three months. Now, if this is correct it would be conclusive proof that this is not the beast which appellant earmarked as a calf. If the beast had fresh earmarks respondent would certainly have reported the matter to the police with a view to a prosecution. He should in any case have reported that he had recovered the beast since he reported the loss. He did not make this report but left it to appellant, the alleged thief, to report the matter. Even at that stage respondent could not have drawn the attention of the police and the sub-headman to the fresh earmarks because neither a police officer nor the sub-headman was called and no explanation is offered for this failure. Moreover appellant and his witnesses were not questioned by respondent's attorney in regard to the fresh earmarks. The inference is that he was not informed by respondent, and the further inference is that the evidence of the fresh earmarks is a fabrication. It is significant that respondent who gave evidence before his witnesses mentioned the earmarks but did not say that they were fresh.

In my opinion respondent has not proved that the beast in question is the one he lost in 1949. The appeal consequently succeeds and is allowed with costs. The judgment of the court below is altered to one "For plaintiff as sprayed with costs."

Young and Kelly (m.m.): Concurred.

For Appellant: Mr. Airey, Umtata.

For Respondent: Mr. White, Umtata.

NORTH EASTERN NATIVE APPEAL COURT.

MOLOTO *v.* MOLOTO.

N.A.C. Case No. 4 of 1953.

Pretoria: 12th March, 1953. Before Steenkamp, President, Balk and Smithers, Members of the Court.

COMMON LAW.

Practice and Procedure—Appeal to Native Appeal Court—Condonation of late noting—No prospect of success on appeal— Locus standi in judicio *of one co-owner of land to sue for ejectment of non-owner.*

Succession—Widow—Marriage in community of property.

Summary: Plaintiff, who inherited an undivided one-twelfth share in a certain farm, sued the son of her late husband by a former customary union, for ejectment from those portions of that farm allocated to her for residential and arable purposes. Plaintiff was married by Christian rites, in community of property to her late husband.

Held: That the application for condonation fails as it is clear that applicant has no prospect of success on appeal.

Held further: That as there is nothing to indicate that defendant suffered any substantial prejudice as the result of the misdescription in the summons of the land in question, he cannot, at this stage, rely on that defect.

Held further: That plaintiff has such special interest in the portions of the farm allocated to her, as entitles her to sue for the defendant's ejectment therefrom, without the other co-owners of the farm being joined in the action.

Held further: That the plaintiff, as a result of her marriage in community of property to her late husband, succeeded, *ab intestato,* to the property in question.

Cases referred to:

Lekhetha *v.* Toane, 1946, N.A.C. (C. & O.), 22.

De Villiers *v.* de Villiers, 1947 (1), S.A. 635 (A.D.).

Amalgamated Engineering Union *v.* Minister of Labour, 1949 (3), S.A. 637 (A.D.).

Statutes, etc., referred to:

Section *fifteen* of Act No. 38 of 2927.

Section *one* (1) (*a*) of Act No. 13 of 1934.

Section *two* (*c*) of Government Notice No. 1664 of 1929 (as amended).

Appeal from the Court of the Native Commissioner, Bochum.

Balk (Permanent Member):

This is an application for condonation of the late noting of an appeal from the judgment of a Native Commissioner's Court for the ejectment of the defendant (present applicant) from the land of the plaintiff (now respondent).

The reasons given by the applicant for the delay in noting the appeal are, firstly that he consulted his Chief in regard to the above-mentioned judgment and believed that the latter had the matter in hand and that therefore there was nothing further for him (applicant) to do, and secondly, lack of funds.

The first reason is untenable as it is based on ignorance of law, see Lekhetha *v.* Toane, 1946, N.A.C. (C. & O.), 22, at page 23, and the remaining reason has not been substantiated.

In any event the application, in my view, fails as it seems clear to me that the applicant has no prospect of succes on appeal, see De Villiers *v.* De Villiers, 1947 (1), S.A. 635 (A.D.). That this is the position will be apparent from what follows.

Insofar as concerns the first ground of appeal, viz. that the evidence does not support the averment in the summons that the plaintiff is the owner of *certain portion* of the farm Westheim No. 983 in the District of Pietersburg, in that it is manifest from the plaintiff's evidence that she is the owner of an undivided one-twelfth share in that farm (hereinafter referred to as "the farm"), there is nothing to indicate that the defendant suffered any substantial prejudice as the result of the misdescription in the summons of the land in question and he cannot, therefore, at this stage rely on that defect, see the proviso to section *fifteen* of the Native Administration Act, 1927.

Turning to the second ground of appeal, viz., that the plaintiff, being the owner of an undivided one-twelfth share in the farm had no *locus standi in judicio* to bring the action for the defendant's ejectment from the farm or any portion thereof without the other co-owners being joined in such action, it is manifest from the evidence as a whole that the plaintiff is the registered owner of one-twelfth share in the farm; that she succeeded thereto on the death of her late husband (hereinafter referred to as "the deceased") as a result of her marriage to him in community of property, i.e. that she succeeded thereto in terms of paragraph (*c*) of section 2 of the Regulations for the Administration and Distribution of Native Estates, published under Government Notice No. 1664 of 1929, as amended by Government Notice No. 939 of 1947, read with section *one* (1) (*a*) of the Succession Act, 1934; that during the deceased's lifetime the farm was by agreement between the co-owners thereof, including the deceased, apportioned amongst them for residential and arable purposes and that the defendant is, without the plaintiff's consent, residing on and ploughing the portions of the farm that were so allocated to the deceased for those purposes. It therefore seems clear to me that notwithstanding that the plaintiff's share in the farm is an undivided one she, as the deceased's successor in title, has such a special interest in the portions of the farm allocated to the deceased as aforesaid, as entitles her to sue for the defendant's ejectment therefrom without the other co-owners of the farm being joined in the action; in other words it cannot, to my mind, in the circumstances, be said either that the co-owners of the farm other than the plaintiff are directly and substantially interested in the portions of land in question or that their interests in the farm are so affected by the order of the Court *a quo* for the defendant's ejectment therefrom as to require their joinder in that action, see *Amalgamated Engineering Union* v. *Minister of Labour*, 1949 (3) S.A. 637 (A.D.) from page 649 onwards and Vol II of Maasdorp's *Institutes of South African Law* (7th edition) at page 155. It follows that the plaintiff had *locus standi in judicio* to bring the action in question.

As regards the third ground of appeal, viz., that the Additional Native Commissioner *a quo* failed to take into account that the defendant had a lawful right to remain on the farm, having acquired that right from his father, the defendant in his plea resisted the plaintiff's claim for his ejectment only on one ground, i.e. by reason of his (defendant's) being the owner, according to Native Law, of the deceased's share of the farm because he was the deceased's eldest son. This defence is obviously untenable as it is manifest from the relative title deed that the plaintiff is the registered owner of the deceased's share in the farm. Here it may be mentioned that it emerges from the defendant's evidence that he is the deceased's son by a customary union and that his (defendant's) mother died prior to the plaintiff's marriage to the deceased so that in any event the defendant has no claim, based on inheritance *ab intestato,* to the deceased's share in the farm which, it is clear from the uncontroverted evidence of the plaintiff, was acquired by the deceased after her marriage to him. In his evidence the defendant stated that deceased had given him the right to reside on and to plough the portions of land in question. He does not state for what period the deceased gave him that right nor has he called any witnesses to coroborate his evidence. That being so and as this defence is at variance with that put forward in his plea, it can obviously not be accepted. It follows that, on the evidence, including the plaintiff's uncontroverted testimony that the defendant is residing on and ploughing the portions of land in question without her consent, the defendant cannot be said to have a right to reside on or to plough those portions of land.

The evidence specified in the fourth and last ground of appeal, insofar as it may be inadmissible, does not, to my mind, affect the decision of the case since, as is clear from the pleadings and evidence of both parties, the question of whether the defendant obtained any rights to occupy or cultivate portions of the farm from any of the co-owners other than the deceased and the plaintiff does not arise and the defendant does not deny the plaintiff's evidence that he is occupying the portions of the land in question against her will.

In the result I am of opinion that the application should be refused with costs.

Steenkamp (President): I concur.

Smithers (Member): I concur.

For Appellant: Mr. C. L. Aarons instructed by Messrs. Moss, Cohen & Meyer of Pietersburg.

For Respondent: Mr. E. R. de Villiers instructed by Mr. L. B. Gillette of Pietersburg.

NORTH EASTERN NATIVE APPEAL COURT.

KEKANE *v.* **MOKGOKO N.O.**

N.A.C. Case No. 120 of 1952.

Pretoria: 13th March, 1953. Before Steenkamp, President, Balk and Smithers, Members of the Court.

NATIVE CUSTOM.

Practice and Procedure—Appeal from Native Commissioner's Court—Application for filing additional grounds of appeal—Point that summons discloses no cause of action not raised in Court below.

Land—Tribally owned land—Member of tribe—Termination of membership of tribe—Ejectment from tribal farm—Tribe is legal entity.

Summary: Plaintiff, a Native Chief, suing in his official capacity, sought an order for defendant's ejectment from a tribal farm occupied by such Chief and his followers.

Held: That as written application for leave to file additional grounds of appeal had not been made and lodged with the Registrar or Clerk of the Court and service not having been effected on the respondent as required, the verbal application be refused and appellant was thus limited to the grounds stated in his notice of appeal.

Held further: That as defendant did neither except to the summons nor ask for further particulars, and as the defect in the summons was remedied by the evidence for plaintiff, the defendant cannot be said to have been prejudiced thereby so that he cannot, on appeal, rely on that defect.

Held further: That as the land is owned by the tribe, and as the tribe is a legal entity, the defendant cannot be a part owner of the land.

Held further: That the *lekgotla's* decision to refund to the defendant the £24 paid by him for admission to the membership of the tribe, and the payment of that sum to the Native Commissioner for refund to defendant as well as the *lekgotla's* and the Chief's order to defendant thereupon to leave the land, are tantamount to the termination, by the tribe, of the defendant's membership thereof.

Held further: That the tribe had ample justification for terminating, according to Native Law and Custom, the defendant's membership thereof.

Cases referred to:

Hamlin *v.* Dunn & Co., 1908, N.L.R., 731.

Monnakgotle and Others *v.* Heskia and Another, 1921, A.D. 56.

Matope *v.* Day, 1923, A.D. 397.

Rathibe *v.* Reid and Another, 1927, A.D. 74.

Magano *v.* Mathope, N.O., 1936, A.D. 502.

Statutes, etc., referred to:

Sections *three* and *fifteen* of Act No. 38 of 1927.

Native Appeal Courts Rules Nos. 14 and 16.

Appeal from the Court of the Native Commissioner, Hammanskraal.

Balk (Permanent Member):—

This is an appeal from the judgment of a Native Commissioner's Court for plaintiff (now respondent) as prayed with costs in an action in which he sought an order for the defendant's (present appellant's) ejectment from tribal Portion A of the farm Bultfontein No. 472, in the District of Pretoria, and costs of suit, or alternative relief, averring that—

"(A) Plaintiff is Elence Mapala Mokgoko, Chief of the Bakgotla-Ba-Mokgoko tribe, who sues in his capacity as such, with the consent of the Honourable the Minister of Native Affairs having been granted in terms of section *three* (1) of the Native Administration Act, No. 38 of 1927 (as amended).

(B) Defendant is Elias Kekane, a Native male adult.

(C) Plaintiff in his capacity aforesaid and the Bakgatla-ba-Mokgoko tribe lawfully occupy Tribal Portion A of the farm Bultfontein No. 472, in the District of Pretoria, which said farm is registered in the name of the Minister of Native Affairs in Trust for the said Bakgatla-Ba-Mokgoko tribe.

(D) Defendant is in unlawful occupation of tribal Portion A of the aforesaid farm Bultfontein No. 472.

Despite demand defendant fails and/or refuses to vacate the said portions of the farm which he unlawfully occupies".

The defendant pleaded:—

"1. Defendant admits clauses (A) (B) and (C) of plaintiff's summons.

2. Defendant denies clause (D) of plaintiff's summons and states—

(*a*) that during or about the year 1923 he (defendant) together with several others agreed to purchase certain portion of the farm Bultfontein No. 472;

(*b*) that he (defendant) duly paid his share of the purchase price of the aforementioned farm;

(*c*) that he (defendant) as one of the original purchasers of the farm Bultfontein No. 472 is entitled to occupy certain portion of the farm Bultfontein No. 472.

3. By reason of these premises defendant prays that plaintiff's claim be dismissed with costs".

The grounds of appeal are:—

"The judgment was (sic) bad in law for the following reasons:—

(i) The summons does not disclose the cause of action.

(ii) The defendant has vested rights in the property as part owner and/or bona fide occupier, and/or bona fide possessor and/or in the exercise of a lien for the improvements erected by him.

(iii) The judgment offends against the principle of non-enrichment".

In limine Counsel for appellant applied verbally for this Court's approval of certain additional grounds of appeal.

Written application for such approval not having been made and lodged with the Registrar or Clerk of the Court and service not having been effected on the respondent as required by Rule 14 of the Rules of this Court, published under Government Notice No. 2887 of 1951, the verbal application was refused by this Court and the appellant was thus, in terms of Rule 16 of those Rules, limited to the grounds stated in his notice of appeal as set out above.

The first point taken by the appellant, viz., that the summons does not disclose the cause of action, was not raised in the Court *a quo* and whilst it is true that the summons does not fully set out the cause of action, it has been sufficiently amplified in this respect by the evidence for plaintiff. Moreover the defendant, who was represented by Counsel in the Court *a quo*, could have excepted to the summons or asked for further particulars. He failed to adopt either of these courses and as the defect in the summons was remedied by the evidence for plaintiff, the defendant cannot be said to have been prejudiced thereby so that he cannot at this stage rely on that defect, see the proviso to section *fifteen* of the Native Administration Act, 1927, and Hamlin *v.* Dunn & Co., 1908 (Vol. 29), N.L.R., 731, at page 740.

Turning to the remaining grounds of appeal, it is clear from the pleadings that the land is owned by the tribe and as the tribe is a legal entity, the defendant cannot be a part owner of the land, see Matope *v.* Day, 1923, A.D. 397, at pages 401 and 405 and Rathibe *v.* Reid and Another, 1927, A.D. 74, at page 88. As regards the defendant's rights as a bona fide occupier or a bona fide possessor of the land, it is manifest from the Acting Assistant Native Commissioner's reasons for judgment that he accepted the evidence for plaintiff and there being no appeal on fact, this Court is not called upon, as was conceded by Counsel for appellant, to consider whether or not the Commissioner was right in so doing.

According to the evidence for plaintiff, it appears that in the year 1926 the then Chief of the tribe on payment to him by the defendant of £24, accepted the latter as a member of the tribe and gave him permission to reside on the land. This action by the Chief was within his powers, see Monnakgotle and Others *v.* Heskia and Another, 1921, A.D. 56, at pages 57 and 58, so that the defendant had the right to reside on the land.

It also emerges from the evidence for plaintiff that in the year 1934 the defendant failed to pay homage to the then new Chief of the tribe and the *lekgotla* thereupon decided to refund to the defendant the £24 paid by him in respect of his admission to the membership of the tribe. The sum was paid to the Native Commissioner at Hammanskraal for refund to the defendant and the latter was ordered by the Chief and *lekgotla* of the tribe to leave the land. The defendant refused to accept the refund and leave the land. Since then the defendant has persisted in his refusal to recognise and obey the Chief of the tribe, has defied him and interfered in tribal matters. The defendant was again given notice by the tribe on several occasions to quit the land, the one which was apparently served on him last, being that dated 29th August, 1951 (Exhibit "C"). The defendant did not comply with these notices and the plaintiff instituted the instant action after he had obtained consent hereto from the *lekgotla* of the tribe, from a majority of the adult male members of the tribe present at a public meeting convened for the purpose of considering that matter and from the Minister in terms of section *three* of the Native Administration Act, 1927.

The Minister's consent to bring the instant action was necessary not only in terms of the lastmentioned section, see Magano *v.* Mathope, N.O., 1936, A.D. 502, but also because the land is registered in the name of the Minister in trust for the tribe.

To my mind the *lekgotla's* decision to refund to the defendant the £24 paid by him for his admission to the membership of the tribe and the payment of that sum to the Native Commissioner at Hammanskraal for refund to the defendant as well as the *lekgotla's* and the Chief's order to the defendant thereupon to leave the land, are tantamount to the termination by the tribe of the defendant's membership thereof. That the tribe had ample justification for terminating, according to Native Law and Custom, the defendant's membership thereof and giving him notice to vacate the land is manifest from his persistent recalcitrant attitude referred to above. That being so the reasons for terminating the defendant's membership of the tribe are good and sufficient ones and accordingly his rights as bona fide occupier or bona fide possessor of the land were properly terminated.

I do not see how the defendant can rely on a right of retention in respect of his improvements to the land or on the doctrine of unjust enrichment seeing that he made no claim in regard thereto and his evidence does not indicate to what extent he may be entitled to compensation for those improvements. Besides it is still open to him to prefer a claim therefor if so advised. Here it may be added that the defendant stated in his evidence that the borehole sunk by him on the land was to provide water for the school children and was regarded by him in the nature of a gift to the Chief; further that the tribe assisted him in erecting the school building and that both that building and the borehole belonged to the tribe.

It should be added that the delay in bringing this action is explained by the plaintiff and the senior member of the *lekgotla* of the tribe in their evidence, viz., that the tribe looked to the Government to remove the defendant from the land after the many complaints lodged with the Native Commissioner at Hammanskraal against the defendant in regard to his conduct.

In the result I am of opinion that the plaintiff is entitled to the order of ejectment sought by him and that the appeal should accordingly be dismissed with costs. In order to clarify the judgment of the Court *a quo,* however, I consider that it should

be altered to read "For plaintiff for an order for the defendant's ejectment from tribal Portion A of the farm Bultfontein No. 472, in the District of Pretoria, with costs".

Counsel for appellant intimated that the Governor-General's consent was being sought for the appellant to bring an action against the tribe concerned in the Supreme Court for a declaration of rights in regard to his occupation of the land in question and applied verbally to this Court, that it should, in the event of its dismissing the appeal in the instant case, suspend the execution of the order of the Court *a quo* for the appellant's ejectment, pending the outcome of the Supreme Court proceedings. In my view this application cannot be entertained as it is not the function of this Court to deal therewith.

Steenkamp (President):—

I wish to emphasize that a Native Commissioner's Court would not normally be justified in granting an order for the ejectment of a person from the tribe unless good reasons are given for the ejectment. A resolution by the Chief and the *lekgotla* is not sufficient, as such resolution might be based on personal grounds or grounds which in the opinion of the Court are without substance, illegal, immoral or do not justify depriving the person concerned of his rights.

The Acting Assistant Native Commissioner has found proved *inter alia* that defendant conducted himself in an unlawful manner towards plaintiff. In his reasons he states he had no hesitation in accepting the evidence adduced on behalf of plaintiff that the defendant had undermined the Chief's authority and interfered with tribal administration. The Presiding Officer does not specify on what evidence he arrived at the various conclusions and here it is desired to set out certain paragraphs of the evidence which, in my opinion, fully justified the Chief and the *lekgotla* to have sought the eviction of the defendant:—

> "Since 1934 defendant ignored customs and laws of tribe . . . Defendant continues to disobey the Chief and interferes in tribal administration . . . Since the death of Chief Jonas in 1934 defendant failed to pay homage to the new Chief . . . Defendant is causing trouble and interfering in tribal matters. . . . Defendant refuses to pay homage to me and ignores my instructions to him.".

Then there is the evidence of Elliot Thuka who was sent by the Chief (plaintiff) to call defendant:—

> "During March, 1951, the Chief sent me to call defendant to appear before *lekgotla*. Defendant told me that his Chief was J. C. Kekana and that if I again come to call him to appear before *lekgotla* he would kill me".

Then there is defendant's own admission in his evidence where he states "I am a follower of Chief Kekana of Leeuwkraal". This evidence of defendant is a clear indication that his loyalty is divided and unless he shows undivided loyalty to the plaintiff, in whose area he is residing, then I do not think it can be expected for the Chief and the *lekgotla* to tolerate his continued membership of the tribe.

I agree that the appeal should be dismissed, with costs, and that the application, referred to in the last paragraph of my brother Balk's judgment, cannot be entertained.

Smithers (Member):—

I agree that the appeal be dismissed with costs, and that the application referred to in the last paragraph of my brother Balk's judgment, cannot be entertained.

For Appellant: Advocate G. P. C. Kotze instructed by Messrs. Helman & Michel of Johannesburg.

For Respondent: Advocate W. J. Human instructed by Messrs. Nel and Nel of Pretoria.

SOUTHERN NATIVE APPEAL COURT.

TOBOTI AND ANOTHER *v.* TOBOTI.

N.A.C. Case No. 9 of 1953.

King William's Town: 23rd March, 1953. Before Sleigh, President, Warner, Permanent Member, and Pike, Member of the Court.

Native Appeal Case—Ownership of stock—Widow of marriage in community of property—Isondlo.

Summary: Respondent, the mother of first and cousin of second appellant, sued appellants jointly and severely, the one paying the other to be absolved, for delivery of 134 sheep, £110 being proceeds of sale of wool of such sheep and costs. She stated that the sheep were the progeny of eight sheep given to her and of others which she had purchased. She admits that first appellant earned 6 sheep whilst a minor and that the progeny of these are also among the sheep now in dispute but nevertheless claims them as her property.

Respondent, her husband, and children were living with second appellant and his mother Nofayi in whose name the sheep in question were registered. On her death the sheep were transferred to second appellant who in turn transferred 104 to first appellant, 30 being retained by second appellant as *isondlo*, as first appellant was still a baby when he came to second appellant's kraal.

Judgment was entered in respondent's favour in the court below. Against this judgment an appeal was noted.

Held:

(1) That it is immaterial whether the sheep, the subject of this case, are the progeny of the sheep earned by first appellant or the progeny of the sheep as indicated by respondent, respondent is in either case the owner and is entitled to recover them by virtue of her marriage in community of property to first appellant's father.

(2) That as respondent is the widow of a marriage in community of property, she was the guardian of first appellant at the time he earned the sheep and that ownership of these sheep therefore vested in her as surviving parent and not in the kraal head.

(3) That second appellant's claim for *isondlo* in respect of respondent's children should have been raised as a defence or counterclaim since the original sheep were not paid as dowry or fine.

(4) That second appellant is liable only to the extent to which he admits he benefitted out of the sale of the wool, as there is no evidence to show that he acted in concert with first appellant in shearing and selling the wool.

The appeal fails.

Cases referred to:

Matomani *v.* Kraai [1947, N.A.C. (C. & O.), 18].

Works referred to:

Maasdorp's Institutes, Vol. I, Fifth Ed., p. 266.

Appeal from the Court of the Native Commissioner, Lady Frere.

Sleigh (President): —

Respondent is the mother of first appellant and a cousin of second appellant. It is common cause that respondent, her husband (the late Ntshintshi) and their children left their kraal in Rodana location, Glen Grey district, about 1918 and went to live with second appellant and his mother, Nofayi, in Bengu location. Shortly thereafter Ntshintshi died and she then was intimate with Simayile Rabe and had children by him. About 1950/1951 Nofayi died and at her death there were 134 sheep registered in her name. These sheep were shorn by first appellant and one Piyose about March, 1951, during the absence of second appellant and the wool was disposed of for the sum of £110. In May, 1951, the sheep were transferred to the name of second appellant who transferred 104 to first appellant who took them to Rodana location.

Respondent claimed that she was the owner of the sheep and sued appellants jointly and severally, the one paying the other to be absolved, for (*a*) payment of £110 proceeds of the sale of the wool, (*b*) delivery of 134 sheep or payment of their value £536, and (*c*) costs. Judgment was entered in her favour as prayed and appellants have appealed.

Respondent's case is that the 134 sheep are the progeny of 8 sheep given to her by Simayile and of others which she had purchased. She admits that first appellant earned 6 sheep when he was a minor and that the progeny of these sheep are also among the sheep now in dispute, but claims that these are also her property. The evidence goes to show that after the matter had been before the headman, second appellant with the full knowledge of respondent's claim transferred 104 sheep to first appellant and kept the remainder for himself.

Appellants' case is that all the sheep are the progeny of the sheep earned by first appellant who gave second appellant 30 as *isondlo* for himself (he was a baby when he came to second appellant's kraal).

A good deal of time was taken up in the Court below with the questions whether appellants were spoliators, whether respondent was in legal possession at the time of such spoliation and whether the onus was on appellants or respondent to prove ownership. In the view I take of the case it is unnecessary to consider these points.

It is clear from the marriage certificate produced that respondent contracted a civil marriage with her husband in 1913. She was therefore the guardian of first appellant at the time he earned the sheep. The ownership in these therefore vested in her as the surviving parent, and not in the kraal head. (*Maasdorp's Institutes,* Vol I, Fifth Ed., p. 266). It is therefore immaterial whether the sheep, the subject of this case, are the progeny of the sheep earned by first appellant or the progeny of the sheep as indicated by respondent. In either case respondent is the owner of the sheep and is entitled to recover them from whoever is in possession.

One of the grounds of appeal is that the Native Commissioner erred in holding second appellant liable to the respondent. In so far as claim (*b*) is concerned, there can be no doubt that his liability is joint and several. It is he who gave first appellant control of the 104 sheep when he knew that they were claimed by respondent, a claim which he denied. It may be, as he claims, that he is entitled to *isondlo* in respect of respondent's children. If so he should have counterclaimed or raised his claim as a defence, since the original sheep were not paid as dowry or fine [Matomani *v.* Kraai, 1947, N.A.C. (C. & O.), 18].

In regard to claim (*a*) respondent alleges in her particulars of claim that in March, 1951, defendants (appellants) acting in concert shore the sheep and sold the wool for £110. Second appellant denies these allegations and he specially denies that he acted in concert with first appellant. Now there is no evidence to support respondent's allegation that the appellants acted in con-

cert. On the contrary she admits that when the sheep were shorn second appellant was in Cape Town. He is therefore only liable to the extent to which he has benefited out of the sale of the wool, and he admits in his plea that he received £20 out of the £110.

The appeal, therefore, substantially fails. It will be noted that second appellant's ground of appeal is not that the Native Commissioner erred in holding him liable jointly and severely with first appellant, but that the Native Commissioner erred in holding him liable at all.

The appeal is dismissed with costs, but the judgment of the Court below is altered to read "On claim (*a*) for plaintiff against defendant No. 1 for the sum of £90 and against defendant No. 2 for the sum of £20. On claims (*b*) and (*c*) for plaintiff with costs against defendants jointly and severely, the one paying the other to be absolved, for delivery of 134 sheep or payment of their value £536".

Warner and Pike (Members) concurred.

For Appellants: Mr. Kelly, Lady Frere.

For Respondent: Mr. Tsotsi, Lady Frere.

SOUTHERN NATIVE APPEAL COURT.

KALIPA *v.* **FOSE.**

N.A.C. Case No. 10 of 1953.

King William's Town: 24th March, 1953. Before Sleigh, President, Warner, Permanent Member, and Pike, Member of the Court.

LAW OF PROCEDURE.

Default judgment—Rescission—Grounds for—Absconder—Representation in legal proceedings.

Plaintiff, Fose, sued Nzima and Ndoyisile Kalipa jointly and severally, the one paying the other to be absolved, for payment of certain cattle or their value as damages. Ndoyisile was sued in his capacity as kraalhead of Nzima. Both copies of the summons were served on Nzima at Ndoyisile's kraal. Two days later appearance was entered on behalf of both defendants and a plea was delivered admitting *inter alia* that first defendant (Nzima) was an inmate of second defendant's (Ndoyisile) kraal. On the first day of trial all parties were in default. At the resumed hearing both defendants were in default, their attorney was given leave to withdraw, evidence was heard and judgment given in favour of plaintiff. Six cattle were attached at the kraal of Nonine, widowed mother of Ndoyisile where the latter resided. An interpleader issued by Nonine was subsequently withdrawn. Application was then made by present appellant, a younger brother of Ndoyisile, *inter alia* for the rescission of the judgment in so far as it affects Ndoyisile, for setting aside the execution and re-opening the proceedings. This application was refused and appellant appealed on the grounds that second defendant was not in wilful default and that he had a bona fide defence to the action in that the summons was not properly served on him and that he is an absconder and not subject to the jurisdiction of the Court. The latter ground was subsequently abandoned as the attorney stated that the provisions of section *ten* (3) of Act No. 38 of 1927 as amended had been overlooked.

Held:

(1) That only the party to an action can make application for the recission of a judgment.

(2) That if the absconder is the defendant the present appellant should have made application in the original case for leave to intervene and defend the case in the name of the absentee.

(3) That the judgment in question is not a default judgment.

(4) That as appellant has not shown that he was affected by the judgment, he could not make application in terms of section 73 of Government Notice No. 2886 of 1951 for rescission of such judgment.

(5) That a party who applies for recission of a judgment must show that he has a bona fide defence.

The appeal fails.

Cases referred to:

Mdontsa *v.* Fumbalele [1946, N.A.C. (C. & O.), 68].

Statutes referred to:

Act No. 38 of 1927, section *ten* (3), as amended.

Government Notice No. 2886 of 1951—sections 31 (3) (*b*), 41, 73 & 74.

Appeal from the Court of the Native Commissioner, Lady Frere.

Warner (Permanent Member):

On the 4th June, 1952, plaintiff sued the defendants (Nzima Kalipa and Ndoyisile Kalipa) jointly and severally, the one paying the other to be absolved, for payment of five head of cattle or their value £40 as damages for adultery with, and the pregnancy of plaintiff's customary wife. Second defendant (Ndoyisile) was sued in his capacity as kraal head of first defendant (Nzima). Both copies of the summons were served upon Nzima at the kraal of Ndoyisile. On 6th June, 1952, Mr. Attorney Tsotsi entered appearance on behalf of both defendants and delivered a plea in which it was admitted that first defendant was an inmate of the kraal of second defendant. The case was set down for hearing and on the first day of trial all the parties were in default. The case was postponed to 2nd October, 1952, and at the resumed hearing, both defendants were in default and their attorney was given leave to withdraw from the case. Evidence was then heard and, at the close of the case, judgment was given in favour of plaintiff as prayed with costs. Thereafter six cattle were attached at the kraal of Nonine, the widowed mother of Ndoyisile, where he also resided. In interpleader proceedings the cattle were claimed by Nonine but the interpleader summons was withdrawn and, on 29th October, 1952, application was made by present appellant to re-open the case.

Applicant (herein referred to as appellant) is a younger brother of Ndoyisile and he applied for—

(1) rescission of the judgment in so far as Ndoyisile is concerned;

(2) setting aside of the execution;

(3) re-opening of the proceedings; and

(4) leave to appellant to defend the action upon the grounds set out in his affidavit.

In his affidavit he declares that he is the heir presumptive of Ndoyisile who left for work at the end of 1949 and has not been heard of since, that he (Ndoyisile) is an absconder, that he was not in wilful default and that he has a bona fide defence in that (*a*) the summons was not properly served upon Ndoyisile and (*b*) at the time of service the latter was not subject to the jurisdiction of the Native Commissioner's Court for the District of Glen Grey.

The application was refused and appellant now appeals on the following grounds:—

1. That the presiding judicial officer erred in dismissing applicant's application for rescission of the judgment entered on behalf of the respondent in Case No. 31 of 1952 on the 2nd October, 1952, in view of the fact that—

   (*a*) second defendant Ndoyisile Kalipa was not in wilful default;

   (*b*) second defendant has a bona fide defence to the action in that—

      (i) the summons was not properly served on him;

      (ii) he is an absconder and at the time of service of the summons was not subject to the jurisdiction of the above Honourable Court.

Paragraph *seven* of appellant's affidavit reads as follows:—

> "That I respectfully pray the above Honourable Court, under the provisions of Rule 74 of the Rules of Court, to rescind the said judgment entered against Ndoyisile Kalipa on the 2nd day of October, 1952; to stay any execution and/or sale in execution under the said judgment to reopen the proceedings and to grant me leave to defend the said action on behalf of my absconding brother."

Section 74 of Government Notice No. 2886 of 1951 provides that any party to an action in which a default judgment is given may within one month after such judgment has come to the knowledge of the party against whom it is given apply to the Court to rescind or vary the judgment. It is clear from the wording of this section that only the party to the action can make application for rescission of the judgment.

Appellant claims to represent Ndoyisile by virtue of the principles enunciated in the case of Mdontsa *v.* Fumbalele [1946, N.A.C. (C. & O.), 68] but he has not complied with the requirements laid down in that case. There is no proof that exhaustive enquiries have been made to trace Ndoyisile nor has appellant made the application in the name of Ndoyisile. In any event, those principles apply only where the absconder is the plaintiff. If the absconder is the defendant the appellant should have applied in the original case for leave to intervene and defend the case in the name of the absentee.

Section 74 provides only for the recission of a default judgment and the judgment appealed against is not a default judgment. Section 41 of Government Notice No. 2886 of 1951 makes provision for the entering of a default judgment in certain circumstances but in the present case defendants entered appearance and filed a plea. As they denied liability it was necessary for plaintiff to prove his case. To do this he led evidence and judgment was given by the Court. A default judgment is entered by the Clerk of the Court in terms of a written request by the plaintiff.

Section 73 of Government Notice No. 2886 of 1951 empowers the Court upon application by any person affected thereby, to rescind or vary any judgment granted by it in the absence of the person against whom that judgment was granted. Appellant could not have made application in terms of this section because, beyond a statement that he is the heir presumptive of Ndoyisile, he has not shown that he was affected by the judgment. Ndoyisile, however, was affected by the judgment which was given against him in his absence. Although, as already indicated, appellant should have applied for leave to intervene in the original action and had no right to apply for recission of the judgment, I shall nevertheless consider the matter as if application had been made by Ndoyisile for recission of the judgment under the provisions of section 73.

In terms of sub-section (5) read with sub-section (8) of section 74 of the Rules, no proof being adduced that applicant was in wilful default, it was necessary, before the judgment could be rescinded, that good cause should be shown for its recission. In other words, appellant must show that he has a bona fide defence to the action. Appellant relies, as he did in the Court below, on two points. The first is that the summons was not properly served upon Ndoyisile. Now, if there had been no service at all, the judgment would be void *ab origine*, but it is clear from the messenger's return that service was effected as provided in Rule 31 (3) (*b*). Irregular service is, however, not a defence to the action and there is much to be said for Mr. Kelly's argument that, by entering appearance and delivering a plea, defendants waived their rights to take advantage of any irregular service.

The second point relied on in the notice of appeal is that Ndoyisile is an absconder and was not subject to the jurisdiction of the trial Court at the time when the summons was served. This defence should have been pleaded and no doubt application would then have been made to amend the summons by alleging that the cause of action arose within the Court's area of jurisdiction, as is the case. We need not consider this point, however, as Mr. Tsotsi admits that he overlooked the fact that section *ten* (3) of Act No. 38 of 1927 has been amended by section *three* of Act No. 21 of 1943. He has, therefore, abandoned this ground of appeal.

As already stated, a party who applies for recission of a judgment, must show that he has a bona fide defence. The only defence to the action relied on in the Court below and in the notice of appeal is that the trial Court had no jurisdiction. As this defence has been abandoned, it has not been shown that Ndoyisile has a bona fide defence to the action.

The result is that whether the application is regarded as having been made in terms of Rule 73 or Rule 74, it must fail and the appeal must be dismissed with costs.

Sleigh (President): I concur.

Pike (Member): I concur.

For Appellant: Mr. Tsotsi, Lady Frere.

For Respondent: Mr. Kelly, Lady Frere.

SOUTHERN NATIVE APPEAL COURT.

NGCONGOLO *v.* **PARKIES.**

N.A.C. Case No. 11 of 1953.

King William's Town: 25th March, 1953. Before Sleigh, President, Warner, Permanent Member, and Pike, Member of the Court.

TEMBU CUSTOM.

Native Appeal Case—Tembu Custom—Native Customary union—essentials of—dissolution of—inference of valid customary union if couple live as man and wife after payment of cattle—twala beast.

Appellant, plaintiff in the court below, sued respondent unsuccessfully for three head of cattle or their value as fine for adultery with his customary wife Ellen. Appellant alleged in his particulars of claim that he married Ellen according to Native

Custom. Respondent in his plea denied the allegation that there was a valid customary union subsisting and stated that the cattle paid to Ellen's father were in respect of damages for seduction and pregnancy, and as fine for *twala*.

It is common cause that appellant *twalaed* Ellen after he had rendered her pregnant. Ellen's father also states that he left her with appellant after the payment of the cattle and they lived together as man and wife. It is also common cause that the equivalent of six cattle were paid by appellant to Ellen's father.

Held:

(1) That the essentials of a native customary union are the consent of the contracting parties, the delivery and acceptance of *lobolo* and the handing over of the bride to the husband. The omission of any of the ceremony often attendant on these essentials does not affect the validity of the union.

(2) That according to Tembu custom no *twala* beast is payable if the woman is already pregnant when *twalaed;* and that the *twala* beast is normally paid before or at the same time as the fine for pregnancy.

(3) That once is is established that cattle have been paid, cohabitation after such payment raises a strong presumption that such cattle were paid as *lobolo.*

(4) That the customary union is not dissolved merely by the driving away of the woman—there must be a public repudiation by the husband (with consequent forfeiture of the *lobolo* paid) or an order of Court dissolving the marriage.

The appeal succeeds.

Cases referred to:

Molisana *v.* Legela, 2., N.A.C., 189.

Mdadeni *v.* Gqibinkomo, 1935, N.A.C. (C. & O.), 54.

Dlomo *v.* Mahodi, 1946, N.A.C. (C. & O.), 61.

Matholo *v.* Moquena, 1946, (N.A.C. C. & O.) 17.

Bobotyana *v.* Jack, 1944, N.A.C. (C. & O.), 9.

Ntsodo *v.* Dlangana, 1., N.A.C. (S), 195.

Appeal from the court of the Native Commissioner, Dordrecht.

Sleigh (President):—

Appellant, who was the plaintiff in the Court below, sued respondent for three head of cattle or their value £24 as fine for adultery with his customary wife, Ellen. It is alleged in the particulars of claim that he married Ellen according to native custom which marriage still subsists and that respondent committed adultery with her in May, 1952. All these allegations are denied in the plea. There are thus three points for decision, namely (1) whether appellant contracted a valid customary union with Ellen, (2) if so, whether the union still subsists and (3) if so, whether respondent had sexual intercourse with Ellen in May, 1952.

The Native Commissioner found that appellant and Ellen were not married and entered judgment for respondent. From this judgment appellant appeals.

It has been frequently stated that the essentials of a native customary union are (*a*) the consent of the contracting parties, (*b*) the delivery and acceptance of *lobolo* and (*c*) he handling over of the bride to her husband. The performance of these acts is often attended by much ceremony but the omission of any ceremony whatsoever has no effect on the validity of the union.

In regard to (*a*) above the consent of the bride's guardian or his representative is absolutely necessary, for a woman cannot give herself in marriage. The bride's consent is also required because it is contrary to native law to force a woman into marriage. In the Transkeian Territories it is a criminal offence to do so. The consent of the bridegroom is also necessary but not that of his father. It must, however, be observed that consent is often inferred from the conduct of the parties.

In regard to (*b*) there is no marriage if the *ikasi* is paid as *lobolo* but accepted as fine. Naturally the guardian of the girl must express his decision to accept the cattle as fine when they are delivered.

In regard to (*c*) there may be either an actual handing over by taking the bride to the bridegroom's kraal and leaving her there or a symbolical handing over by accepting the *ikasi* and leaving her with him after she had been *twalaed*.

In the present case it is common cause that appellant *twalaed* Ellen in 1937 after he had rendered her pregnant. He and his witnesses say that she returned to her father, Peter and that after the payment of *lobolo* she was brought to his kraal by a *Tsiki* party. This is denied by Peter and Ellen, but it makes no difference because Peter admits that he left her with appellant and they lived together as man and wife. If the cattle which passed had been paid as *lobolo* then the consent of Peter and Ellen and the handing over of Ellen to appellant must be inferred .

It is again common cause that the equivalent of six cattle were paid by appellant to Peter. The former and his witnesses say it was paid as *lobolo,* but the latter says that five cattle were paid as fine for the seduction and pregnancy and one as fine for the *twala.* This statement is however inconsistent with his conduct. The parties are Tembus and Peter says that he observes Tembu custom. According to that custom no fine is paid for *twala* if the girl is returned intact. If she has been seduced one beast is payable (Molisana *v.* Legela, 2, N.A.C., 189). If it is afterwards found that she is pregnant as a result of the seduction a fine of five cattle is payable in addition to the *twala* beast [Mdadeni *v.* Gqibinkomo, 1935, N.A.C. (C. & O.), 54]. In the present case Ellen was already pregnant when she was *twalaed.* I do not know of a single case in which a *twala* beast was claimed in such circumstances. In any case, the *twala* beast is paid before or at the same time as the fine for the pregnancy and not afterwards as is alleged in this case. If marriage was offered before or at the time the five cattle were paid, as appellant alleges, the sixth beast would be regarded as *lobolo* and the five cattle would then merg into dowry Moreover, if the six cattle had been paid as fine for the pregnancy and the *twala.* Peter should have taken Ellen to his home [Dlomo *v.* Mahodi, 1946, N.A.C. (C. & O.), 61]. Instead he allowed Ellen to remain with appellant for 14 years although he had many opportunities of keeping her at his kraal. It is significant that Ellen lived with appellant's people while he was on active service and not with Peter. The latter's conduct right through is consistent with appellant's version that the cattle were paid and accepted as *lobolo.*

Finally, the presumption that the cattle were paid as *lobolo* is also against respondent. It is true, as the Native Commissioner says, that long cohabitation standing by itself raises no presumption of a customary union, since it is well known that natives, especially in urban areas, frequently form loose alliances with woman for long periods without contracting valid unions. The passing of cattle or its equivalent is essential in a customary union, but once it is established that cattle have been paid, cohabitation after such payment raises a strong presumption that the cattle were paid as *lobolo* and not as a fine. [Matholo *v.* Moquena, 1946, N.A.C. (C. & O.), 17.]

In my opinion the evidence and the probabilities strongly favour appellant's contention that the cattle were paid and accepted by Peter as *lobolo*. It follows that Peter must be deemed to have consented to the union. All the essentials of a customary union are therefore present in this case.

Peter's complaint seems to be that appellant failed to pay additional cattle when called upon to do so. He had the remedy in his own hands. He could have *telekaed* the woman and if appellant thereafter failed to release her within a reasonable time he could have dissolved the union by returning a beast to mark the dissolution.

The next point for decision is whether the union still subsists. It appears from the evidence that appellant and Ellen had frequent quarrels and that she left him on a number of occasions. The headman of the location says that in March, 1949, and during the absence of Peter, Ellen complained to him that she had been driven away by her husband. He than saw appellant who stated "Yes I have chased her away, I don't want her any more or the children and I don't want the cattle I paid for *lobolo* either". She, however returned to him after staying with her brother. In September, 1951 she left him again as a result of a quarrel and he has not *putumaed* her. I shall assume that he drove her away. Now this driving away did not dissolve the union. In Bobotyana *v.* Jack [1944, N.A.C. (C. & O), 9]. McLoughin (P) said—Native law does not recognise a dissolution of the union by mere desertion of the wife or husband, by abandonment, or even by bare repudiation for these are all eventualities provided for by the *lobolo* cattle; the wife can always claim support from their holder, and the husband can always *putuma* his wife after any length of absence; the wife or widow can always return to her husband's kraal . . . and resume her former status . . . On the part of the husband, he has the right to repudiate the wife, with forfeiture of the *lobolo* if the act be unjustified in native law, but before the wife can act on such repudiation and remarry it is necessary either to return all or some of the *lobolo* or to take the matter before the headman or chief and obtain a public repudiation by the husband".

She can, of course, also obtain an order of court dissolving the union. [Ntsodo *v.* Dlangana, 1, N.A.C. (S), 195.]

Now if Ellen had acted upon the repudiation before the headman in March, 1949, I would be inclined to the view that the union had been dissolved; but she did not regard it as a dissolution as she returned to appellant and lived with him until September, 1951. There was no public repudiation on this date and no cattle have been returned to mark the dissolution. The conclusion is therefore that the union still subsists.

As to the adultery the Native Commissioner, in view of his finding that there was no marriage, considered it unnecessary to decide whether or not adultery had taken place. Mr. Tsotsi has asked this Court to give its own decision on this point. Respondent is entitled to be heard. He is in default and is not represented in this Court and has had no notice that this application would be made. In the absence of his consent to this procedure we are unable to accede to Mr. Totsi's request.

The appeal is allowed with costs, the judgment of the Court below is set aside and the record of proceedings is returned to that Court for a finding on the question whether adultery had taken place and for a fresh judgment.

Warner and Pike (m.m.): Concurred.

For Appellant: Mr. Tsotsi, Lady Frere.

For Respondent: In default.

SOUTHERN NATIVE APPEAL COURT.

MBEKWA *v.* MBEKWA.

N.A.C. Case No. 12 of 1953.

King William's Town: 25th March, 1953. Before Sleigh, President, Warner, Permanent Member, and Pike, Member of the Court.

Mandament van spolie—Application for—Dispute re legality of possession no ground for refusing relief by way of spoliation order—Prior act of spoliation no ground for holding that possession was not peaceful and undisturbed—Contra-spoliation—When competent—Ukukwenzelele Custom.

Certain stock registered in the name of one Mabel, widow of Goliath, brother of the parties in this case, were transferred by appellant to his own name after Mabel's subsequent re-marriage. Appellant was ordered by the location board at the instance of respondent to restore the cattle to respondent. Although he promised to do so appellant did not restore the stock until again ordered to do so when he also claimed certain of the stock as Goliath's heir. The next day the cattle were seen in respondent's kraal, but not transferred to him in the dipping register. Later appellant again removed the stock to his kraal. Such removal amounted to spoliation and respondent was advised of the position. A letter of demand was sent to appellant. Two days later on 17th April, 1952, respondent obtained possession of three head of cattle. Appellant thereupon claimed that the cattle had been spoliated and applied for a *mandament van spolie*. Replying affidavits were filed but in view of the conflicting nature thereof, the Native Commissioner deemed it advisable to hear oral evidence at the conclusion of which the application was refused *inter alia* on the following grounds, viz. that appellant was not in peaceful and undisturbed possession at the time of the alleged spoliation by respondent as he had himself spoliated the cattle from respondent's possession.

Held:

(1) That as the right of so-called contra-spoliation was not exercised *instanter* and did not form part of the *res gestae* of appellant's spoliation, respondent's act of recovering the three head of stock was a new act of spoliation and that appellant (applicant) must therefore be regarded as having been in peaceful and undisturbed possession, and therefore entitled to the mandament applied for.

(2) That if respondent contributed towards the late Goliath's dowry then under the custom of "Ukukwenzelele" he is entitled to claim a refund from Goliath's heir, viz. the appellant.

The appeal succeeds.

Cases referred to:

(i) Theron *v.* Gerber, 1918, E.D.L., 288.
(ii) Mandelhoorn *v.* Strauss, 1942, C.P.D., 493.
(iii) Meyer *v.* La Grange and Ano., 1952 (2), S.A. 55 (N).
(iv) Mans *v.* Loxton Municipality & Ano., 1948 (1), S.A. 966 (C).
(v) Olivier *v.* Botha, 1948 (3), S.A. 664 (C).
(vi) Molo *v.* Gaqa, 1947, N.A.C. (C. & O.), 80.

Works of reference:

Possessory Remedies in Roman-Dutch Law—Price.

Appeal from the Court of the Native Commissioner, Lady Frere.

Sleigh (President):—

The parties in this case are brothers. Appellant is the elder and respondent is permanently employed in Johannesburg but comes home on leave once a year. They had a brother, Goliath, who died some years ago. The evidence shows that, after his death, the stock at his kraal was registered in the name of his widow, Mabel. She re-married about 1947. There was a "keta" of her dowry. The cattle so returned were apparently also registered in her name. It would appear that, at this time, respondent was living at Goliath's kraal. About 1950, and during the absence of respondent, appellant obtained transfer of the cattle in the dipping registrar from Mabel's name to that of his own and took the cattle to his kraal. When respondent returned on leave during that year, he complained to the location board which ordered appellant to return the cattle to respondent. Appellant promised to do so but the cattle were still with him and registered in his name when respondent visited the location in 1951. The latter again complained to the board and at a meeting at the kraal of his uncle, Elphas Mbekwa, appellant claimed some of the cattle by virtue of the fact that he is the heir of Goliath. John Mketi, the convenor of the board, however, told him that he must register the cattle in respondent's name and then claim those to which he was entitled. John says that the next day, he saw the cattle in respondent's stock-kraal. Appellant states that the cattle were spoliated by respondent's wife but the fact that the cattle were at the kraal of respondent's father-in-law, Albert, for six months, supports the evidence that they were delivered to respondent who left them with Albert. Be that as it may, it is clear that the cattle were not transferred to respondent's name in the dipping registers but were dipped by appellant in his name while they were at Albert's kraal.

Towards the end of 1951, appellant again removed the cattle to his kraal. He says that the cattle were given to him by Albert's herd-boy. This is improbable but, in any case, the boy had no authority to do so. Appellant's act in removing the cattle to his kraal therefore amounts to spoliation. Respondent was advised of this removal. He returned home in April, 1952, and on the 15th of that month, he caused a letter of demand to be directed to appellant. On the 17th, he obtained possession of three cattle, namely, a black ox, a cow and its calf. On the 28th, appellant, in an affidavit complained that the cattle had been spoliated and applied for *mandament van spolie*. On the 30th, an *ex parte* order was granted in his favour, calling upon respondent to show cause, *inter alia*, why he should not be ordered, *ante omnia*, to restore the cattle to appellant. Replying affidavits were filed in which it was alleged that the said cattle had been delivered to respondent. In view of the conflicting nature of the affidavits, the Assistant Native Commissioner wisely decided to hear oral evidence and, at the close of the case, refused the application for a mandament with costs. No doubt he intended to discharge the *ex parte* order. In any case, the result is the same. The Native Commissioner's reason for refusing the application are (*a*) that appellant was not in peaceful and undisturbed possession at the time of the alleged spoliation by respondent as he had himself spoliated the cattle from respondent's possession and (*b*) that respondent had removed the cattle on 17th April, 1952, with appellant's consent.

The appeal is against both these findings.

Price, in his work *Possessory Remedies in Roman-Dutch Law*, writing of the law in the Netherlands in the 17th and 18th centuries, says (at page 36) that, if a defendant in an action of *complainte* or *maintenue* could show that the plaintiff's alleged possession had been obtained from himself *vi, clam vel precario*, the action would fail as the plaintiff was held, in such an event, to have failed to prove his possession but the learned author says (at page 58 and 61) that the defence of vicious possession was not competent in an action of *spolie*. The defendant was

restricted to pleading, either that in fact he had not been guilty of spoliation, or that the complainant had never been in possession. He points out, however, that there was an important qualification to this rule, namely, the plea of counter-spoliation and quotes Wassenaar as follows, on this point:—

> "Since the despoiled person may forthwith retake the property from the spoliator, it is the law that one purporting to be despoiled, who actually was the first to despoil, may not argue that he is entitled to restoration before all things; but should the defendant have delayed after he was despoiled before he re-took the property, the plaintiff shall have restitution."

Voet says that a despoiled possessor can re-take the thing there and then. *Savigny* says "whoever loses possession through an act of violence and immediately thereupon re-possess himself by violence, never actually loses the possession". *Huber* says that if the possessor ousts the spoliatior in the same brawl, the latter cannot claim restitution, but if the possessor retires and later collects people and compels the spoliator to retire, the latter has the possessory remedy (see quotations in Mans' case *infra*).

The right of so-called contra-spoliation was recognised in the cases of Theron *v.* Gerber (1918, E.D.L., 288), in Mandelhoorn *v.* Strauss (1942, C.P.D., 493), and in Meyer *v.* La Grange and another [1952 (2), S.A. 55 (N)], but it is very important to note that the retaking must be forthwith. If the retaking is not done forthwith the defendant will be ordered to restore the *status quo ante omnia*. This point was dealt with fully by Steyn, J. in the case of Mans *v.* Loxton Municipality and another (1948) (1), S.A. 966 (C). In that case the plaintiff's sheep had been seized for the purpose of impounding for trespass. He rescued them while they were being driven to the pound by defendant's employees and placed them in a camp hired by him. The second defendant then collected other employees, went to the camp, opened the gate, collected the sheep and drove them to the pound where they were impounded. It was contended on behalf of the defendants that a despoiled possessor may recover the property of which he had been despoiled provided that he acted forthwith (*instanter*). The learned Judge in considering what construction should be placed upon the word "forthwith" and, after quoting a number of authorities on Roman-Dutch law, said: "From the authorities cited above, and more especially *Savigny*, and *Huber*, it seems to me that the principle of *spoliatus ante omnia restituendus est* has been developed and become engrafted on to our legal system so as to preserve peace in the community. Breaches of the peace are punishable offences and to prevent potential breakers the law enjoins the person who has been despoiled of his possession, even though he be the true owner with all rights of ownership vested in him, not to take the law into his own hands to recover his possession; he must first invoke the aid of the law; if the recovery is *instanter* in the sence of being still a part of the *res gestae* of the act of spoliation then it is a mere continuation of the breach of the peace which already exists and the law condones the immediate recovery, but if the dispossession has been completed, as in this case where the spoliator, the plaintiff, had completed his rescue and placed his sheep in his lands, then the effort at recovery is, in my opinion, not done *instanter* or forthwith but is a new act of spoliation, which the law condemns".

There are cases in which an applicant was refused restitution on the ground that his prior possession was vicious, that is, obtained by theft or fraud. It is unnecessary to consider this aspect in the present case as it was never alleged or contended nor does the evidence disclose that applicant's prior possession was vicious.

The re-taking of the cattle from respondent by appellant (assuming that he took them without appellant's consent) was not done forthwith. The cattle were in April, 1952, registered in appellant's name and were in his physical possession and he obviously intended to hold them for himself. He had, therefore, strict legal possession. The fact that the legality of possession is in dispute is no ground for refusing relief by way of a spoliation order if he has been dispossessed unlawfully [see Olivier *v.* Botha 1948 (3), S.A. 664 (C)]. The Native Commissioner therefore erred in holding that appellant was not in peaceful and undisturbed possession because of his prior act of spoliation.

I come now to the question as to whether appellant consented to the cattle being taken by respondent. The burden of proof is, of course, on the latter.

Respondent states that, when he returned from Johannesburg, in 1952, he went with his uncle Elphas to demand the cattle. After some discussion appellant said: "Take your cattle and leave my younger brother's (Goliath's) cattle". He goes on to say that appellant promised to be at the dipping tank on the next dipping day (which was the 17th April), and to transfer the cattle to his name. On this day appellant was not at the tank so he (respondent) took the cattle from the herd boy, Matusi. Elphas supports respondent as to what took place at appellant's kraal. Appellant denies that he consented to the cattle being taken or that respondent came to his kraal about them. He says, and Matusisi supports him, that respondent came to his kraal after the cattle had been taken and that this visit was in connection with a trek chain.

In my opinion, respondent has not established that he had appellant's consent to the taking of the cattle. His conduct in issuing a letter of demand on the 15th April is entirely inconsistent with his evidence that plaintiff had given him permission, before this date, to take the cattle and had promised to transfer them on the 17th April. When he issued the demand, he had no reason to suspect that appellant would not be at the dipping tank on the 17th. Likewise the institution of these proceedings by appellant shortly after the cattle were taken is inconsistent with the statement that he consented to the taking of the cattle Elphas' evidence is palpably false and must be rejected. Respondent states that the black ox (one of the animals claimed) was "ketaed" after Mabel's re-marriage. Elphas denies this, and, although he lives less than 100 yards from Goliath's kraal and is a senior member of the family, he does not know that Mabel has re-married, that some of the dowry paid by Goliath has been refunded, or that Mabel's father was called upon to make a refund. He first said he did not go to the dipping tank on the 17th but later says he did go. No reliance can be placed on his evidence.

Even if applicant did give respondent authority to take the cattle, the latter had no authority to take the cattle belonging to Goliath's estate and there can be no doubt that, on the evidence before this Court, the black ox belongs to that estate. If respondent contributed towards Goliath's dowry, as he states, then under the custom of "ukukwenzelelele" he is entitled to claim a refund from Goliath's heir [see Molo, N. O. *v.* Gaga, 1947, N.A.C. (C. & O.), 80]. He is not entitled to help himself.

For these reasons, the appeal succeeds and is allowed with costs. The judgment in the Court below is altered to read:—

> "The rule *nisi* granted on 30th April, 1952, is made absolute with costs."

Warner and Pike (Members) concurred.

For Appellant: Mr. Tsotsi.

For Respondent: Mr. Kelly.

INDEX OF SUBJECT MATTER.

INDEX OF LITIGANTS.

VERSLAE

VAN DIE

NATURELLE-APPÈLHOWE

1953 (2)

REPORTS

OF THE

NATIVE APPEAL COURTS

DIE STAATSDRUKKER, PRETORIA
THE GOVERNMENT PRINTER, PRETORIA
G.P.-S.10110—1953-4—815.

VERSUS

FOR THE

NATURELLE-
APPELHOWE

WITH

REPORTS

OF THE

NATIVE APPEAL
COURTS

NORTH-EASTERN NATIVE APPEAL COURT.

N.A.C. CASE No. 106 OF 1952.

SHABANGO *v.* **NGABI.**

VRYHEID: 8th April, 1953. Before Steenkamp, President, Balk and Van Niekerk, Members of the Court.

LAW OF SUCCESSION.

Succession—Marriage according to Civil Rites—No indication whether marriage under antenuptial contract, in community or with community excluded.

Practice and Procedure—Proof of marriage—Best evidence rule.

Summary: Plaintiff, an emancipated widow, sued defendant in a Chief's Court, for four head of cattle forming assets in the estate of her late husband.

Held: That the widow can only sue for property forming assets in her late husband's estate if she is entitled to succeed to such property under her late husband's will, or, in the event of his having died intestate, if he falls within the purview of paragraphs (*b*), (*c*) or (*d*) of section *two* of Government Notice 1664 of 1929, as amended, or if she has has been appointed to administer such estate.

Held further: That a certified copy of the relative marriage certificate should have been produced to prove the marriage and to disclose essential information in respect thereof.

Held further: That if the relative marriage certificate should disclose that the provisions of section *eleven* of Natal Law No. 46 of 1887, apply to the marriage between plaintiff and the deceased or that community of property was excluded therefrom by virtue of section *twenty-two* (6) of Act 38 of 1927, the property in the deceased's estate would devolve according to Native Law and Custom and the plaintiff would not be entitled to succeed thereto.

Held further: That if the provisions of section *eleven* of Natal Law, No. 46 of 1887, do not apply, either because the marriage was under antenuptial contract or in community of property, or if the plaintiff was entitled to succeed in terms of section 2 (*b*) or 2 (*d*) of the above-mentioned Regulations, it would not have been competent for the Chief to have tried the instant case in that the plaintiff's claim would be founded on succession *according to common law* whereas a Chief's jurisdiction as regards causes of action is limited in terms of section *twelve* (1) (*a*) of Act No. 38 of 1927 to those arising from *Native law and custom.*

Cases referred to:

Danana *v.* Sotatsha, 1947, N.A.C. (C. & O.), 48.
Xakaza *v.* Mkize, 1947, N.A.C. (T. & N.), 85.
Zungu *v.* Zungu, 1948, N.A.C. (T. & N.), 7.

Statutes, etc., referred to:

Sections *twelve* (1) (*a*) and *twenty-two* (6) of Act No. 38 of 1927.

Section *eleven* of Natal Law, No. 46 of 1887.
Section *twenty-eight* of Natal Code of Native Law of 1932.

Appeal from the Court of the Native Commissioner, Nqutu.

Steenkamp (President):

The plaintiff (now respondent) who is an emancipated Native widow, sued the defendant (present appellant) in a Chief's Court for "one head of cattle and its increase of three head".

The Chief gave judgment in favour of the plaintiff for four head of cattle with costs. An appeal against that judgment was dismissed by the Native Commissioner's Court.

Both parties were not legally represented in the Native Commissioner's Court and after it had given judgment, the defendant, through an Attorney, noted an appeal to this Court on the following grounds:—

"1. The claim was one for four cattle based on alleged sisa, and—

(*a*) plaintiff failed to prove a valid delivery of the heifer alleged to be sold to her late husband whereby he became owner thereof entitled to sisa it;

(*b*) plaintiff failed to prove a sisa of the heifer by her husband with defendant;

(*c*) plaintiff failed to prove the increase she claims.

2. The Native Commissioner erred in concluding that the plaintiff was the heir of her husband in the absence of evidence proved by the production of a marriage certificate or other proper evidence, that their marriage was by Christian rites, in which Province it occurred; and if in Natal or Zululand that it took place after the coming into force of Native Administration Act, No. 38 of 1927, section *twenty-two* (6)."

According to the uncontroverted evidence of the plaintiff she was emancipated and thus capable of suing and being sued unassisted; but sight must not be lost of the fact that she is suing for property which forms an asset in the estate of her late husband (hereinafter referred to as the "deceased") and that a Native woman does not succeed to such property because of her emancipation in terms of section *twenty-eight* of the Natal Code of Native Law published under Proclamation No. 168 of 1932. In the case of Zungu *v.* Zungu, 1948, N.A.C. (T. & N.), 7, it was left an open question whether an emancipated Native woman succeeded to the property in her late husband's estate by virtue of her emancipation but, as indicated above, she is not entitled to do so on that ground. She can only succeed to such property under her late husband's will or in the event of his having died intestate, if he falls within the purview of paragraphs (*b*), (*c*), or (*d*) of section 2 of the Regulations for the Administration and Distribution of Native Estates published under Government Notice No. 1664 of 1929, as amended by Government Notice No. 939 of 1947, all of which postulate the application of common law; and she can only sue for property forming an asset in his estate if she is entitled to succeed to such property in terms of any one of those paragraphs or if she has been appointed to administer such estate. There is not a tittle of evidence that the plaintiff is entitled to succeed to the property in the deceased's estate in terms of any one of the said paragraphs (*b*), (*c*) or (*d*) or that she was appointed to administer that estate either by the Master of the Supreme Court if the deceased died testate or in terms of section 4 of the Regulations referred to above if he died intestate. All that the Plaintiff states in her evidence is that she and the deceased were married by Christian rites, that they had no children and that she succeeded to all of his property. This is not the best evidence. What should have been produced is a certified copy of the relative marriage certificate. Such certificate would, in addition to proving the marriage,

disclose essential information in respect thereof, viz., the date of the marriage and whether it was in community of property or whether community was excluded by antenuptial contract or by the provisions of section *twenty-two* (6) of the Native Administration Act, 1927 (hereinafter referred to as "the Act"). Here it should be mentioned that in determining the devolution of property left by a Native spouse who has died intestate, a distinction must be drawn between cases in which such spouses are married by antenuptial contract or in community of property on the one hand and on the other those in which community is excluded by the provisions of section *twenty-two* (6) of the Act In the former event the property in such estate devolves according to common law as modified by the Succession Act, 1934, whereas in the latter event it devolves according to Native law and custom unless the Minister has otherwise directed, see section 2 of the above-mentioned Regulations and Danana *v.* Sotatsha, 1947, N.A.C. (C. & O.), 48. If the marriage between the plaintiff and the deceased took place prior to the coming into operation of Chapter V (which includes section *twenty-two*) of the Act, and fell within the ambit of section *eleven* of Natal Law, No. 46 of 1887, then the property in the deceased's estate would also devolve according to Native law and custom, see Xakaxa *v.* Mkize, 1947, N.A.C. (T. & N.), 85, at page 86.

As pointed out earlier in this judgment there is no evidence on the essential points dealt with above and the second ground of appeal therefore succeeds.

It seem to me that no useful purpose would be served in setting aside the Native Commissioner's judgment and remitting the case to him for further evidence and a fresh judgment thereupon; for, on the one hand if the relative marriage certificate should disclose that the provisions of section *eleven* of Natal Law, No. 46 of 1887, apply to the marriage between the plaintiff and the deceased or that community of property was excluded therefrom by virtue of section *twenty-two* (6) of the Act, then, as pointed out above, the property in the deceased's estate would devolve according to Native law and custom and the plaintiff would not be entitled to succeed thereto; and if, on the other hand, the marriage certificate should disclose that the provisions of section *eleven* of Natal Law, No. 46 of 1887, do not apply to the marriage in question and that the plaintiff was, either because of her marriage to the deceased under antenuptial contract or in community of property, entitled to succeed to his property in terms of section 2 (*c*) of the Regulations referred to above, i.e. as if the deceased had been a European, or if the plaintiff was entitled to succeed thereto, otherwise under common law, i.e. in terms of section 2 (*b*) or 2 (*d*) of the above-mentioned Regulations, then it would not have been competent for the Chief to have tried the instant case in that the plaintiff's claim would be founded on succession *according to common law* whereas in terms of section *twelve* (1) (*a*) of the Act, the Chief's jurisdiction as regards causes of action is limited to those *arising from Native law and custom.*

In the result I am of opinion that the appeal should be allowed with costs and that the Native Commissioner's judgment should be altered to read "Appeal allowed with costs and the Chief's judgment is altered to one of absolution from the instance with costs".

Balk (Permanent Member): I concur.

Van Niekerk (Member): I concur.

For Appellant: Mr. D. Hine of Messrs. D. H. T. Hannah, Vryheid.

For Respondent: Mr. H. L. Myburgh of Messrs. Bennett & Myburgh, Vryheid.

NORTH-EASTERN NATIVE APPEAL COURT.

N.A.C. CASE No. 66 OF 1952.

In re: **SHANGASE** *v.* **KUMALO.**

PIETERMARITZBURG: 20th April, 1953. Before Steenkamp, President in Chambers.

Cur. ad. vult.

Postea—Durban, 30th April, 1953—Before Steenkamp, President in Chambers.

LAW OF PROCEDURE.

Appeal to Native Appeal Court—Appeal struck off roll and subsequently re-instated—Costs—Review of taxation—Practice to be followed.

Summary: An appeal was noted by the applicant for review but was struck off the roll with costs on the 14th October, 1952. On the 27th October, 1952, a Bill of Costs was taxed on behalf of respondent. On the 23rd January, 1953 the appeal was reinstated on the roll and the appeal allowed in part with costs.

Held: That once an appeal has been struck off the roll with costs, that appeal has been disposed of in so far as the parties are concerned, and only if the machinery of the law is set into motion by way of an application, may the appeal be reinstated on the roll, when it becomes a fresh appeal.

Held further: That the Registrar correctly taxed the Bill of Costs and that the application for review is dismissed.

Held further: That the following procedure should be followed by an applicant for review of a Bill of Costs taxed by the Registrar:—

Firstly written notice must be given to the Registrar and to the other party and secondly application must be made within a reasonable time after taxation.

Statutes, etc., referred to:—

Rule 24 of the Rules for Native Appeal Courts.

Application for Review of the taxation by the Registrar of a Bill of Costs in a Native Appeal Case.

Steenkamp (President):

In the Native Commissioner's Court the defendant obtained a judgment in his favour with costs.

Plaintiff lodged an appeal to the Native Appeal Court and that appeal was set down for hearing on 14th October, 1952, but on this day the appeal was struck off the roll with costs. It is not necessary to set out the reasons for striking the case off the roll.

Subsequently plaintiff made application for the reinstatement of the appeal on the roll and for condonation of the late noting thereof.

Before the hearing of the application defendant's Attorneys had submitted a Bill of Costs to the Registrar for taxation. This was duly taxed in an amount of £6. 5s. 9d. made up as follows:—

	Fees.	*Disbursements.*
Instructions to defend.....	£1 1 0	
Buying official copy of the record.....		11 3
Perusing record and preparing to conduct appeal.....	2 2 0	
Conducting application for condonation of late filing of appeal.....	2 2 0	
Drawing Bill of Costs.....	5 0	
	£5 10 0	
Stamps on Taxation.....	4 6	
Add disbursements.....	11 3	
Total.....	£6 5 9	

The application for reinstatement of the appeal on the roll and for the condonation of the late noting was heard by the Native Appeal Court on 20th January, 1953. The application was granted the appeal allowed with costs and the Native Commissioner's judgment altered to one in favour of plaintiff with costs.

The Attorneys for appellant, i.e. plaintiff in the Court below, have now lodged an objection against the Bill of Costs amounting to £6. 5s. 9d. as taxed by the Registrar of this Court and have applied for the review of the taxation in terms of Rule 24 of the Native Appeal Court Rules. The objection is against the whole amount and the arguments raised by Mr. Davies, who appeared before me on behalf of the applicant, were mainly confined to the fact that once an appeal has been noted all costs incurred regarding applications incidental to the appeal or costs incurred through omissions, dilatoriness or other causes entirely due to the appellant, must abide the final conclusion of the appeal. He has also argued that according to Table "B" of the Annexure to the Rules of the Native Appeal Court costs are prescribed per appeal and not per hearing and that no costs are prescribed for any intermediate or subsidiary applications.

These arguments are all very well as far as they go, but what strikes me as militating against the submissions advanced is the fact that once an appeal has been struck off the roll with costs that appeal has been disposed of in so far as the parties are concerned and only if the machinery of the law is set into motion by way of an application may that appeal be reinstated on the roll when it becomes a fresh appeal.

It seems to me that once costs have unconditionally been granted in favour of a party, no subsequent action by the other party may automatically deprive him of those costs and this is what applicant has asked the Registrar to do and in my opinion the Registrar has correctly taxed the Bill of Costs submitted by respondent.

In the circumstances I hold that the Bill of Costs was correctly taxed by the Registrar and the application for review is dismissed.

It is desirable that advantage be taken of this opportunity to lay down the practice and procedure to be followed by an applicant for review of a Bill of Costs as taxed by the Registrar. Rule 24 of the Native Appeal Court Rules does not lay down what procedure should be followed or within what period after taxation may an applicant apply for review.

Firstly written notice must be given to the Registrar and to the other party and secondly application must be made within a reasonable time after taxation.

For Applicant: Mr. D. B. Davies of Messrs. J. Fraser & Co., Pietermaritzburg.

Respondent in default.

NORTH-EASTERN NATIVE APPEAL COURT.

N.A.C. CASE No. 43 OF 1952.

RADEBE *v.* NDHLOVU.

PIETERMARITZBURG: 21st April, 1953. Before Steenkamp, President, Balk and Wessels, Members of the Court.

LAW OF PROCEDURE.

Practice and Procedure—Native Appeal Court's Judgment—Application for rescission—Costs of application.

Summary: Applicant was the respondent in a matter which came before the Native Appeal Court on appeal. He was in default at the hearing of the appeal, the Clerk of the Court having submitted a notice of hearing wrongly purporting to have been signed by applicant.

Held: That as the Native Appeal Court acted on wrong premises to the applicant's prejudice, in proceeding to hear the appeal in the applicant's absence on the assumption that he had decided not to argue his case in person nor to have it argued by Counsel before this Court, applicant was entitled to have this Court's judgment, allowing the appeal, rescinded.

Held further: That as neither party appears to have been responsible for the fault on which this application turns, and as the respondent has not opposed it, there should be no order as to costs thereof.

Cases referred to: Molete *v.* Molete, 1, N.A.C. (N.E.), 48.

Application for the rescission of the judgment of the Native Appeal Court given on an appeal from the Court of the Native Commissioner, Estcourt.

Balk (Permanent Member):

In this application the relief sought includes the rescission of this Court's judgment of the 18th July, 1952, allowing an appeal noted by the present respondent from the judgment of the Native Commissioner's Court at Estcourt in a civil action in which he was the plaintiff and the present applicant was the defendant.

In allowing the appeal this Court altered the Native Commissioner's judgment from one for defendant to one for plaintiff as prayed with costs.

This application is based on the ground, *inter alia*, that the applicant (then respondent) was not notified of the hearing of the appeal and thus not afforded an opportunity of himself arguing or having his case argued by Counsel thereat.

In his supporting affidavits the applicant also alleges that—

(*a*) after he had obtained the judgment in the Native Commissioner's Court he was informed verbally by the present respondent that he intended noting an appeal and he (applicant) then arranged with the Clerk of that Court to inform him at his Johannesburg address of the grounds of appeal and of the date and place of the hearing thereof which the Clerk undertook to do;

(*b*) he (applicant) did not sign the relative notice of hearing of the appeal (Form N.A. 149).

There is no replying affidavit by the present respondent.

An affidavit by the responsible Clerk of the Court was called for in regard to the last-mentioned allegation. That affidavit reads as follows:—

"1. I am the Clerk of the Native Commissioner's Court at Estcourt.

2. Phineas Ndlovu, the respondent on appeal in the case of E. Radebe *v.* Ndlovu, 199/51, was not represented in the Court of the Native Commissioner. Phineas is an inmate of the kraal of which Enos Ndlovu is kraalhead; the latter is also respondent's father.

3. Phineas Ndlovu was said to be in Johannesburg; meanwhile the Registrar of the Native Appeal Court was pressing for the return of Form N.A. 149, duly signed (*vide* N.A.C. 16, dated 20th May, 1952, endorsed 'urgent' from Registrar, and filed in original record).

4. I accordingly sent for Enos Ndlovu, the father and kraalhead of Phineas. He reported at this office on 23rd May, 1952.

5. It will be observed that N.A. 149 is endorsed thus:—

'Phinius Ndlovu His X mark.
for Respondent.
Witness: V. A. B. Nyembezi.'

It was intended to endorse:—

'Enos Ndlovu His X mark.
for Respondent.
Witness: V. A. B. Nyembezi.'

If the respondent himself had made the mark, the preposition 'FOR' would have been omitted.

6. The endorsement that the X mark was made by Phineas was in error, as it was the intention to indicate that respondent's farther, Enos, had accepted Notice of Hearing on behalf of respondent. Enos is illiterate, and could only have shown his acceptance by an X mark."

It is clear from the foregoing affidavit by the Clerk that applicant did not sign the relative notice of hearing of the appeal (Form N.A. 149) and that the latter's allegation that he was not given notice of the hearing of the appeal falls to be accepted. It follows that this Court in relying, as it did in accordance with practice, on what purported to be the applicant's signature to his acceptance on the form N.A. 149 of the notice of the hearing of the appeal and in therefore proceeding to hear the appeal in the applicant's absence on the assumption that he had decided not to argue his case in person nor to have it argued by Counsel before this Court, acted on wrong premises to the applicant's prejudice and he is therefore entitled to have this Court's judgment allowing the appeal, rescinded. That this Court has power to grant that form of relief in a proper case, such as the present, is clear from Molete *v.* Molete, 1, N.A.C. (N.E.), 48, and the authorities there cited.

I am therefore of opinion that the application should be granted to this extent that the judgment of this Court allowing the appeal, should be rescinded and that the Native Commissioner's judgment should be restored. The relative notice of appeal should be allowed to stand and the hearing afresh of the appeal at Pietermaritzburg postponed to 10 a.m. on Wednesday, the 15th July, 1953, as agreed upon by Counsel for the parties, subject to the present respondent forthwith lodging with the Clerk of the Native Commissioner's Court concerned, if he has not already done so, the prescribed security for the payment of the other party's costs of appeal. A copy of the notice of appeal need not be served on the present applicant as his Counsel intimated that he had obtained a copy thereof. As neither party appears to have been responsible for the fault on which this application turns and as the respondent has not opposed it, there should be no order as to costs thereof.

Reverting to the Clerk's explanation quoted above, I fail to appreciate how he came to insert the applicant's signature on the form N.A. 149 if he had intended to insert the signature of the applicant's father thereon. Moreover, the writing on that form which, according to the Clerk, represents the word "for", is not legible and gives the impression that it was crossed out. It seems to me that he must have realised at the time that he inserted the applicant's signature on form N.A. 149 to signify the latter's acceptance of the notice of the hearing of the appeal, that it was wrong for him to do so in the applicant's absence and without notifying the latter of that hearing. The Clerk ought also to have realised that that procedure would mislead this Court and would lend itself to its acting on wrong premises to the applicant's prejudice as in fact it did. Furthermore, it is manifest that the Clerk did not comply with Rule 13 (2) of this Court. The Native Commissioner concerned will no doubt take the necessary steps, if he has not already done so, to obviate a recurrence of similar lapses.

Steenkamp (President): I concur.

Wessels (Member): I concur.

For Applicant: Mr. R. W. Anderson instructed by Messrs. Daneman and Cohen.

For Respondent: Mr. A. Manning of Messrs. A. J. McGibbon and Brokensha.

NORTH-EASTERN NATIVE APPEAL COURT.

N.A.C. CASE No. 116 OF 1952.

MAZIBUKO *v.* **NYATHI.**

PIETERMARITZBURG: 21st April, 1953. Before Steenkamp, President, Balk and Wessels, Members of the Court.

LAW OF PROCEDURE.

Appeal from Chief's Court—System of Law to be applied in Native Commissioner's Court.

Summary: The facts of this case are immaterial for the purposes of this report. The relative portion of the judgment is quoted below.

Held: That in terms of section *twelve* of the Native Administration Act, 1927, the jurisdiction of a Chief's Court is restricted to the determination of Native civil claims arising out of *Native law and custom* and that as an action for damages in respect of loss caused by animals can be maintained under that system of law, the instant case, which emanated from a Chief's Court, should, in the absence of a good defence under common law, have been decided according to Native law.

Cases referred to:

Sibiya v. Mtshali, 1, N.A.C. (N.E.), 198.

Statutes, etc., referred to:

Section *twelve* of Act No. 38 of 1927.

Appeal from the Court of Native Commissioner, Escourt.

EXTRACT FROM THE JUDGMENT OF BALK (PERMANENT MEMBER) IN WHICH STEENKAMP (PRESIDENT) AND WESSELS (MEMBER) CONCURRED.

"It is observed that both the Attorneys who appeared in the instant case in the Court *a quo*, agreed that it fell to be decided under common law and that the Native Commissioner thereupon applied that system of law. But as this case emanated from a Chief's Court in which the jurisdiction is, in terms of section *twelve* of the Native Administration Act, 1927, as amended, restricted to the determination of Native civil claims arising out of *Native law and custom*, and as an action for damages in respect of loss caused by animals can be maintained under that system of law, see Sibiya *v.* Mtshali, 1, N.A.C. (N.E.), 198, it should, in the absence of a good defence under common law, have been decided according to Native law. As is clear from what has been stated above, the plaintiff has not proved his case and the application of Native law instead of common law therefore does not affect the Native Commissioner's judgment.

I am therefore of opinion that the appeal should be dismissed with costs."

For Appellant: Adv. O. A. Croft-Lever instructed by C. H. Jerome.

For Respondent: Adv. J. H. Niehaus instructed by J. M. K. Chadwick.

NORTH-EASTERN NATIVE APPEAL COURT.

N.A.C. CASE No. 112 OF 1952.

BUJELA *v.* MFEKA.

PIETERMARITZBURG: 21st April, 1953. Before Steenkamp, President, Balk and Wessels, Members of the Court.

COMMON LAW.

Damages—Seduction and breach of promise of marriage—Action brought under common law—quantum of damages.

Practice and Procedure—System of law applied to be specifically recorded—Citing of parties.

Summary: Plaintiff, in an action in which she claimed from defendant the sum of £300 as damages for seduction and breach of promise of marriage, obtained judgment for £120 with costs. Defendant has noted an appeal against that judgment.

Held: That a Native woman may recover damages in a Native Commissioner's Court for her seduction if the Native Commissioner decides to apply common law.

Held further: That under Native law it is only the father or guardian of a woman who can maintain an action for damages for her seduction.

Held further: That attention must again be drawn to the injunction of this Court that the system of law applied by a Native Commissioner in deciding a civil action is to be specifically recorded.

Held further: That it cannot be said that the Additional Native Commissioner did not exercise his discretion properly when he applied common law in deciding the instant case.

Held further: That as the system of law applied dictates the capacity of the parties, the plaintiff, who is a major spinster, was entitled to bring the instant action unassisted and she is therefore properly cited.

Held further: That the two items (*a*) loss of salary for six months during pregnancy, and (*b*) loss of prospects of an increase in salary owing to plaintiff having had to relinquish her post as Government teacher, are not recoverable from defendant, except in so far as the claim for loss of salary covers the maintenance of plaintiff herself included in lying-in expenses.

Held further: That in a case such as the present, where the seduction is effected by means of a promise of marriage and that promise is broken, the damages fall to be more substantial than in the case of seduction unattended by breach of promise of marriage.

Cases referred to:—

Magwentshu *v.* Molete, 1930, N.A.C. (C. & O.), 40.
Ramothata *v.* Makhothe, 1934, N.A.C. (T. & N.), 74.
Phefo *v.* Raikane, 1942, N.A.C. (T. & N.), 16.
Ndimande *v.* Mkize, 1943, N.A.C. (T. & N.), 93.
Nzimande *v.* Phungulu 1, N.A.C. (N.E.), 386.
Spies' Executors *v.* Beyers, 1908, T.S., 473.
Wiehman *v.* Simon, N.O., 1938, A.D., 447.
Ex Parte Minister of Native Affairs in *re* Yako *v.* Beyi, 1948 (1), S.A. 388 (A.D.).
Page *v.* Kirk, 52 P.H., J. 9.

Appeal from the Court of the Native Commissioner, Richmond.

Balk (Permanent Member):

This is an appeal from the judgment of a Native Commissioner's Court given for plaintiff (now respondent) in the sum of £120 with costs in an action in which she claimed from the defendant (present appellant) the sum of £300 as damages for seduction and breach of promise, averring that that promise had been made by the defendant to her prior to her seduction by him.

In her main claim for the £300 the plaintiff included in addition to general damages certain special damages which will be dealt with at a later stage; in her alternative claim for that amount she sought only general damages.

In his plea the defendant denied the alleged seduction and breach of promise of marriage.

The grounds of the appeal are—

"1. The plaintiff is cited incorrectly and as such is not entitled to any judgment.

2. From the circumstances upon record this case should have been decided upon under Native Law, more especially as the parties are unexempted Natives and as it appeared upon record that the plaintiff would be satisfied with a judgment awarding the customary Inqutu (sic) and Imvimba beasts.

3. The intimacy of the parties referred to by the Native Commissioner was not such as is foreign to Native Custom, and in general, unless the appellant be disbelieved, which is apparently not the case, a judgment of absolution should have been made.

4. There is insufficient corroboration to establish that intercourse did in fact take place.

5. There is insufficient evidence to support a breach of promise claim.

Wherefore the appellant prays for judgment in his favour with costs.

Alternatively.

In the event of the above Honourable Court finding that plaintiff is entitled to a judgment for damages, the appellant avers as follows:—

6. He repeats there is insufficient evidence to establish that appellant did promise to marry respondent, and in any event the amount of damages awarded is excessive and unsupported.

Wherefore appellant will submit to such reasonable amount the above Honourable Court may award the Respondent, but prays for costs in his favour."

Although the Additional Native Commissioner *a quo* does not state specifically which system of law he applied in deciding the instant case, i.e. Common Law or Native Law, it seems clear that he had recourse to the first-mentioned system as it emerges from his reasons for judgment that in awarding the plaintiff, a Native woman, the £120 damages for seduction and breach of promise of marriage, he relied on *Ex parte* Minister of Native Affairs *in re* Yako *v.* Beyi, 1948, (1) S.A. 388, A.D., which lays down that a Native woman may recover damages in a Native Commissioner's Court for her seduction if the Native Commissioner decides to apply Common Law, see page 401 of the report of that case; and under Native Law it is only the father or guardian of a woman who can maintain an action for damages for her seduction, see Phefo *v.* Raikane, 1942, N.A.C. (T. & N.), 16, at page 17, and breach of promise of marriage is not actionable under that system of law, being unknown thereto, see Ndimande *v.* Mkize, 1943, N.A.C. (T. & N.), 93 and the authority there cited.

Here attention must again be drawn to the injunction of this Court that the system of law applied by a Native Commissioner in deciding a civil action is to be specifically recorded, see Nzimande *v.* Phungula, 1, N.A.C. (N.E.), 386, at page 388 and previous cases in that volume.

According to the pleadings and evidence the plaintiff is a Government school teacher and the defendant an interpreter employed at a Magistrate's Office in an urban area where he lives. The former is a well educated major spinster and had been employed as a Government school teacher for a period of six years at the time of the alleged seduction. Both of them were members of the Methodist Church. Their recreation consisted of walks and attending concerts. These factors indicate not only that the parties were not living under tribal conditions in the traditional way but that their mode of life approximated European standards. It is true that neither of them had been exempted from the operation of Native Law and that in their earlier relations with one another they observed the *ukusoma* custom (external sexual intercourse). But it seems to me that these two factors are outweighed by the others I have mentioned and that therefore it cannot be said that the Additional Native Commissioner did not exercise his discretion properly when he applied Common Law in deciding the instant case; in other words there appears to be no justification in the circumstances for holding that the Additional Native Commissioner did not exercise his discretion on the basis of which was the best system of law to apply in order to reach a just decision between the parties, see Yako's case (*supra*) at pages 397 to 401, inclusive, and Ramothata *v.* Makhothe, 1934, N.A.C. (T. & N.), 74. at pages 76 and 77. Here it should be added that, as is manifest from the defendant's evidence, the prior action brought by the present plaintiff against him under Native Law for damages for his having seduced her was withdrawn, so that there can be no question of

her being satisfied with a judgment for the customary *ngqutu* and *imvimba* cattle, which in any case she could not have obtained as such a judgment could, for the reasons given above, only have been given in favour of her guardian according to Native Law if he had sued in his personal capacity. It follows that as the Additional Native Commissioner properly applied Common Law and as the system of law applied dictates the capacity of the parties, see Nzimande's case (*supra*) at page 387, the plaintiff who, as pointed out above, is a major spinster, was entitled to bring the instant action unassisted and she is therefore properly cited. Consequently the first two grounds of appeal fail.

Turning to the third, fourth and fifth grounds of appeal, the plaintiff's version, according to her evidence, is that she was seduced by the defendant by means of a promise of marriage, that the latter broke that promise and that he was the father of her stillborn child. It is manifest from the Additional Native Commissioner's reasons for judgment that he believed the plaintiff and to my mind her evidence as a whole bears the impress of truth and sincerity and is in accordance with the probabilities and Counsel for appellant conceded that he could not say that the Additional Native Commissioner was wrong in finding against the appellant on the facts. Here it should be added that in my view the plaintiff's letter (Exhibit "J") does not, in the light of her evidence and that of the defendant thereanent, militate against the acceptance of the plaintiff's evidence as a whole. It also seems clear to me that the plaintiff's evidence regarding the seduction, paternity and breach of promise of marriage in question, was amply corroborated by the defendant's letters that were put in as exhibits in the instant case and which the latter admitted he had written, particularly by his letters (Exhibits "B", "C", "D", "H" and "M") which, to my mind, are clearly consistent with the plaintiff's evidence and inconsistent with that of the defendant. In this connection the explanations given by the defendant in the course of his cross-examination in regard to material passages in his letters, particularly the passages in his letters (Exhibits "B" and "C") containing the words "*bhebha*", "*mpahla*" and "activities", appear to me to be obviously false. Then there is the defendant's contradictory evidence regarding his having had external intercourse with the plaintiff and obvious evasiveness in his evidence as regards whether the plaintiff had stated in her registered letter to him that he had got her into trouble and that unless he did something she would have to disclose the matter to her parents. It follows that the third, fourth and fifth grounds of appeal fail, see Wiehman *v.* Simon, N.O., 1938 (A.D.), 447.

As regards the sixth and last ground of appeal, the Additional Native Commissioner unfortunately has not stated how he computed the £120 he awarded in the instant action.

In support of her claim for £10 special damages the plaintiff stated in her evidence that her expenses for attending clinic and preparing the baby's clothes cost her that sum. This item of expenditure, the correctness of which was not called into question by the defendant, is recoverable from the latter, see Spies' Executors *v.* Beyers, 1908, T.S., 473.

In regard to the plaintiff's claim for further special damages amounting to £146. 13s., she stated in her evidence that she had been obliged to relinquish her post as a Government teacher for a period of six months because of her having been rendered pregnant by the defendant, thus losing her salary at the rate of £7. 15s. per month for that period; further that owing to her having had to relinquish her post as Government teacher she had lost certain prospects of an increase in the salary in respect of which she claimed £100. These two items are not recoverable from the defendant except in so far as the claim for loss of salary covers the maintenance of the plaintiff herself included in lying-in expenses, in respect of which an amount equalling three months' salary, i.e. £23. 5s., may reasonably be allowed, see Marudu *v.* Langa, 1 N.A.C. (N.E.), 106, at page 109.

As regards general damages in the instant case, the Court in the case of Magwentshu *v.* Molete, 1930, N.A.C. (C. & O.), 40, on appeal increased the general damages for seduction to £50 on the ground that the plaintiff was an educated Native girl, having held the post of teacher. In that case the defendant was a clerk and the question of breach of promise of marriage did not arise. In a case such as the present where the seduction is effected by means of a promise of marriage and that promise is broken, the damages fall to be more substantial than in the case of seduction unattended by breach of promise of marriage, see Page *v.* Kirk, 52 P.H., J.9. Here it should be added that the defendant admitted under cross-examination that his intentions towards the plaintiff were dishonest from the very beginning and he never intended marrying her.

Taking into account all the relevant factors in the instant case including the social standing of the parties, and the circumstances in which the seduction took place, it seems to me that an amount of £86. 15s. general damages cannot properly be regarded as excessive and as that sum with the £33. 5s. which, as indicated above, is recoverable as special damages, makes up the £120 awarded by the Additional Native Commissioner, the last ground of appeal also fails.

In my opinion therefore the appeal should be dismissed with costs.

Steenkamp (President):—

I agree that the appeal should be dismissed with costs.

In the case of Phefo *v.* Raikane, 1942, N.A.C. (T. & N.), 16, there was no question of applying any other system of law but that of Native Law. That action was brought by the girl in the Chief's Court and as the Chief only had jurisdiction in cases arising out of Native Law [*vide* section *twelve* (1) (*a*) of Act No. 38 of 1927], the application of Common Law would not have been competent.

Wessels (Member): I concur.

For Appellant: Adv. J. H. Niehaus instructed by Wynne, Cole & Tod.

For Respondent: Adv. J. A. Meachin instructed by J. Hershensohnn.

CENTRAL NATIVE APPEAL COURT.

N.A.C. CASE No. 12 OF 1953.

KOTOLE *v.* KOTOLE.

JOHANNESBURG: 22nd April, 1953. Before Marsberg, President, Wronsky and Towne, Members of the Court.

COMMON LAW.

Damages—Assault—Committed op partner to Civil Marriage in community of property during subsistence of marriage.

Summary: Plaintiff claimed £500 as damages for assault. Defendant admitted the assault but denied that Plaintiff had suffered damages in the sum of £500. At the time of the assault a marriage in community of property was subsisting between the parties.

Held: That as the cause of action arose during the subsistence of a valid marriage in community of property between the parties no damages were claimable.

Cases referred to:

Mann *v.* Mann, 1918, C.P.D., 8a.
Rex *v.* Mavros, 1921, A.D., 22.
Regina *v.* Dirk van Vliet, 2, C.T.R., 211.
Rex *v.* Hoffman, 16, C.T.R., 67a.

Statutes, etc., referred to:

Section *one hundred and eighty-seven,* Act No. 24 of 1886.
Van der Sinden's Institutes, 2:4:7.
Halsburg, 9/631.
Russel on Crimes (2nd Vol.), 1636.
Gardiner & Lansdown (2nd Vol.), 1159-1162.
McKerron on Delicts, 151-153.

Appeal from the Court of the Native Commissioner, Germiston.

Wronsky, Member (delivering judgment of the Court):—

Plaintiff sued Defendent in the Native Commissioner's Court, Germiston, *inter alia* for £500 damages suffered as a result of an assault committed on the 5th March, 1952.

An absolution judgment was granted in respect of this claim against which an appeal has been noted on the grounds that the Native Commissioner erred in his conclusions namely—

(1) that she was not entitled to damages as the plaintiff and defendant were married in community of property at the time of the assault; and,

(2) the assault having been committed during the subsistence of the marriage, plaintiff is not entitled to damages.

In his plea defendant admits the assault but denies that plaintiff suffered damages in the sum of £500 and puts the plaintiff to the proof thereof. It is admitted that defendant was prosecuted for this offence and sentenced to a fine of £12 or 2 months' imprisonment with hard labour.

Medical evidence was tendered to indicate the extent of the assault and the restultant permanent disability suffered—very little proof, however, was tendered to prove the quantum of damages suffered.

At the time of the assault the parties were still living together, a decree of divorce was only granted later on the 5th May, 1952.

Normally in a case of this nature substantial damages, if proved, would be granted—but in this case as the cause of action arose during the subsistence of a valid marriage in community of property no damages are claimable following the dictum of the case of Mann *v.* Mann, 1918, C.P.D., 89, where it was held that in cases where the parties were married in community one spouse cannot maintain an action against the other which sounds in damages, since any damages would be payable out of the joint estate.

The appeal must accordingly fail and it is dismissed with costs.

H. F. Marsburg: I concur.

H. G. F. Towne: I concur.

For Appellant: Adv. I. E. Lubinsky instructed by Mr. H. W. Chain of Johannesburg.

For Respondent: Adv. E. K. Weber instructed by Mr. M. A. Mosselson of Germiston.

SOUTHERN NATIVE APPEAL COURT.

N.A.C. CASE No. 13 OF 1953.

NDAMASE *v.* MDA AND ANOTHER.

PORT ST. JOHNS: 25th May, 1953. Before Sleigh, President, Bates and Wilbraham, Members of the Court.

PONDO CUSTOM.

Pondo Custom—Seduction and pregnancy of daughter of Paramount Chief—Damages awarded.

Summary: Plaintiff (now appellant) the Paramount Chief of Western Pondoland sued respondents for 100 head of cattle or £1,000 as damages for the seduction and pregnancy of his eldest daughter. Second respondent was sued in his capacity as first respondent's Kraal head. Judgment in favour of second respondent in the Court below was upheld on appeal. The further facts of the case are set out in the written judgment.

Held: That as the damages payable by a commoner amount to 5 head of cattle, i.e. half the average dowry, and as appellant paid 60 head of cattle for his wife, the award of thirty head of cattle or £300 as damages is considered adequate.

Statutes referred to: Section eleven (1), Act No. 38 of 1927.

Cases referred to:

Nqina *v.* Ntlupeko and Another, 3, N.A.C., 12.
Mehlomane *v.* Gxekungi, 4, N.A.C., 317.
Dalisile *v.* Dungulu and Another, 1940, N.A.C. (C. & O.), 83.
Qhu *v.* Scanlen Lehana, 4, N.A.C., 318.
Mpaipeli Nqwiliso *v.* Notshweleka, 3, N.A.C., 12.
Tshikitshwa *v.* Ranayi, 4, N.A.C., 319.
Raxoti *v.* Mveyitshi and Another, 4, N.A.C., 316.

Appeal from the Court of the Native Commissioner, Bizana.

Sleigh (President):—

Plaintiff (now appellant) who is the Paramount Chief of Western Pondoland sued respondents for payment of 100 head of cattle or their value, £1,000, as damages for the seduction and pregnancy of his eldest daughter, Eunice. It is alleged that first respondent seduced and rendered the girl pregnant and that he is an inmate of second respondent's kraal.

Respondents delivered separate pleas. First respondent admits the charge but pleads that 20 head of cattle or their value, £160, would be ample compensation for the damage suffered by appellant. He alleges that the sum of £65 has been paid on his behalf by second respondent and consents to judgment being entered against him in the sum of £95 with costs to date of plea, viz. 15th September, 1951. Both respondents deny that first respondent is an inmate of second respondent's kraal.

In a replication appellant admits the payment of £65 and at the commencement of the trial his attorney reduced his claim to 74 head of cattle. The note on the record shows that the reduction was made by reason of the payment of the £65. Mr. White who appeared for appellant in the Court below, however, informs this Court that the reduction was made not because

of the payment of £65 but because the dowry value of the girl was still considered to be 26 head of cattle.

The Native Commissioner, after hearing evidence, entered the following judgment:—

"For plaintiff for 20 head of cattle or £200 in terms of consent for 20 head of cattle and costs against first defendant, second defendant with costs up to date of consent by first defendant."

This judgment is ambiguous. At the last hearing the Native Commissioner was asked to clarify it and he has since reported that the sum of £65 paid on account was included in the award of 20 head of cattle or £200, thus leaving a balance of £135, the cattle equivalent of which is 14 head.

From this judgment appellant has appealed on the following grounds:—

1. That the judgment of the Native Commissioner is against the weight of evidence and probabilities of the case in so far as his judgment for the second defendant against plaintiff is concerned.
2. That it is respectfully submitted, the Native Commissioner erred in the following findings:—
   (*a*) That 20 head of cattle was a sum in Native Custom befitting as damages to a Paramount Chief for the seduction of his daughter, and that the Native Commissioner should have awarded higher damages.
   (*b*) That first defendant was not at the time of the seduction an inmate of second defendant's kraal.
   (*c*) That the second defendant be given judgment against plaintiff despite the fact that second defendant was not called or presented for cross examination on his plea.
3. That the Native Commissioner failed to take proper cognizance of a certain letter written by second defendant to the brother of plaintiff and which was handed into Court.
4. That the judgment of the Native Commissioner should have been as prayed by plaintiff in his summons and that the Native Commissioner by his judgment for 20 head of cattle or £200 against first defendant, has not given a judgment in accordance with Native Custom or in accordance with the special circumstances of the case."

The first question for decision is whether second respondent is liable as kraal head. First respondent is the son of second respondent and up to 1942 was apparently living at his father's kraal. In 1942 he went to work at Cape Town where he married his wife and had his own home. In 1945 he obtained employment in the Magistrate's Office, Bizana and lived at second respondent's kraal. In 1949 he was transferred to Elliotdale where he had his own home for about three months. In October, 1949, he was dismissed from the Public Service and presumably returned to his father's kraal. On 1st February, 1950, he was employed as secretary by appellant and lived with his wife in a kraal provided by appellant. It was while he was living at this kraal that he seduced the girl. This was about the end of 1950. It is thus clear that at the time of the seduction he was not living at a kraal under the control of second respondent. The latter was therefore not liable under Native Law, as applicable to commoners, for the delicts of first respondent.

In Nqina *v.* Ntlupeka and Another (3, N.A.C., 12), Native assessor Maxaka stated that when a daughter of a chief has been rendered pregnant all the relatives of the seducer are liable for payment of the fine demanded by the Chief. This statement of the original custom is probably correct for where the dignity of the Chief was concerned he could do more or less as he pleased. There was nothing to prevent him from seizing the property of

the relatives of the seducer. The insult to the Chief was so great that the seducer's life would be in jeopardy if his relatives did not come to his assistance by paying the fine. Moreover, in those days, the head of the family was theoretically in control of all property belonging to members of the family whether they were inmates of his kraal or not, and he could not therefore legally refuse to pay. But a Native Commissioner can apply Native Law to a case only if such Law is not opposed to the principles of natural justice [see section *eleven* (1) of Act No. 38 of 1927]. According to the decisions of this Court a kraal head has no control over the assets and earnings of a son or relative who is married and is not an inmate of his kraal. It would, therefore, be manifestly unjust to compel second respondent to pay the fine.

It is contended that second respondent virtually admits liability in his letter addressed to Chief Notsolo Bokleni and which was put in by consent. The relative portions read as follows:—

> "I did not know of so much damage caused by my dog (first respondent) to my Chief . . . Pardon me Faku, pardon me my Chief, I am like a dead person; my flesh has been buried by this occurrence. I have no words that can come out of my corpse . . . you may expect something very little, my Chief, that I have raised. Do not be annoyed at that tickey (the £65) my Chief. I have driven the boy away as a result of this occurrence so that he may fight this crisis."

Now I do not read this letter as an admission of liability for the tort of first respondent. When a Native has wronged another and desires to be forgiven it is not sufficient merely to apologise: he must pay something to show that his repentance is genuine and to salve the wounded feelings of the injured person. It is true the second respondent refers to his son as his "dog" and says that the Chief can expect money which he has raised, but the letter is essentially an apology for the gross insult suffered by appellant at the hands of second respondent's son. It was addressed to appellant's brother who was expected to intercede on respondent's behalf. There was no legal liability to pay. In sending the money second respondent was merely following the usual Native Custom of sending something with the apology so that the latter would be more acceptable.

It is further contended that since second respondent did not give evidence he was not entitled to judgment in his favour. This contention is not sound. The onus was on appellant to establish second respondent's legal liability and he has not done so. The appeal against the judgment in so far as it affects second respondent consequently fails.

The other question for decision is whether the amount awarded is inadequate having regard to the rank and status of appellant.

Appellant is the Paramount Chief of a section of the Pondo nation. His rank and position is such that the seduction of his daughter would seriously impair his dignity in the eyes of his people and of other Chiefs and it would be regarded as an insult of the gravest nature. Had appellant claimed damages for this insult I have no doubt that, in the absence of an acceptable apology, he would have been entitled to substantial damages under this head. But he does not claim damages for *contumelia* He makes it clear that his claim is based on the reduced *lobolo* value of his daughter, for he says in his evidence "I have received £65 on account as damages and I estimate my daughter's dowry value to-day at 26 head of cattle and I now ask for judgment for 74 head of cattle or £740 as damages." The Court must therefore consider the adequacy or otherwise of the award on this basis. It should be noted that he does not regard the £65 as damages for the insult because he invites the Court, in effect, to deduct this amount from the amount claimed.

There is no fixed scale of damages claimable for the seduction and pregnancy of the daughter of a Chief. Apart from the question of *contumelia,* the Chief would be entitled to the

difference in the *lobolo* value of his daughter as a virgin and a *dikazi* (a woman who has had a child). As far as I have been able to ascertain, there is no reported decision of the amount awarded as damages for the pregnancy of a daughter of a Paramount Chief, but in testing the adequacy of the present ward it will be of assistance to review briefly the decisions in which damages were awarded to lesser Chiefs.

In Mehlomane *v.* Gxekungi (4, N.A.C., 317), it was held that the appellant who was a remote descendant of Hintsa, the Paramount Chief of Gcalekaland, was not entitled to higher damages. A similar ruling was given in Dalisile *v.* Dunguiu and Another [1940, N.A.C. (C. & O.), 83]. In Qhu *v.* Scanlen Lehana (4, N.A.C., 318), it was held that the respondent who is the recognised Chief of a Basuto tribe in Mount Fletcher District, was entitled to higher damages and he was awarded 6 cattle for seduction only. In Mpaipeli Nqwiliso *v.* Notshweleka (3, N.A.C., 12), the appellant who was the younger son of the Paramount Chief of Western Pondoland was awarded ten cattle as damages for adultery, and in Nqina *v.* Ntlupeko and Another (*supra*) the appellant who was retated to the Paramount Chief of Western Pondoland through the Pondo Chief Nyawuza was also awarded 10 cattle for seduction and pregnancy. A similar award was made to the grandson of Chief Ndamase of Western Pondoland [see Tshikitshwa *v.* Ranayi (4, N.A.C., 319)]. Finally in Raxoti *v.* Mveyitshi and Another (4, N.A.C., 316), the appellant was awarded eight cattle but this award was probably influenced by considerations not present in this case. The amount awarded for seduction and pregnancy thus never exceeded 10 cattle.

It appears from the evidence that at the time of the seduction negotiations were in progress for the marriage of Eunice to Chief Sigidi Matiwane of the Pondomisi. Appellant states that Sigidi was agreeable to pay 100 head of cattle, but it is doubtful whether this number would have been paid ultimately. Nor is there any certainty that Sigidi would have married her because although the negotiations were commenced in 1949, no cattle had been paid at the time when the pregnancy was discovered in 1951. I shall, however, assume that there are other Chiefs who are prepared to marry Eunice. In my opinion appellant's estimate of her *lobolo* value is too low. If she married a Chief her *lobolo* would be paid by the tribe of that Chief and it is most unlikely that the Chief would belittle his own importance and that of his tribe by paying 26 head of cattle for the woman who is to become the mother of the tribe. If she were to marry a commoner it would be a great honour to the latter and he would be prepared to pay a substantial dowry. Even if he paid less than 26 cattle, appellant's expenses in connection with her marriage would be proportionately less and his material gain—if one can look at it in that light—would be more or less the same as if she married a Chief.

The average dowry paid for the wife of a commoner is 10 cattle and the fine for the pregnancy of a girl is 5 head, that is half the dowry. Having regard to the fact that appellant who married his wife in 1918 has only paid 60 cattle, half this quantity would, in my opinion, be adequate compensation to appellant for the material loss he has sustained.

The appeal is consequently allowed with costs as against first respondent and the judgment of the Court below is altered to read: "For plaintiff against first defendant with costs for 30 head of cattle or their value, £300, less £65, the equivalent of 7 head of cattle paid on account. For second defendant with costs up to 15th September, 1951.

The appeal against the judgment in favour of second respondent is dismissed with costs.

Bates and Wilbraham (m.m.) concurred.

For Appellant: Mr. White, Umtata.

For Respondents: Mr. Birkett, Port St. Johns.

SOUTHERN NATIVE APPEAL COURT.

N.A.C. CASE No. 16 OF 1953.

MLUNGU *v.* ZALA.

KOKSTAD: 9th June, 1953. Before Sleigh, President, Kelly and Van Aswegen, Members of the Court.

COMMON LAW.

Government headman—Duties and powers of—Personally liable if he acts without reasonable cause or in excess of his authority.

Summary: Appellant sued respondent (a government appointed headman) for certain 4 coils of barbed wire or their value, £12, and costs. Appellant denied the statement in respondent's plea that the wire formed part of a communal fence erected by appellant's father and others, and which appellant had pulled up, and alleged that respondent wrongfully and unlawfully and without his permission or consent caused the wire to be removed from the lorry in which it was being transferred and took possession thereof. The evidence supports appellant's contention that the wire is his personal property and did in fact *not* form part of the communal fence.

Respondent then filed an additional plea at the close of appellant's case pleading that whatever action he took or instructions he gave in regard to the wire were done in his capacity as Government headman, and that he is not personally liable. The Assistant Native Commissioner upheld this plea holding that respondent acted in a representative capacity and that he could not be sued in his personal capacity. The summons was accordingly dismissed and appellant has appealed on the grounds that the Assistant Native Commissioner erred in holding that the additional plea disclosed a defence to plaintiff's (appellant's) claim.

Held: That as plaintiff claimed that defendant wrongfully and unlawfully and in abuse of his authority dispossessed him, a plea that he acted in his capacity as headman and is not personally liable, is no defence, as no public officer is free from personal liability if he acts without reasonable cause and in excess of his authority.

Statutes referred to: Government Notice No. 2252 of 1928.

Cases referred to:

Macdonald *v.* Kumalo, 1927, E.D.L., 293.
Rex *v.* Kumalo and Others, 1952 (1), S.A., 381 (A.D.).

Appeal from the Court of the Native Commissioner, Umzimkulu.

Sleigh (President):—

Appellant sued respondent for certain four coils of wire or payment of their value, £12, and costs. In his particulars of claim he alleges that some years ago he purchased four coils (presumably he means rolls) of barbed wire with which he fenced his lands in Indawana Location, and that on the 6th October, 1952, while he was removing his goods, including the barbed wire, to the farm Driefontein, respondent wrongfully, unlawfully and without appellant's permission or consent caused the wire to be

removed from the lorry in which it was being transferred and took possession thereof.

Respondent in his plea avers that a communal fence was erected at the expense of appellant's father and others; that appellant pulled up a portion of this fence and when he attempted to remove the wire, consisting of eighteen coils, a complaint was made to the Police and as a result appellant caused the wire to be removed from the lorry; and that on the instructions of respondent, who is the headman of the location, the wire was removed to the kraal of Mncedisi Mlungu.

Appellant filed a reply in which he denies that the wire formed part of the communal fence. He states that the wire is his personal property and was removed from his own fence which was in existence before the communal fence was erected. He admits that respondent is the Government headman of the location but states that the latter abused his position in dispossessing appellant of the wire in question.

The case was then set down for trial and appellant led evidence which, in so far as it goes, shows, that the wire is appellant's personal property and did not form part of the communal fence; that on the day in question the lorry was stopped by a European sergeant of the Police who sent for respondent; that when the latter arrived he informed the sergeant that the wire formed part of the communal fence; that on the sergeant's instruction the wire was offloaded by a native; and that respondent then caused the wire to be removed to the kraal of Mncedisi.

At the close of appellant's case respondent obtained leave to file the following additional plea:—

> "4. Defendant pleads that whatever action he took or instructions he gave in regard to the wire were done in his capacity as Government headman and that he is not personally liable."

The Assistant Native Commissioner upheld this plea, holding that respondent acted in a representative capacity with a reasonable belief that the wire was communal property and that, therefore, he could not be sued in his personal capacity. He dismissed the summons with costs up to the date of the plea. From this judgment appellant has appealed and respondent has noted a cross-appeal on the question of costs.

The ground of appeal is that the Native Commissioner erred in holding that the additional plea disclosed a defence to plaintiff's claim. It is alleged in fact that it discloses no defence.

The duties of a duly appointed Government headman are prescribed in Government Notice No. 2252 of 1928. He must *inter alia*, preserve fences and prevent thefts and offences. There is no doubt that in the exercise of his duties he has the power to take possession of and impound property which he believes on reasonable grounds to have been stolen. If his defence had been that he was holding the wire as an exhibit pending investigation of a suspected offence, and this is established, he would not be liable either in his personal or official capacity because his possession would not be unlawful. But it is clear from the pleadings which I have put in a concise form, that appellant does not dispute the headman's authority to seize the wire in the lawful execution of his duties. He alleges that respondent had wrongfully and unlawfully and in abuse of his authority dispossessed him. Consequently a plea that respondent acted in his capacity as headman and is not personally liable, is no defence to the above allegation. No public officer is free from personal liability if he acts without reasonable cause or in excess of his authority [see Macdonald *v.* Kumalo, 1927, E.D.L., 293, and Rex *v.* Kumalo and Others, 1952 (1), S.A., 381 (A.D.)]

The Native Commissioner was, therefore, wrong in ruling that the plea was a complete answer to appellant's claim. The appeal consequently succeeds and the cross-appeal, which was not pressed, falls away.

On the evidence it is clear that it was not respondent who dispossessed appellant of the wire, and his action in having the wire removed to a kraal for safekeeping was a reasonable and necessary precaution to take, but there is the further allegation in the summons that respondent is in possession of the wire and the evidence shows that respondent has failed to restore the wire after a demand had been issued. If the Police has completed its investigation and does not intend to institute a prosecution, respondent's possession of the wire is unlawful unless he can show that it did in fact form part of the communal fence.

The appeal is consequently allowed with costs, the judgment of the Court below is set aside and the record of proceedings is returned to that Court for such further action as respondent may be advised to take and for a fresh judgment. The cross-appeal falls away.

Kelly and Van Aswegen (m.m.) concurred.

For Appellant: Mr. Eagle, Kokstad.

For Respondent: Mr. Walker, Kokstad.

SOUTHERN NATIVE APPEAL COURT.

N.A.C. CASE No. 15 OF 1953.

MDINWA *v.* **MAQAKAMBA.**

PORT ST. JOHNS: 26th May, 1953. Before Sleigh, President, Bates and Wilbraham, Members of the Court.

PONDO CUSTOM.

Native customary union—Desertion by wife—Dissolution of union on part refund of dowry.

Summary: Plaintiff was married to his wife by Native Custom. In 1944 he obtained a judgment against her dowry holder for the immediate return of his wife (who had left him) or refund of the dowry valued at £76. The wife did not return and her dowry holder paid £14 to Plaintiff on account of the judgment against him. In the present action plaintiff alleges that his wife is living in adultery with defendant, that his marriage still subsists, and claims three head of cattle or their value £24 as damages for adultery.

On the foregoing facts the Assistant Native Commissioner ruled that the customary union between plaintiff and his wife was dissolved upon payment of the £14, and dismissed plaintiff's summons with costs. An appeal is noted against this ruling and it is contended that the woman remains plaintiff's wife until the dowry has been refunded in full.

Held: That the refund of portion of the dowry indicated that both the woman and her dowry holder repudiated the union, which in the absence of evidence that the dowry holder notified plaintiff that he was abiding by the alternative judgment (granted in 1944) was dissolved as from the date of payment.

The appeal fails.

Cases referred to:

Bobotyane *v.* Jack 1944, N.A.C. (C. & O.), 9.

Appeal from the Court of the Native Commissioner, Lusikisiki.

Sleigh (President):—

It is common cause that Manzondeni was married to plaintiff according to Native Custom. She left him and in 1944 he obtained a judgment against her dowry holder, Mpiwa, for her immediate return or refund of the dowry valued at £76. She did not return and Mpiwa has paid only £14 to plaintiff on account of the judgment against him.

Plaintiff alleges in the present action that his marriage to Manzondeni still subsists and that she is now living in adultery with defendant. He claims three head of cattle or their value £24 as damages for adultery.

On the facts as stated above the Acting Native Commissioner ruled that the customary union between plaintiff and Manzondeni was dissolved upon payment of £14 and dismissed plaintiff's summons with costs. From this judgment plaintiff appeals. It is contended that the woman remains plaintiff's wife until the dowry has been refunded in full.

The judgment in the 1944 case was framed in the alternative and Mpiwa had the option of either returning Manzondeni to plaintiff or restoring the dowry. He elected to refund the dowry and paid something on account.

It is a debatable point whether plaintiff could have treated the union as dissolved when Mpiwa failed to return the woman *immediately* and insisted on refund of the dowry. It would depend upon the length of and the reason for the delay. In order to avoid this uncertainity it is always desirable in cases of that nature to state in the judgment the date on or before which the woman has to be returned. The passing of this date dissolves the union and the alternative judgment then comes into effect.

In Bobotyane *v.* Jack [1944, N.A.C. (C. & O.), 9], McLoughlin (President), in dealing with the dissolution of a customary union by repudiation by one of the partners said: " On the part of the wife, a repudiation can become effective only by restoration of the *lobolo* or part thereof, for there is no corresponding practice known to Native Law which gives the wife a right similar to the husband's of public repudiation with resultant forfeiture of *lobolo*." This is what happened in the 1944 case. The refund of portion of the dowry can mean only one thing; that is that the woman and her dowry holder repudiated the union, which, in the absence of evidence that Mpiwa notified plaintiff that he was abiding by the alternative judgment, was dissolved as from the date of payment.

The Native Commissioner's ruling was therefore correct. The appeal is dismissed with costs.

Bates and Wilbraham (m.m.) concurred.

For Appellant: Mr. C. Stanford, Lusikisiki.

For Respondent: Mr. Birkett, Port St. Johns.

NORTH-EASTERN NATIVE APPEAL COURT.

N.A.C. CASE No. 9/53.

MAKHUDU *v.* LETSEBE AND OTHERS.

PRETORIA: 12th June, 1953. Before Steenkamp, President, Liefeldt and Cordingley, Members of the Court.

COMMON LAW.

Practice and Procedure—Application for condonation of late noting of appeal—No prospect of success on appeal.

Mandament van Spolie: When action therefor can be instituted. Judgment on claim amounting to novation of claim. Res judicata: Essentials of plea of.

Summary: In 1946 plaintiff sued defendants for an order declaring plaintiff to be entitled to reside on a certain farm. After defendants had pleaded, plaintiff applied for and obtained leave to insert an alternative claim for refund of the amount contributed by him to the purchase price, for which he eventually obtained judgment. In November, 1951, plaintiff sued defendants for a *mandament van spolie* in respect of certain arable land on the same farm. The Native Commissioner upheld the special plea of *res judicata* and dismissed the summons with costs.

Held: That a *mandament van spolie* usually precedes any other action and is only taken as a speedy remedy, and that no authority can be found that this right may be invoked when an action on the merits of the case has failed.

Held further: That there can be no doubt that the judgment of 1946 was a final judgment between the parties, that the case concerns the same subject matter and is based on the same ground of action.

Held further: That having regard to the pleadings of the case decided in 1946, only one conclusion can be arrived at and that is that the applicant's intention was that his claim to reside on the farm was to be novated by a judgment for the refund of the £96 he paid to the respondents.

Held further: That applicant has no prospect of success and the application for condonation of late noting of appeal is refused with costs.

Cases referred to:

Milner *v.* Webster, 1938, T.P.D., 598.
Nienaber *v.* Stuckey, 1946, A.D., 1049.

Application for condonation of the late noting of an appeal from the judgment of the Court of the Native Commissioner, Nebo.

Steenkamp (President):

On the 29th January, 1946, the applicant sued Johannes Malaka in his capacity as Headman of the Bakani tribe of Natives resident on Tweefontein, Nebo area, for—

(*a*) an order declaring applicant to be entitled to reside and live on the said farm;

(*b*) alternative relief;

(*c*) costs of action.

After the respondent had submitted a verbal plea the Attorney for applicant admitted that there is an order in force against the applicant to leave the farm in question and it is therefore not competent for the Court to give a judgment on the main claim.

He thereupon applied for an amendment of the summons by adding after paragraph (*a*) "Alternatively, the refund of the purchase price paid together with interest at the rate of 6 per cent per annum". The amendment was granted and the issue then before the Court *a quo* was whether the applicant had paid the sum of £96 to the respondent.

The Native Commissioner gave judgment for defendant (i.e. respondents in the present action) but on appeal to the Native Appeal Court that judgment was altered to one of "For plaintiff (i.e. applicant in the present action) for £96 and costs". That judgment was delivered by the Native Appeal Court on the 18th September, 1946.

For all intents and purposes it would appear that the litigation between the parties had been finalised, but on the 14th November, 1951, the applicant caused a summons to be issued against Johannes Malaka and eleven others. It makes no difference whether the summons is issued against the Headman in a representative capacity or against all those others mentioned by the plaintiff as it was conceded by Counsel for applicant that the parties in the present case are the same as in the previous action.

In this summons the applicant claims a *mandament van spolie* in respect of certain arable lands, in all about 14 morgen on the same farm.

The respondents filed a special plea that the subject matter of the present action is *res judicata*. They also pleaded specially that plaintiff's, i.e. applicant's, claim is prescribed. After the previous record had been handed in by the Clerk of the Court and arguments had been heard the Native Commissioner upheld the special plea of *res judicata* and dismissed the summons with costs.

An appeal was then noted to this Court but as the notice of appeal was not lodged in the prescribed period permitted by the Rules, application is now being made for condonation of the late noting. To enable this Court to decide whether the applicant has a reasonable prospect of success it was deemed necessary to call upon both Counsel to argue on the merits of the case.

Counsel for applicant in his argument conceded that the declaration order mentioned in the action instituted in 1944 was abandoned but he urged that until such time as the applicant executes on a judgment which he previously obtained for £96 he is not debarred from instituting any other action for an order permitting him to reside on the farm. He also conceded that the present action of *mandament van spolie* is in respect of the same property for which he sued for a declaration of rights.

The main question which this Court has to decide is whether the action instituted in 1946 is the same as the action now before the Court. As previously mentioned the first action was for a declaration of rights to reside on the farm and the present action is for a *mandament van spolie*. It seems to me that these two actions in the circumstances are synonymous. Both boil down to the fact that applicant reckons he has a right to live on the farm and to occupy the farm and whether he calls it one or other of these claims, seems to me to be immaterial.

Counsel for applicant has quoted various authorities but in my view these have no application in the instant action. Counsel for applicant has argued that there is no time limit in which a *mandament van spolie* can be brought before the Court. He has argued that so long as it is brought within the prescriptive period it could be made an order of Court. He has quoted the case of Nienaber *v.* Stuckey, 1946, A.D., page 1049 at page 1060, in which Greenberg, J.A., stated—

> "It is true that Sivigny on *possession* describes this remedy as *possessorium summariissimum*, but I think the adjectival qualification refers not to the period within which the remedy must be claimed but to the procedure of the Court in dealing with the application. I express no opinion on the question whether the Court has the discretion to refuse an application where on account of the delay in bringing it no relief of any value can be granted."

I do not think that passage is a clear exposition of the law that *mandament van spolie* can be delayed for many years and can be brought after all other actions have failed. *Mandament van spolie* usually precedes any other action and is only taken as a speedy remedy and I can find no authority that this right may be invoked when an action on the merits of the case has failed. There can be no doubt that the judgment given in 1946 was a final judgment between the parties, that the case concerns the same subject matter and is based on the same ground of action.

although in the last action it was given a different name, but the essence remains the same.

When applicant obtained a judgment in his favour for £96 during 1946, that judgment was in fact a novation concerning any claim he had in respect of the property in question and the fact that he did not execute on that judgment cannot alter the nature of the new debt. The case of Milner *v.* Webster, 1938, T.P.D., 598, quoted by Counsel for applicant bears this out. It was held in that case that a novation may be established by necessary inference from all the circumstances of the case. If we look at the pleadings of the case decided in 1946 only one conclusion can be arrived at and that is that the applicant's intention was that his claim to reside on the farm was to be novated by a judgment for the refund of the £96 he paid to the respondents.

In my opinion the applicant has no prospect of success and the application for condonation is refused with costs.

Both Counsel have submitted that in this case increased costs should be granted but I do not think that the preparation work involved is such that we could accede to that request and therefore costs will be granted on the ordinary scale as prescribed in items 4 and 5 of Table B of the Annexure to the Native Appeal Court Rules.

Liefeldt (Member): I concur.

Cordingley (Member): I concur.

For Appellant: Adv. R. W. Jepson instructed by Mr. H. A. Jensen of Pretoria.

For Respondent: Adv. M. Horwitz instructed by Messrs. Basner, Kagan & Willen of Johannesburg.

SOUTHERN NATIVE APPEAL COURT.

N.A.C. CASE No. 17 OF 1953.

SILIMO *v.* VUNIWEYO.

UMTATA: 19th June, 1953. Before Sleigh, President, Midgley and Nel, Members of the Court.

LAW OF PROCEDURE.

Disinherison—Application to vary must be made to Resident Magistrate—Appeal against lies to Chief Magistrate not to Native Appeal Court.

Summary: An order for the disinherison of his son Silima was obtained by the late Vuniweyo Bonga on 22nd December, 1939. The order was granted by the Resident Magistrate, Mqanduli who also declared Mmoshi (respondent) heir of the late Vuniweyo Bonga. The proceedings were instituted under the provisions of section *eleven* of Proclamation No. 142 of 1910. Silima died in June, 1952, and Vuniweyo Bonga in November, 1952. Appellant, Silima's eldest son, made application on 22nd January, 1953, to the Native Commissioner's Court Mqanduli for an order declaring the order of 22nd December, 1939, null and void. The Additional Assistant Native Commissioner upheld an objection by

respondent's attorney that the Native Commissioner's Court had no jurisdiction and dismissed the application. From this judgment the appeal was noted.

Held:

(1) That if a Native elects to proceed in terms of section *eleven* of Proclamation No. 142 of 1910 for the disinherison of his heir the proceedings must be conducted by the Magistrate of the district who may later in certain circumstances, cancel the order; and

(2) That appeals against such an order lie to the Chief Magistrate. In the Cape Province the proceedings must be conducted by the Native Commissioner of the district and appeals lie to the Chief Native Commissioner (see 7, Part 11, of Government Notice No. 2257 of 1928).

(3) That a Native who desires to disinherit his heir is not confined to the statutory procedure. He may disinherit his heir according to Native Custom provided he complies with the formalities laid down in Mnengelwa *v.* Mnengelwa [1942, N.A.C. (C. & O.), 2].

The appeal fails.

Statutes, etc., referred to:

Proclamation No. 142 of 1910—section *eleven.*
Act No. 38 of 1927—section *ten.*
Government Notice No. 2257 of 1928—section *seven* (Part 11).

Cases referred to:

Mnengelwa *v.* Mnengelwa [1942, N.A.C. (C. & O.), 2].
Joel *v.* Zibokwana (4, N.A.C., 130).

Appeal from the Court of the Native Commissioner, Mqanduli.

Sleigh (President):

On 26th May, 1939, the late Vuniweyo Bonga instituted disinherison proceedings in terms of section *eleven* (1) of Proclamation No. 142 of 1910 before the Magistrate of Mqanduli against his eldest son and heir, the late Silima Vuniweyo. Considerable evidence was led and the following note appears at the end of the record of proceedings:—

"On 22nd December, 1939, respondent (Silima) declared to be disinherited.
Applicant expresses a desire to have Mmoshi (next son to respondent) of the same wife appointed as heir.
Mmoshi accepts the nomination.
Mmoshi appointed heir in place of respondent.

(Sgd.) J. K. H. Guest,
Magistrate."

On the outside cover of the file there appears the endorsement:—

"Respondent disinherited and Mmoshi declared heir in his stead.

(Sgd.) J. K. H. Guest,
Native Commissioner.

Date Stamp.
22.12.39."

Silima died in June, 1952, and Vuniweyo in November, 1952. On 22nd January, 1953, application was made in the Native Commissioner's Court by present appellant, the eldest son of Silima, for an order declaring the order of 22nd December, 1939, null and void. The application was resisted on the ground that the 1939 order was made by the Resident Magistrate and that the Native Commissioner's Court has no jurisdiction to vary any order of the Resident Magistrate. The Additional Assistant Native Commissioner upheld this objection and dismissed the application. From this judgment appellant appeals on the following grounds:—

"The grounds of appeal are that the judgment dismissing the application—

(1) was bad in Law and at total variance with facts found to be proved;

(2) that respondent's reply was proved by the findings of the Court in that it was accepted as a matter of fact that the Native Commissioner and not the Resident Magistrate had granted the order that formed the subject matter of the proceedings;

(3) that in the circumstances consideration of the question as to whether the Native Commissioner's Court could or could not vary an order of the Resident Magistrate was irrelevent and beside the point;

(4) that on the facts and pleadings, applicant was entitled to judgment as prayed."

In regard to the second ground of appeal it is sufficient to say that although the presiding officer's designation is given as "Native Commissioner" on the outside cover of the file, it is quite clear from the order given at the end of the proceedings and the numerous postponements that he held the inquiry in his capacity as "Magistrate".

Counsel for appellant contends that the 1939 proceedings were judicial and not administrative because an entry of the proceedings had been made in the Native Commissioner's civil record book, and that in terms of section *ten* of Act No. 38 of 1927, the Native Commissioner's Court has jurisdiction to hear all civil causes and matters between Native and Native.

The contention that the proceedings are judicial and not administrative is not well-founded. Section *eleven* of Proclamation No. 142 of 1910 reads as follows:—

"11. (1) If any Native shall desire to disinherit his heir, either wholly or in part, for gross misconduct or incapacity to deal with or manage the heritable property, or through insanity or idiocy, it shall be lawful for the Resident Magistrate of the district, on the application of such person, to summon before him the heir so proposed to be disinherited, and in the presence of such heir, or in his absence in case he should neglect or refuse to appear at the time or place mentioned in the summons, to inquire into all the circumstances, to declare such heir disinherited, and to appoint as heir in his place any other person proposed by the person disinheriting, who accepts the proposed situation, and whom the Resident Magistrate approves; and thereupon all property, movable or immovable, and all rights and responsibilities which would, but for such declaration, have devolved upon the original heir, shall devolve upon the person declared to be heir in his stead.

(2) It shall be lawful for the Resident Magistrate of the district in which any such disinheriting order has been made, upon representation to him either by the Native at whose desire such order was issued or of the person disinherited by the said order, that the causes which led to the issue thereof no longer exist, to re-open the inquiry, and, in the event of the Resident Magistrate being satisfied of the accuracy of the representation, and that no reasons to the contrary exist, it shall be lawful for him to cancel the said order.

(3) Record shall be kept of all proceedings under this section, and it shall be competent for any person interested in the issue or cancellation of any order hereunder to appeal to the Chief Magistrate against any decision of a Resident Magistrate. The decision of the Chief Magistrate upon any such appeal shall be final."

It should be noted that a Native who desires to disinherit his heir is not confined to the procedure prescribed in this section. He has the right to disinherit his heir according to Native Custom provided he complies with the formalities laid down in Mnengelwa *v.* Mnengelwa [1942, N.A.C. (C. & O.), 2], and the

Native Commissioner's Court has no jurisdiction to set aside such a public disinherison (see Joel *v.* Zibokwana, 4, N.A.C., 130). If, however, such Native elects to proceed in terms of the above section the enquiry must be conducted by the Magistrate of the district; he is authorised in certain circumstances to cancel the order and appeals lie to the Chief Magistrate of the Transkeian Territories and not to the Native Appeal Court. In fact section *six* (1) of the Proclamation (since repealed) specially excluded the jurisdiction of the Native Appeal Court to hear such appeals. Section 7 of Part II of Government Notice No. 2257 of 1928 (in force in the Cape Province, excluding the Transkeian Territories) makes provision for disinherison proceedings to be conducted by the Native Commissioner and appeals lie to the Chief Native Commissioner—an officer who has no judicial functions. It is thus clear that the proceedings are administrative. Even if it is conceded that in view of the changes brought about by Act No. 38 of 1927, that the designation "Resident Magistrate" in section *eleven* should now be read as "Native Commissioner", appellant is still bound to follow the procedure prescribed in that section and is not entitled to apply to the Native Commissioner's Court for rescission of an order made by the Native Commissioner in his administrative capacity.

The Native Commissioner was therefore correct in holding that the Native Commissioner's Court has no power to vary or rescind an order granted by the Resident Magistrate in terms of section *eleven*.

The appeal is dismissed with costs.

Midgley and Nel (m.m.) concurred.

For Appellant: Mr. Mda, Mqanduli.
For Respondent: Mr. Hughes, Umtata.

SOUTHERN NATIVE APPEAL COURT.

N.A.C. CASE No. 18 OF 1953.

ZIBI *v.* ZIBI.

UMTATA: 22nd June, 1953. Before Sleigh, President, Midgley and Nel, Members of the Court.

LAW OF SUCCESSION.

Native Estate Enquiry in terms of Section 3 (2) *of Government Notice No.* 1664 *of* 1929—*Surveyed quitrent allotment—Registered holder married in community of property—Devolution of, in Transkei.*

Summary: Patrick Zibi, the deceased registered holder of a building and garden lot in a location in the Engcobo district, was married by Christian Rites in community of property. He left no male issue but instituted (with due formality) one Soga Zibi as his heir. The latter did not take transfer but on his death his heir, Ndodomkosi sought to take transfer of the lots. An appeal against the Native Commissioner's finding that Soga had been instituted heir was dismissed. An appeal is now lodged by the daughters of the late Patrick against the Native Commissioner's finding that they do not fall to share in the devolution of the lots and that Ndodomkosi is the sole heir.

Held:

(1) That as the lands were allotted to the registered holder subject to the regulations contained in section *eight* (2) of Proclamation No. 142 of 1910, he, his wife and children are bound by those regulations.

(2) That any rights which might have accrued prior to survey by virtue of the marriage in community of property were annulled by Proclamation No. 143 of 1919 which was in force at the time of survey.

(3) That the succession to these lots both before and after survey is governed by statute and it was not possible for any legal rights of succession according to Roman Dutch Law to accrue.

The appeal fails.

Statutes referred to:

Act No. 38 of 1927—Sections *twenty-two* and *twenty-three.*
Proclamation No. 140 of 1885.
Proclamation No. 227 of 1898.
Proclamation No. 125 of 1903.
Proclamation No. 142 of 1910.
Proclamation No. 143 of 1919.
Proclamation No. 196 of 1920.
Government Notice No. 1664 of 1929.
Government Notice No. 2257 of 1928.

Cases referred to:

Zibi *v.* Zibi, 1952 (2), P.H. (R.15).
Njobe *v.* Njobe, 1950 (4), S.A., 545 (C).

Appeal from the Court of the Native Commissioner, Engcobo.

Sleigh (President):

This appeal concerns the devolution of two quitrent allotments being Garden Lot No. 51 and Building Lot No. 34, situate in Tora Location, Engcobo District, and registered in the name of the late Patrick Zibi.

The Native Commissioner in an inquiry held in terms of Section 3 (2) of Government Notice No. 1664 of 1929, as amended, found that Patrick had instituted the late Soga Zibi as his heir and that the latter's heir, Ndodomkosi, was therefore entitled to succeed to the allotments.

The Native Commissioner's finding that Soga had been instituted as heir by Patrick was upheld on appeal by this Court, but as there was no evidence as to whether the principles of community of property applied to the marriage of Patrick and his wife, Dorcas, the Native Commissioner's ruling that Ndodomkosi was entitled to succeed to the allotments in question was set aside and the proceedings were returned to the Native Commissioner with instructions to obtain such evidence, and to give the daughters of Patrick an opportunity of stating their claims, if any [see Zibi *v.* Zibi, 1952 (2), P.H., R.15].

The inquiry was re-opened and after hearing further evidence the Native Commissioner confirmed his previous ruling and held that the two surviving daughters of Patrick do not fall to share in the devolution of the lots. From this ruling appellant has again appealed.

There is no substance in the first ground of appeal which alleges that the judgment is against the weight of evidence. The additional evidence adduced, in so far as it is relevant to the issue, is in fact not disputed. The other ground of appeal is that the Native Commissioner erred in finding that the daughters of Patrick are not entitled to succeed to his allotments.

Patrick was chief of a section of the Hlubi tribe and was living in Tora Location, Engcobo District, when he married his wife, Dorcas, according to Christian Rites and without ante-nuptial contract on 14th July, 1891. His only son, Lennox,

predeceased him without leaving any issue. He thereafter instituted Soga as his heir. He died intestate on 15th October, 1926, leaving, surviving him, his widow, Dorcas, who died in 1944, his adopted son, Soga, and two daughters, Frances and Alice. At his death he was in occupation of the two lots in question and thereafter Dorcas had the use of them in terms of Proclamation No. 142 of 1910 (section *nine*) until her death.

Patrick's estate was not reported to the Master of the Supreme Court. The provisions of Act No. 38 of 1927 (herein referred to as the Act) therefore apply to his estate [see section *twenty-three* (11) of the Act]. Section *twenty-three* (2) provides that "all land in a location held in individual tenure upon quitrent conditions by a Native, shall devolve upon his death upon one male person to be determined in accordance with tables of succession to be prescribed under sub-section (10)". It is common cause that the lots in question belong to the class referred to in this sub-section, and the tables of succession prescribed for the Transkeian Territories are contained in the third schedule to Proclamation No. 142 of 1910. According to these tables females have no right of succession to quitrent allotments in native locations. Soga would therefore be the heir to the allotments, but section *twenty-two* (8) of the Act provides that "nothing in this section or in section *twenty-three* shall affect any legal right which has accrued or may accrue as the result of a marriage in community of property contracted before the commencement of this Act." It follows, therefore, that if Patrick and Dorcas were married in community of property, and if heritable rights in respect of these lots had accrued to Patrick's two daughters as the result of the marriage, each of them would be entitled to a share of the lots.

Engcobo District is in Tembuland. At the time of the marriage of Patrick and Dorcas the provisions contained in the schedule to the Tembuland Annexation Proclamation (No. 140 of 1885), were in force. Section *thirty* thereof provides that a Christian marriage shall have the same effect upon the parties and their issue and property as a marriage contracted under the marriage laws of the Cape Colony. It is thus clear, and indeed it is not disputed, that Patrick and Dorcas were married in community of property, and in terms of section *thirty-seven* their intestate estates devolve according to Roman-Dutch Law rules of intestate succession. Sections *thirty* to *thirty-seven* were, however, repealed by Proclamation No. 142 of 1910, but the second provision to section *two* of this Proclamation (added by Proclamation No. 127 of 1918) provides "that nothing in this Proclamation shall affect any legal rights which has accrued or may accrue as the result of a marriage in community of property contracted before the promulgation thereof." It will be noted that these provisions are identical with those contained in section *twenty-two* (8) of the Act.

In Njobe *v.* Njobe and Another [1950 (4), S.A., 545 (C)], it was held that the protection accorded by the proviso to section *two* of the Proclamation and by section *twenty-two* (8) of the Act preserves not only the rights of the parties to the marriage but also preserves the consequences flowing therefrom in regard to the issue of such marriage, and consequently the devolution of the property in the estate of a Native married in community of property is governed by Roman-Dutch Law rules of intestate succession, unless there are legal provisions, statutory or otherwise, which prevent the devolution of the estate according to such rules (see report at page 549). The learned Judge was there dealing with property falling within the purview of section *twenty-three* (3) of the Act. The question I now propose to consider is whether there are statutory provisions which prevent the accrual of heritable rights to the issue of a marriage in community of property in respect of quitrent allotments referred to in section *twenty-three* (2) of the Act.

The Survey Proclamation (No. 227 of 1898) was applied in the first instance to the district of Butterworth only. It made

provisions for the framing of a list of persons entitled to land and for the survey and grant of allotments to such persons (section *four*). Subject to the provisions of section *twenty-three*, it provided for the administration of all property belonging to a deceased person (sections *nineteen* to *twenty-two*). Section *twenty-three* provided that immovable property may not be devised by will, but shall devolve according to the rule of primogeniture upon one male person to be called the heir and to be determined in accordance with the tables of succession which are set out. It will be seen that in terms of these provisions no right of succession to immovable property of whatsoever nature could accrue to the issue of a marriage in community of property unless he had been the "heir". Any rights which might have accrued were taken away by section *twenty-three*. Sections *nineteen* to *twenty-four* were repealed and re-enacted in a modified form by Proclamation No. 142 of 1910. As I have already pointed out the second proviso to section *two* of the latter Proclamation protects the rights of the issue of a marriage in community of property. This is in direct conflict with the provisions of the repealed Proclamation. Further, section *eight* (2) applies only to immovable property granted under the provisions of Proclamation No. 227 of 1898 and does not apply to other immovable property. This sub-section reads as follows:—

> "Subject to the provisions of sections *nine* and *ten* of this Proclamation (i.e. the rights of widows and of heirs who are already in possession of allotments) all immovable property belonging to such deceased person and held by him under title granted under the provisions of Proclamation No. 227 of 1898, shall devolve upon one male person to be determined by the Table of Succession in the Third Schedule to this Proclamation contained."

Proclamation No. 227 of 1898 in its truncated form was extended to the Engcobo District by Proclamation No. 320 of 1911, but the former Proclamation must be read with Proclamation No. 142 of 1910 which applied to the whole of the Transkeian Territories, and which is still in force. Now although the provisions of the 1898 Proclamation were extended to Engcobo District with effect from 20th December, 1911, it is obvious that section *eight* (2) of the 1910 Proclamation could have no application until such time as the survey had been completed. Until then the occupiers of unsurveyed land retained all their existing rights. This is made clear by section *seven* of Proclamation No. 320 of 1911 which provides as follows:—

> "7. Upon completion of survey and taking over of beacons by the Resident Magistrate under the provisions of this Proclamation, all rights to arable allotments previously held by persons therein under the provisions of Cape Proclamation No. 125 of 1903 shall lapse and be determined, and thereupon every holder of such lapsed rights shall cease to enclose, cultivate or otherwise occupy his allotment unless he is an approved claimant under the provisions of this Proclamation and is granted permission by the Resident Magistrate to continue in occupation pending issue of title."

There is no evidence of the precise date the survey of these lots was completed and the beacons were taken over, but counsel are agreed, and the diagrams show, that the survey of the garden lot was completed in August, 1922, and the building lot in September, 1923. The title deeds were issued on 24th June, 1926, and 30th January, 1933, respectively. The latter date is after Patrick's death but in my opinion it makes no difference. Clause xv of the title deeds provides that "The land hereby granted shall be also subject to all such duties and regulations as either are already or shall in future be established with regard to such lands." (See Schedule B of Proclamation No. 196 of 1920.) Now the lots in question were allotted to Patrick subject to the regulations contained in section *eight* (2) of Proclamation No. 142 of 1910. He, his wife and their children, are bound by these regulations. It is, however, contended that the accrued

rights of the daughters are protected by the second proviso to section *two* of the Proclamation. It is therefore necessary to consider the question whether any rights of succession according to Roman-Dutch Law in respect of these lots had accrued to the daughters prior to survey.

It is common cause that the lots in question originally belonged to Patrick's father. The latter became ill, handed the lots over to Patrick and left the district. This was apparently in 1905. The regulations governing the occupation of unsurveyed land at that time were contained in Proclamation No. 125 of 1903. This Proclamation did not make provision for the devolution of such land. I shall therefore assume, without deciding the point, that by virtue of the marriage in community of property, heritable rights in respect of these lots did accrue to Patrick's daughters. But the above Proclamation was repealed by Proclamation No. 143 of 1919. The lots were thereafter occupied subject to this Proclamation which was in force in the Engcobo District when the survey of the lots was completed. Section *nine* (2) thereof provides "upon the death of an allotment holder his rights of occupation are *ipso facto* cancelled, but his widows or heirs shall have first claim for re-allotment of the land, should the Resident Magistrate consider that they require the same." This section, therefore, annuls any rights which may have accrued to the daughters while the 1903 Proclamation was in force. It is thus clear that the succession to these lots both before and after survey is governed by statute and therefore it was not possible for any legal rights of succession according to Roman-Dutch Law to accrue. In the words of the learned judge in Njobe's case (*supra*) statutory provisions "supervened to prevent the devolution . . . by the ordinary rules of intestate succession according to Roman-Dutch Law."

The result is that the Native Commissioner was correct in ruling that the daughters of Patrick and Dorcas are not entitled to succeed to the lots in question. The heir in accordance with the tables of succession is Ndodomkosi, the eldest son of Soga who had been instituted as heir of Patrick according to Native Law.

The appeal is dismissed with costs.

Nel (mem.) concurred.

Midgley (Member):—

I have had the advantage of reading the judgment of the learned President and I agree generally with the conclusions at which he has arrived, but I wish to add a few observations on the effect of Proclamation No. 125 of 1903, and the nature of the rights which accrued to Patrick and his spouse.

In my opinion the rights conveyed by Proclamation No. 125 of 1903 under which Patrick apparently first acquired occupation are occupationary rights only and therefore purely personal rights which cannot be passed to his heirs. All subsequent legislation including Proclamation No. 143 of 1919 conveyed no greater rights to Patrick except that when title was issued to Patrick he was in a position to pass heritable rights to his heirs. But these rights were conveyed subject to special provisions in regard to succession.

Counsel for appellant strenuously contended that section *two* of Proclamation No. 142 of 1910, as amended, preserves the rights of Patrick's *ab intestato* heirs and that succession to the allotments does not therefore follow the table of succession in the Third Schedule to that Proclamation. It seems to me, however, that his contention is unsound because the right that did eventually accrue to Patrick was that of ownership specially qualified by the various conditions in the title deed and Proclamation No. 227 of 1898, as amended, especially that of succession to land held under the provisions thereof.

Applying the test mentioned by the learned Judge in Njobe *v.* Njobe and Dube, N.O. [1950 (4), S.A. 545 (C)], as to whether

at Patrick's death no legal provision, statutory or otherwise, had supervened to prevent devolution by the ordinary rules of intestate succession, it seems quite clear that statutory legislation had supervened to prevent it, viz., Proclamation No. 142 of 1910, as amended. Succession to these allotments must therefore follow the table of succession.

I agree therefore that the appeal should be dismissed with costs.

For Appellant: Mr. Tsotsi, Lady Frere.

For Respondent: Mr. Hughes, Umtata.

NORTH-EASTERN NATIVE APPEAL COURT.

N.A.C. CASE No. 118 OF 1952.

MNGOMEZULU *v.* **LUKELE.**

ESHOWE: 28th April, 1953. Before Steenkamp, President, Balk and Fenwick, Members of the Court.

ZULU LAW AND CUSTOM.

Customary union—Infant betrothal—Payments in pursuance thereof.

Contract: Illegality—Doctrine of undue enrichment.

Practice and procedure: Application for condonation of late noting of appeal—No prospect of success on appeal.

Summary: Plaintiff claimed from defendant the refund of cattle paid by him to the latter in pursuance of an agreement of infant betrothal.

Held: That plaintiff's application fails as he has no prospect of success on appeal.

Held further: That the Court will not countenance a claim based on infant betrothal.

Held further: That the doctrine of undue enrichment cannot even be considered and if the plaintiff will part with cattle for such an immoral consideration he has only himself to blame if his intentions suffer the fate he has experienced in the instant case.

Cases referred to:

De Villiers *v.* De Villiers, 1947 (1), S.A., 635 (A.D.).
Zulu *v.* Mdhletshe, 1952, N.A.C., 203 (N.E.).

Application for condonation of late noting of an appeal from the Court of the Native Commissioner, Ingwavuma.

Balk (Permanent Member):

This is an application for condonation of the late noting of an appeal.

Apart from the fact that the applicant has not given a satisfactory explanation for the delay in noting the appeal in that it is based on ignorance of law, the application in my view fails as it seems clear to me that he has no prospect of success on appeal, see De Villiers *v.* De Villiers, 1947 (1), S.A., 635 (A.D.), for the plaintiff's (present applicant's) claim in the instant case

is based on an infant betrothal, a practice which this Court will not countenance, see Zulu *v.* Mdhletshe, 1952, N.A.C., 203 (N.E.).

I am therefore of opinion that the application should be refused with costs.

Steenkamp (President):

The plaintiff and defendant entered into an agreement, the illegality of which is such that the susceptibilities of the Court are shocked.

No Court can tolerate the sale of a child, in this case according to plaintiff, an infant, with the object of the plaintiff eventually marrying that child.

The doctrine of undue enrichment cannot even be considered and if the plaintiff will part with cattle for such an immoral consideration he only has himself to blame if his intentions suffer the fate he has experienced in the instant case.

I agree that the application should be refused with costs.

Fenwick (Member): I concur.

Applicant in person.

Respondent in person.

CENTRAL NATIVE APPEAL COURT.

N.A.C. CASE No. 11 OF 1953.

MOSIA *v.* **NHLOPE.**

JOHANNESBURG: 22nd April, 1953. Before Marsberg, President, Wronsky and Towne, Members of the Court.

LAW OF PROCEDURE.

Practice and Procedure—Appeal—Interlocutory orders.

Summary: Appeal was lodged against (*a*) refusal to rescind a default judgment with costs; (*b*) order that plaintiff should furnish further particulars within 14 days from date; (*c*) further order that plaintiff should furnish further particulars within seven days and refusal to hear application for amendment of summons and postponement of Plaintiff's application for the amendment to the date of hearing of the main action; and (*d*) dismissal of summons with costs.

Held: That all the orders and rulings given by the Native Commissioner were interlocutory in nature and had not the effect of a final judgment.

Held further: That no appeal on the grounds mentioned was permissible.

Cases referred to:

Steytler N.O. *v.* Fitzgerald, 1911, A.D., 304.

De Wet *v.* S.W. Africa Trading Co., 1920, S.W.A., 51.

Appeal from the Court of the Native Commissioner, Johannesburg.

Wronsky, Member (delivering judgment of the Court):—

In this action summons was issued on 18th March, 1952 in the

Native Commissioner's Court, Johannesburg. Plaintiff sued defendant for the return of certain goods or their value £200, alternatively for a declaration of rights—the summons alleged that on or about the 1st March, 1951, the defendant in furtherance of an Order of Court obtained by defendant falsely and fraudulently removed all plaintiff's stock in trade from Germiston to defendant's shop in Johannesburg but on 12th March, 1951, the order was varied by the Native Commissioner, Johannesburg, and the goods in possession of defendant were impounded by the Messenger of the Court, Johannesburg, pending a further Order of Court.

Much litigation since the issue of summons on 18th March, 1952, has taken place in the form of requests for further particulars, application for dismissal of summons, application for amendment of the summons culminating in a successful application on 22nd October, 1952, for a dismissal of the summons in terms of Order No. 42 (3) of the Native Commissioners' Courts Rules. On the 11th November, 1952, an application for the recission of the default judgment granted on 22nd October, 1952, was refused and at the same time an application by defendant for uplifting the taxed costs was granted.

An appeal has now been lodged:—

(*a*) Against the Native Commissioner's decision of 11th November, 1952, for refusing to rescind the default judgment with costs.

(*b*) Against the Native Commissioner's ruling on 20th August, 1952, when plaintiff was ordered to furnish further particulars within 14 days of the date—costs to be costs in cause.

(*c*) Against the Native Commissioner's ruling on 24th September, 1952, when the Court ordered the Plaintiff to furnish within 7 days the particulars previously ordered to be furnished on 20th August, 1952, and further the refusal by the Native Commissioner to hear the application for an amendment of the summons and the postponement of Plaintiff's application for the amendment to the date of hearing of the main action.

(*d*) Against the Native Commissioner's judgment on the 22nd October, 1952, when the summons was finally dismissed with costs.

The summons in this action was dismissed without the case being heard on its merits and the parties have been mulcted in much unnecessary costs extending over a period of a year. All the orders and rulings given by the Native Commissioner are interlocutary in nature and have not the effect of a final judgment in the main case as contemplated by paragraph 81 (1) (*b*) of the Native Commissioners' Courts Rules. The test whether or not an appeal lies against an order such as has been given by the Native Commissioner is whether on the particular point in respect of which the order is made the final word has been spoken in the suit or whether, in the ordinary course of the same suit the final word has still to be spoken—De Villiers, C. J. in Steytler, N.O. versus Fitzgerald, 1911, A.D., at page 304.

The final word has not as yet been spoken in this action which may again be brought before the Court by the simple process of issuing a fresh summons. In De Wet *v.* S.W. Africa Trading Co., 1920, S.W.A., 51, it was held that if the party aggrieved still has remedy in the lower court, the order is not final and definitive.

None of the orders given by the Native Commissioner therefore fall within the category of Rule No. 81 of the Native Commissioners' Courts Rules and consequently no appeal to this Court on the grounds mentioned is permissible.

Taking all the facts into consideration and particularly bearing in mind the provisions of Rule 47 of the Native Commissioners'

Courts which requires that action should be taken in such a manner as to aid in the disposal of the action in the most expeditious and least costly manner and further invoking the provisions of Rule 44 read with Rule 84 the Court finds that the action taken by the Native Commissioner was substantially and in effect within the competence of the rules.

The remarks quoted in a Judgment given in this Court in case No. 31/1952—Ismael Matonsela *v.* Solomon Matonsela where this Court laid down the procedure to be followed in interpreting and applying the new rules of the Native Commissioners' Courts should be a guide to the parties in this action.

"In interpreting and applying the new rules of the Native Commissioners' Courts it would be well for parties to keep in mind the provisions of section 15 of Act No. 38 of 1927, which have been frequently invoked by the Native Appeal Court where there has been a tendency on the part of litigants to rely on technicalities. Parliament has expressly laid down that judgments shall not be reversed through irregularity in the proceedings unless substantial prejudice has resulted. The new rules are intended to improve the machinery for settlement of disputes between the parties. They must be used for that purpose not as weapons for further tactical disagreement. For instance, Rule 47 clearly indicates the principle behind procedure in Courts of Native Commissioner, viz. to do things in such manner "as may aid in the disposal of the action in the most expeditious and least costly manner".

The appeal is dismissed with costs.

H. F. Marsberg: I concur.

H. G. F. Towne: I concur.

For Appellant: Mr. J. Fine of Johannesburg.

For Respondent: Mr. H. Helman of Messrs. Helman & Michel of Johannesburg.

SOUTHERN NATIVE APPEAL COURT.

N.A.C. CASE No. 14 OF 1953.

MBALO *v.* **LOLIWE.**

PORT ST. JOHNS: 26th May 1953. Before Sleigh, President, Bates and Wilbraham, Members of the Court.

COMMON LAW.

Wilful destruction of animal—Damages—Disposal of carcass—Duty on owner to take whatever steps necessary to mitigate the loss—Onus on defendant to prove steps owner could reasonably take to lessen damages.

Summary: Appellant (first defendant in the lower court) acting in concert with second defendant caused the death of respondent's ox. Respondent sold the skin for £1. 2s. 6d. and he and his family ate the meat. The defendants were only afterwards proved to be instrumental in causing the death of the animal which respondent valued at £20. Defendants were then sued for the payment of £20. Judgment was entered in respondent's favour in an amount of £18. 17s. 6d.

Held:

(1) That if the culprit (causing the death of the animal) is unknown, the owner of the animal is entitled to make use of the carcass; if the culprit is later determined the owner is entitled to sue under Roman Dutch Law for the loss he has suffered.

(2) That the onus was on defendant to prove the steps which plaintiff could reasonably have taken to mitigate his loss.

The appeal fails.

Cases referred to:

(*a*) Skeyi *v.* Mxamleni, 2, N.A.C., 22.
(*b*) Mtyotyo v. Makebenzi, 1939, N.A.C. (C. & O.), 167.
(*c*) Victoria Falls & Transvaal Power Co., Ltd. *v.* Consolidated Langlaagte Mines, Ltd. (1915, A.D., at p. 22).
(*d*) Matanzima *v.* Mbobi, 1942, N.A.C. (C. & O.), 105.
(*e*) Wilhelm *v.* Norton, 1935, E.D.L., at p. 172.

Appeal from the Court of the Native Commissioner, Tabankulu.

Sleigh (President):

The main facts in this case are as follows:—

Appellant (first defendant in the Court below) acting in concert with the second defendant hamstrung a red ox belonging to respondent as a result of which it died. Respondent skinned the ox, sold the hide for £1. 2s. 6d. and he and his family ate the meat. Thereafter it was ascertained that the defendants were responsible for the death of the beast which respondent values at £20. This valuation is not disputed.

Respondent sued the defendants for the payment of £20. Second defendant was in default and default judgment was granted against him. Appellant delivered a plea and at the conclusion of the case the following judgment was entered against him:—

> "For plaintiff for the sum of £18. 17s. 6d. against defendant No. 1 jointly and severally with defendant No. 2, with costs."

In Native Law a person who has killed an animal belonging to another is bound to replace it but he is entitled to the carcase of the dead animal. [See Skeyi *v.* Mxamleni (2, N.A.C., 22) and Mtyotyo *v.* Makebenzi, 1939, N.A.C. (C. & O.), 167.] But it is unreasonable to apply this principle to a case in which the culprit is not known, as was the position in the present case, and may never be known. The owner is entitled to make use of the carcass and if the culprit is discovered he is entitled to sue for the loss he has suffered under Roman-Dutch Law. This is what respondent has done. He is not asking for replacement of the beast under Native Law.

In the alternative, it is contended that there was a duty on respondent to mitigate the loss by selling the meat; that the onus was on him to prove damage, and that as he has not proved the value of the meat the Court should have assessed the value on the basis of an average weight of 400 lb. at sixpence per pound.

It is correct that under Roman-Dutch Law there is a duty upon a plaintiff who has suffered loss through the acts of another to take proper and reasonable steps to mitigate the loss. [Victoria Falls and Transvaal Power Co., Ltd. *v.* Consolidated Langlaagte Mines, Ltd., 1915, A.D., at p. 22; but the onus is upon the defendant to prove the steps which the plaintiff could reasonably have taken in order to lessen the damages (see Matanzima *v.* Mboli, 1942, N.A.C. (C. & O.), 105 and Wilhelm *v.* Norton, 1935, E.D.L., at p. 172.]

No doubt the meat had a value and it is contended that respondent should have sold it, but there is no evidence at all

that there was a market for the meat in the rural location in which respondent resides. He is not a butcher and cannot reasonably be expected to hawk the meat in the location with possibly negative results. Further, there is the question whether such meat (the meat on an animal which had died) is saleable at all. On this point also the record is entirely silent. Respondent says that he has never bought or sold meat. This seems to indicate that such meat is not usually sold in a rural location. Appellant has consequently failed to discharge the onus which rested on him.

The appeal is dismissed with costs.

Bates and Wilbraham (m.m.) concurred.

For Appellant: Mr. Birkett. Port St. Johns.

For Respondent: Mr. C. Stanford, Lusikisiki.

CENTRAL NATIVE APPEAL COURT.

N.A.C. CASE No. 13 OF 1953.

CHABEDI *v.* **NYAZELO.**

JOHANNESBURG: 24th April, 1953. Before Marsberg, President, Wronsky and Towne, Members of the Court.

LAW OF PROCEDURE.

Practice and procedure—No evidence led by plaintiff—Judgment given for plaintiff at close of defendant's case—Onus on defendant.

Summary: Plaintiff sued for delivery of a certain horse or refund of its purchase price, £8. Defendant admitted receipt of £8 but pleaded that he had delivered the horse to Plaintiff. At the trial defendant accepted the burden of proving delivery. At the close of his case, the Native Commissioner gave judgment for plaintiff as prayed with costs, without any evidence being led for plaintiff. He stated that he did so because defendant did not impress him as being a very honest and reliable witness and his only witness made contradictory statements.

Held: That unless defendant's story was so palpably untrue that it could not be believed, the Native Commissioner was bound to call on the other side to state its case.

Held further: That the truth of the story told by defendant and his witness could be tested only as against that which the plaintiff might put forward so that the Native Commissioner's judgment was premature.

Cases referred to:

Hodgkinson *v.* Fourie, 1930, T.P.D., 740.
Seeko *v.* Zonza, 1908, T.S., 1013.
Sifinan *v.* Kriel, 1909, T.S., 538.
Katz *v.* Blomfield and another, 1914, T.P.D., 379.
Theron *v.* Behr, 1918, C.P.D., 443.
Erasmus *v.* Boss, 1939, C.P.D., 204.
Myburg *v.* Kelly, 1942, E.D.L., 202.

Appeal from the Court of the Native Commissioner, Johannesburg.

Marsberg, President (delivering judgment of the Court):—

In the Native Commissioner's Court at Johannesburg *plaintiff* Wilson Nyazeka sued *defendant* Simon Chabedi for delivering of a certain colt (horse) or refund of £8, being its purchase price. Plaintiff alleged that about April, 1950, he purchased the colt, aged 1 year and 9 months, from defendant and paid the full purchase price by 3rd June, 1950, but that defendant had not delivered the colt to him at the time summons was issued on 26th February, 1952.

Defendant admitted receiving the £8 but pleaded that he had duly handed over the colt to plaintiff after payment on the 3rd June, 1950.

At the trial defendant accepted the burden of proving delivery. In evidence he averred that he gave delivery on the 30th of May or 30th June, 1950. According to him plaintiff came to his house and led the horse away on a halter. Defendant was supported by a witness, a neighbour, Lydia Phafane.

After this evidence was given and defendant had closed his case, plaintiff asked for judgment in his favour without leading any evidence or closing his case. The Native Commissioner thereupon gave judgment for plaintiff as prayed.

Defendant has now appealed against this judgment on the ground—

(1) That the judgment is bad in law and contrary to law in that the learned Commissioner erred in granting judgment for the plaintiff as claimed, with costs, at the conclusion of the evidence given for the defence and without calling upon the plaintiff to give evidence either to rebut the evidence for the defence or to support his claim.

(2) That the judgment is against the evidence and the weight of evidence.

We think that there has been some confusion in regard to the terms "onus" and "burden of proof". We have studied the Native Commissioner's reasons for judgment to find out why he gave judgment after hearing one side only. He says: "The Court considered the evidence before it in the light of the onus which rested on defendant to prove that he, in fact, delivered the horse which he had sold to plantiff." In other words, when plaintiff applied for judgment the Native Commissioner asked himself "Has the defendant, in fact, proved delivery?" Or, as he says elsewhere: "It was the defendant on the other hand who had to prove delivery to avoid judgment being given against him." Now, we think that the problem before the Native Commissioner at the stage where defendant had closed his case on those issues whereof the burden of proof rested on him was: Was the story of defendant and his witness that the plaintiff came to defendant's house and led the horse away on a halter so palpably untrue that he could not believe it? If he could not say it was untrue then he was bound to call on the other side to state its case. If plaintiff had elected to close his case without leading evidence then the matter of "onus would have been in point in deciding what judgment to enter".

Was defendant's story obviously untrue? Of defendant the Native Commissioner remarks: "Defendant did not impress the Court as a very honest and reliable witness." And of defendant's witness, Lydia: "Her attitude in the witness box, her switching and twisting of her evidence in an effort to reconcile her various contradictory statements created a doubt in the Court's mind whether she was speaking the truth of what she actually saw or whether hers was a concocted story."

We have not had the advantage of personal observation of the witnesses and if demeanour were the only point at issue we would be very reluctant to quarrel with the judicial officer's estimate

of the party concerned. But this is not a case where it was the Native Commissioner's immediate task to decide on the credibility of one party as against the other. Here he has decided questions of credibility on the statements of one side only. As we said such statements must be palpably or inherently or on the face of them untrue before they can be rejected in circumstances such as those before the Native Commissioner. The recorded evidence of what defendant and his witness Lydia said to him does not convey to us the impression that their story was palpably or inherently false. The inconsistencies and contradictions do not appear to be so glaring as to be self obvious. In fact on the face of the record they have certainly made out a case against plaintiff which he is required to meet. On the face of their statements do certainly afford evidence of delivery of the horse. The truth of their story can be tested only as against that which the plaintiff may put forward. Hodgkinson *v.* Fourie, 1930, T.P.D., 740.

We have arrived at no conclusion regarding the merits of the case. We are concerned only with deciding whether the burden of proof had been shifted to plaintiff, which is the purport of the appeal. *Ex facie* the record, we are of opinion that plaintiff should adduce what evidence, if any, he desires to place before the Court.

The judgment of the Native Commissioner was premature and is hereby set aside.

The appeal is allowed with costs.

R. Wronsky: I concur.

H. G. F. Towne: I concur.

For Appellant: Mr. C. M. Sacks of Johannesburg.

For Respondent: Adv. C. P. Christodolides, instructed by Mr. L. N. Rosencrown of Johannesburg.

NORTH-EASTERN NATIVE APPEAL COURT.

N.A.C. CASE No. 18 OF 1953.

CELE *v.* **CELE.**

DURBAN: 5th May, 1953. Before Steenkamp, President, Balk and Cowan, Members of the Court.

LAW OF PROCEDURE.

Practice and procedure—Appeal from Native Commissioner's Court—Service of copy of notice of appeal on respondent—Native Appeal Court Rule 6 (1) *and* (2).

Summary: A Native Commissioner's Court having given judgment against defendant, he "noted" an appeal to the Native Appeal Court but did not serve a copy of the notice of appeal on plaintiff, alleging that he was not advised by the Clerk of the Court that it was necessary to do so.

Held: That it is the duty of the appellant to see that a notice of appeal is properly served on the respondent.

Held further: That the Court cannot subscribe to the argument advanced by appellant that it was the Clerk of the Court's fault.

Held further: That the appeal will consequently be struck off the roll.

Statutes, etc., referred to:

Rule 6 (1) and 6 (2) of th eNative Appeal Court Rules.

Appeal from the Court of the Native Commissioner, Port Shepstone.

Steenkamp (President):

The judgment in this case was delivered by the Native Commissioner on the 13th February, 1953.

The appellant, who was the defendant in the Court below, noted an appeal on the 21st February, 1953, but the copy of the notice of appeal was not served on the respondent as provided for in Rule No. 6 (1) and 6 (2) of the Native Appeal Court Rules.

When the notice of hearing was served on the respondent his Attorneys returned it to the Clerk of the Court intimating that this is the first intimation the respondent had of any appeal having been noted. They also stated that no notice of appeal was lodged on respondent or on them, i.e. his Attorneys, and nor have they received any intimation as to the grounds of appeal.

Appellant appeared in person before this Court and the respondent was in default.

Appellant conceded that a notice of appeal or grounds of appeal had not been served on respondent, but he gave the excuse that this was left in the hands of the Clerk of the Court who did not advise him that it was necessary that a notice of appeal should be served on the opposite party. It is clear from the Rule already quoted that it is the responsibility of the appellant to see that a notice of appeal is properly served on the respondent and we cannot subscribe to the argument advanced by the appellant that it was the Clerk of the Court's fault.

This Court therefore strikes the appeal off the roll.

This does not prevent the appellant from noting a fresh appeal in the proper manner and applying for condonation of the late noting.

Balk (Permanent Member): I concur.

Cowan (Member): I concur.

Appellant in person.

Respondent in default.

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NORTH EASTERN NATIVE APPEAL COURT.

N.A.C. CASE No. 13/53.

SIBISI *v.* **MTSHALI.**

VRYHEID: 6th July, 1953. Before Steenkamp, President, Balk and King, Members of the Court.

LAW OF PROCEDURE.

Practice and Procedure—Appeal from Chief's Court—Appeal noted late—No application made for extension of time within which to note.

Costs: Point on which appeal turns not taken in Court a quo.

Summary: Defendant noted an appeal against a judgment of a Chief's Court well beyond the period prescribed within which such an appeal should be noted.

Held: That a Native Commissioner cannot entertain an appeal from a Chief's judgment unless the appeal was noted in time or, if noted late, condonation has been applied for and granted.

Cases referred to:

Ntombela *v.* Zungu, 1, N.A.C. (N.E.), 302.

Nxumalo *v.* Nxumalo, 1, N.A.C. (N.E.), 318.

Mtshali *v.* Ndima, 1, N.A.C. (N.E.), 322.

Appeal from the Court of the Native Commissioner, Nqutu.

Steenkamp (President):—

The Chief gave judgment in favour of plaintiff on the 3rd October, 1952. Defendant noted an appeal on the 26th November, 1952, i.e. well beyond the period prescribed within which an appeal should be noted from a Chief's judgment.

There was no application for an extension of time in which to appeal nor was there any condonation of the late noting of the appeal.

The Native Commissioner allowed the appeal and altered the Chief's judgment to one dismissing the summons with costs.

An appeal has been noted to this Court and one of the grounds of appeal is:—

> "The appeal noted by the defendant against the Chief's judgment on the 26th day of November, 1952, was out of time, and in the absence of an application made for condonation of the late noting, the Native Commissioner erred in entertaining hearing the appeal."

This point is well taken and it is only necessary for me to refer to the following cases to show that a Native Commissioner cannot entertain an appeal from a Chief's judgment unless the appeal was noted in time or if noted late condonation has been applied for and granted:—

Ntombela *v.* Zungu, 1, N.A.C. (N.E.), 302;

Nxumalo *v.* Nxumalo, 1, N.A.C. (N.E.), 318; and

Mtshali *v.* Ndima, 1, N.A.C. (N.E.), 322.

In the circumstances I am of opinion that the appeal should be allowed and that the proceedings before the Native Commissioner should be set aside. There should be no order as to costs in the Native Commissioner's Court or in this Court as the point on which the appeal turns was not taken in the Court *a quo*.

Balk (Permanent Member): I concur.

King (Member): I concur.

For Appellant: Mr. D. B. Hine, instructed by Messrs. S. E. Henwood & Co., of Vryheid.

Respondent in person.

NORTH EASTERN NATIVE APPEAL COURT.

N.A.C. CASE No. 10/53.

DUBAZANA *v.* **DUBAZANA.**

VRYHEID: 6th July, 1953. Before Steenkamp, President, Balk and King, Members of the Court.

ZULU CUSTOM.

Practice and Procedure—Long delay in instituting action—Appeal from Chief's Court—Form prescribed in Annexure "B" to Rules for Chiefs' Courts.

Lobolo: Advance of cattle towards nephew's lobolo: *Presumption that advance is loan and not gift.*

Summary: Nine years after defendant's eldest daughter married, plaintiff brought an action against defendant for repayment of cattle advanced by plaintiff's late father for defendant's *lobolo*.

Held: That the delay in the institution of the action does not militate against the success of the plaintiff's case since, as explained by him, the defendant in the first instance admitted the claim, and the inconsistencies and improbabilities inherent in the evidence for the defendant are such as to establish the plaintiff's case clearly.

Held further: That the proper form prescribed in Annexure "B" of the Chiefs' Courts Rules must be used in appeals from Chiefs' Courts.

Held further: That as defendant acknowledges in his plea that plaintiff's father advanced the cattle towards the defendant's *lobolo*, the onus is on defendant to prove that it was a gift and not a loan repayable out of the *lobolo* received for defendant's eldest daughter.

Held further: That it is good Native law that a father is expected to provide *lobolo* for his sons, but there is no law that he should similarly provide for his nephews unless he became their guardian and was thus entitled to their earnings while they were still minors.

Statutes, etc., referred to:

Section 35 (1) of the Natal Code of Native Law, 1932.

Appeal from the Court of the Native Commissioner, Babanango.

Steenkamp (President):—

The grounds of appeal as originally filed with the Clerk of Court read:—

"1. That the judgment is against the evidence and the weight of evidence.

2. That the learned Native Commissioner erred in rejecting the evidence for plaintiff in preference to that for the defendant."

An unopposed application for their amendment as follows was granted:—

(*a*) By substituting the word "accepting" for the word "rejecting" appearing in paragraph 2.

(*b*) By the addition of the following words at the end of that paragraph:—

"in view of the nature thereof and in particular in view of the long delay in instituting proceedings and in view of the evidence relating to the depositions of Nxokozeli Dubazana in the Chief's Court and in the Native Commissioner's Court respectively".

The proceedings in the Native Commissioner's Court commenced with an application by plaintiff, against whom the Chief had apparently given judgment, for an extension of time in which to note and prosecute an appeal against the judgment pronounced by Chief Gojana on 25th May, 1951. Plaintiff in his supporting affidavit avers as follows:—

"I am the son and heir of Matalaza deceased, who died in or about the year 1918. Before he died he lent 9 head of cattle to respondent to pay his wife's *lobolo*. Respondent's father was Nhlansana deceased, who was present when the loan was made.

The 9 head of cattle were used to pay lobolo of Nombi the daughter of Mabengwana to her father. A promise was made that the first daughter of Nombi's *lobolo* would repay the loan. To Nombi was born Julili who is now married to Mbanbozethole Mpungose who paid her full lobolo to Mbambeni the Respondent."

The application was set down for hearing on 13th August, 1952, and the Chief who tried the case was duly notified.

The Chief submitted his reasons for judgment and these read as follows:—

"In the above case the plaintiff claimed 9 head of cattle from the defendant which he averred were lent to the defendant by his late father.

On the date of the hearing in my Court the heirship was not in dispute, and it therefore not decided who were the late Matasa's general heir.

The plaintiff called only one witness Mxokozeli Dubazane and this witness stated in my Court that he does not know about any cattle which were lent to the defendant by plaintiff's late father.

As the plaintiff did not prove his case I gave judgment for defendant with costs."

After a default judgment had been granted in favour of defendant and rescinded on application made by plaintiff, the case eventually reached the stage when the following verbal plea was taken from the defendant:—

"(1) Admit that plaintiff is the general heir of the late Matalaza Dubazana.

(2) Admits that he received 9 cattle from plaintiff's late father but denies that they were a loan, and states that they were payment for services rendered.

(3) Defendant put plaintiff to the proof of his claim."

It is not understood why the proper form prescribed in Annexure "B" of the Chiefs' Courts Rules published under Government Notice No. 2885 of 1951 was not used and I am constrained to remark that a disregard of rules shows indifference to duty and certainly does not make it any easier for this Court to deal with a maze of documents when one or two would have been sufficient.

The Court *a quo* accepted the documents as outlined above as the basis of the claim and I think this Court should, in disposing of the appeal, act likewise to save further costs.

Defendant in his plea acknowledges that plaintiff's father advanced the nine head of cattle towards the *lobolo* and therefore the onus is on defendant to prove that it was a gift and not a loan repayable out of the *lobolo* received for his eldest daughter.

The Native Commissioner has found as proved that the cattle received by defendant from plaintiff's late father was on loan and not as payment for services rendered as alleged by defendant and are therefore repayable to plaintiff.

From the evidence it would appear that the respective fathers of the parties were brothers from different mothers. They lived together on the same farm but the defendant, when still very young, went and lived with plaintiff's father. Defendant avers that his mother was affiliated to his uncle's house, but as this is foreign to Native Law and Custom no serious notice can be taken of such an allegation. It is only natural that when defendant lived with his uncle, plaintiff's father, he was subject to his instructions and had to perform such farm labour as was required by the owner of the farm but this does not follow that plaintiff's father had to provide *lobolo* in the same manner as his own son would expect. Defendant's father was still alive when he married and it must be accepted that whatever farm labour defendant was called upon to perform was for the benefit of himself and that of his own father and mother and not for the benefit of his uncle, plaintiff's father.

It is good Native Law that a father is expected to provide the *lobolo* for his sons, but there is no law that he should similarly provide for his nephews unless he became their guardian and was thus entitled to their earnings while still minors *vide* section 35 (1) of the Natal Code.

I am not prepared to hold that the evidence of Mxokozeli, already referred to, should be discarded in view of the alleged conflicting statements he made. He was not subjected to close cross-examination on this aspect of the case and it might well be that the Chief, in preparing his reasons for the judgment he granted in favour of defendant, made a mistake.

The delay of nine years after defendant's eldest daughter married before plaintiff brought action is explained by plaintiff where he states that defendant promised to repay the cattle. He goes on and states "we always argued and defendant refused to repay the nine cattle saying that he is my late father's general heir".

Natives usually delay actions and I do not think that the period of nine years is such that it militates against the plaintiff's success in the action.

The probabilities favour plaintiff and I am not prepared to interfere with the Native Commissioner's judgment.

Consequently the appeal fails, and should be dismissed with costs.

Balk (Permanent Member):—

The points at issue emerge from the learned President's judgment.

The plaintiff's version as disclosed by his evidence and that of his witnesses, viz., that his late father, Matalaza, whose heir he is, advanced the nine head of cattle in question to the defendant for payment by the latter as *lobolo* for his wife on condition that those cattle were to be repaid from the *lobolo* received for the defendant's eldest daughter, is straightforward and in keeping with Native Custom and therefore in accordance with the probabilities. On the other hand the defendant's version that the cattle concerned did not form a loan but were given to him by the late Matalaza as a gift for services rendered, that he received no cattle for his *lobolo* from Matalaza and that his father, Nhlantzana, sent him and his mother to live with Matalaza to look after him, is not supported by the evidence of his witnesses, who stated, *inter alia,* in their evidence that—

(*a*) the cattle paid by the defendant as *lobolo* for his wife came from Matalaza;

(*b*) Matalaza made a gift of the cattle to defendant because the latter's mother was affiliated by her husband, Nhlantzana, to Matalaza who was Nhlantzana's half brother;

(*c*) Nhlantzana and Matalaza lived together in one kraal until the latter married, whereafter he (Matalaza) established his own kraal.

The alleged affiliation is contrary to Native Custom and there was no need for Nhlantzana to send his wife, i.e., the defendant's mother, to look after Matalaza after the latter had married. These features in the evidence for the defendant indicate that his case is a fabrication. If, as stated by the defendant's witnesses, the cattle he paid for his *lobolo* were obtained by him from Matalaza, then in accordance with Native Custom the presumption is that they formed a loan and not a gift in view of the relationship of the parties.

I do not think that the delay in the institution of the instant action militates against the success of the plaintiff's case since, as explained by him, the defendant in the first instance admitted the claim and the inconsistencies and improbabilities inherent in the evidence for the defendant are such as to establish the plaintiff's case clearly.

As the defendant's witness, Magongo, admitted that Mxkozeli was present when the cattle transaction in question was discussed between the parties thereto, it seems to me that it is improbable that Mxokozeli said he knew nothing about the cattle in the Chief's Court and yet subsequently corroborated the plaintiff's version in the Native Commissioner's Court.

I am therefore of opinion that the Native Commissioner *a quo* properly accepted the evidence for the plaintiff in preference to that for the defendant and agree that the appeal to this Court should be dismissed with costs.

King (Member): I concur.

For Appellant: Mr. W. E. White, of Eshowe.

For Respondent: Mr. D. B. Hine, instructed by Mr. D. H. T. Hannah, of Vryheid.

NORTH EASTERN NATIVE APPEAL COURT.

N.A.C. CASE No. 41/53.

BUTELEZI *v.* **BUTELEZI.**

VRYHEID: 7th July, 1953. Before Steenkamp, President, Balk and King, Members of the Court.

ZULU CUSTOM.

Ownership in cattle within kraal—Presumption that ownership therein vests in kraal-head.

Practice and Procedure—Notice of Appeal—Ground of appeal that judgment is against the law must specifically state in what respect it is against the law.

Summary: Plaintiff, the eldest son of the third wife married by the late father of the parties, sued his half-broher, he defendant, the eldest son of the first wife married, for the return of 50 head of cattle which were found within the kraal of their late father at the latter's death.

Held: That it is a presumption of law that the ownership in all cattle within the kraal vests in the kraal-head.

Held further: That as all the cattle in the instant case were found at the kraal of the parties' late father, the onus was properly placed on plaintiff to prove that those cattle were the property of the *house* to which he belonged.

Held further: That as ground 3 of the notice of appeal does not mention in what respect the Native Commissioner erred in his application of Native Law, that ground of appeal falls to be disregarded.

Cases referred to:

Cili *v.* Cili, 1935, N.A.C. (T. & N.), 32.

Mcunu *v.* Mcunu, 1939, N.A.C. (T. & N.), 28.

Statutes, etc., referred to:

Rule 7 (*b*) of the Rules for Native Appeal Courts.

Appeal from the Court of the Native Commissioner, Mahlabatini.

Steenkamp (President):—

In the Native Commissioner's Court the plaintiff sued the defendant for fifty head of cattle. His particulars of claim read as follows:—

"1. Plaintiff claims the return of fifty head of cattle which were wrongfully and unlawfully taken by defendant.

2. That the said cattle were registered in the name of the late Nomdanda Butelezi, who is the father of plaintiff and the defendant."

In his plea the defendant admitted that the cattle were registered in the name of their late father, but he avers that the cattle in question belonged to him as he is the heir to the estate of the late father.

The Native Commissioner gave judgment *for defendant with costs.* Against that judgment an appeal has been noted by the plaintiff, now appellant, on the following grounds:—

"1. The Court erred in granting defendant full judgment for the cattle in dispute.

2. The defendant was not entitled to the cattle found and/or used by plaintiff's house in any event the onus was on the defendant to prove that the cattle did not belong to plaintiff's house.

3. The Court erred in its application of Native Law and Custom."

It is not mentioned in ground 3 in what respect the Native Commissioner erred in his application of Native Law. This should have been stated in terms of the requirements laid down in Rule 7 (*b*) of the Native Appeal Court Rules and as laid down in various cases by this Court that if an appeal is against the law it must be specifically stated in what respect it is against the law. This ground of appeal is therefore disregarded.

From the evidence it appears that when the late Nomdanda died there were registered in his name a considerable number of cattle. A dispute arose between plaintiff and defendant concerning the heirship to the estate left by their late father. An enquiry was held by the Native Commissioner and his decision *was that the defendant was the heir.* The defendant is the eldest son of the first wife married and plaintiff is the eldest son of the third wife and therefore there can be no question at all that defendant is the general heir. The plaintiff, however, now bases his claim on the allegation that all the cattle found at his father's kraal belonged to his mother's *house,* that is the third wife married.

It is a presumption of law, as laid down in the case of Cili *v.* Cili, 1935, N.A.C. (T. & N.), 32, at page 33, that the ownership in all cattle within the kraal vests in the kraal head. The cattle in dispute in the instant case were all found at the kraal of the late Nomdanda.

In his evidence plaintiff states there were altogether seventy head of cattle registered in the name of his late father. The cattle, other than those claimed by him, belonged to various *houses.* Plaintiff also admits that after his father's death he registered the cattle in the name of his younger brother because he wanted to speak to his other brothers first. If it is true, as alleged by the plaintiff, that fifty head of cattle belonged to his mother's *house* he would certainly not have registered the cattle in his younger brother's name but would have taken steps immediately to have those cattle registered in his own name.

Plaintiff's mother, who was the third wife, gave evidence and it is rather significant that she states that when her husband died he had no cattle whatsoever and that the cattle at the kraal belonged to her son and herself. Then she goes on in her evidence and states "there were many cattle when my husband died. I do not know who they belonged to." In cross-examination she states "My husband had no cattle when he died. The only cattle at the kraal are the increase of my beast". This beast she states was her property and is alleged to have been purchased by her out of the proceeds of mats she had made.

Defendant had been away from home for a number of years and it seems to me that when his father died the plaintiff wanted to claim all the property under the pretence that he was the heir and only after the Native Commissioner had decided at an enquiry that defendant was the heir he, in an attempt to obtain the cattle, used the subterfuge that the cattle belonged to his mother's *house.*

The Native Commissioner did not believe the plaintiff, on whom there was an onus, and here I wish to state that ground 2 of the appeal is without substance where the appellant states that the onus was on the defendant to prove the cattle did not belong to plaintiff's *house*. As stated earlier it is a presumption of law that the cattle found at a kraal belong to the deceased and on his death they devolve on the legal heir according to Native Law and Custom. That onus was not discharged to the satisfaction of the Native Commissioner who, after all, had the witnesses before him and he was in a much better position to judge where the truth lies.

In his reasons for judgment the Native Commissioner states that the plaintiff's conduct in Court, as well as in the matter generally, was unsatisfactory and only after the decision in the estate enquiry had gone against him did he seek to establish his right to a large portion of the estate.

On the other hand, according to the Native Commissioner, the defendant's evidence was straightforward and plain reasoning and is strongly supported by his half-brother, Philemon, in another *house*.

In my opinion the appeal fails.

King (Member): I concur.

Balk (Permanent Member): The facts emerge from the learned President's judgment.

As it is implicit in the evidence that all the cattle concerned were found in the kraal of the parties' late father, Nomdanda, on his death and as it is common cause that the defendant is the general heir of Nomdanda (hereinafter referred to as "the deceased"), the Native Commissioner *a quo* properly placed on the plaintiff the onus of proving that those cattle were the property of the *house* to which he belonged, see Mcunu *v.* Mcunu, 1939, N.A.C. (T. & N.), 28.

The Native Commissioner's conclusion that the defendant's evidence was strongly supported by that of his half-brother, Philemon, does not appear to me to be justified in that the latter's evidence cannot be regarded either as consistent or as against his own interest seeing he stated therein that he claimed as his property some of the cattle left by the deceased after having intimated that they all belong to the latter. But it seems to me that even if Philemon's testimony be discarded, the inconsistencies in the evidence for the plaintiff on most material points are so serious that considered in conjunction with his previous unsuccessful claim that he was the deceased's general heir, they lead to the inescapable conclusion that the plaintiff, having failed in his earlier action, has cloaked his present claim in other guise with a view to securing cattle to which he is not entitled. That being so and in the light of the judgment in *Mcunu's* case (*supra*) which is apposite in all respects here, it seems to me that the Native Commissioner cannot be said to have erred in entering a full judgment for the defendant in the instant case.

I therefore agree that the appeal should be dismissed with costs.

For Appellant: Mr. C. W. G. Cox, of Messrs. S. E. Henwood & Co., of Vryheid.

Respondent in Person.

NOORDOOSTELIKE NATURELLE-APPÈLHOF.

N.A.H. SAAK No. 37/53.

NDHLOVU *teen* **MASUKA.**

VRYHEID: 8 Julie 1953. Voor Steenkamp, President, Balk en King, Lede van die Hof.

PROSESREG.

Praktyk en Prosedure—Vertraging van menige jare by instelling van geding wat kragtens Naturellereg behoort beslis te word—Vereistes—Vertraging tot nadeel van verweerder gestrek.

Opsomming: Eiser het verweerder gedagvaar vir die terugbetaling van *lobolo* deur hom aan verweerder betaal, aangesien die gebruiklike verbinding, ten opsigte waarvan die *lobolo* betaal is, nie plaasgevind het nie. Die eis het menige jare voor die instelling van die geding ontstaan.

In 'n meerderheidsuitspraak waarmee Steenkamp, President, verskil het, is dit:—

Beslis: Dat die teenstrydighede en onwaarskynlikhede in die getuienis vir die eiser sulks is dat daardie getuienis nie aanneemlik is nie, en gevolglik kan die eiser se verduideliking vir die vertraging van menige jare by die instelling van die onderhawige geding ook nie aangeneem word nie.

Verder beslis: Dat dit bowendien blyk dat twee van die verweerder se hoofgetuies in die tussentyd oorlede is, en dat dit volg dat die gemelde vertraging tot die nadeel van verweerder gestrek het.

Verder beslis: Dat in geval van eise wat menige jare gelede ontstaan het en wat kragtens Naturellereg, waarin verjaring nie van toepassing is nie, behoort beslis te word, is die vereistes dat—

(*a*) die duidelikste bewys dat die eis gegrond is gelewer moet word;

(*b*) genoegsame redes vir die vertraging by die instelling van die geding aangevoer moet word; en

(*c*) dat bewys, dat die gemelde vertraging nie die teenparty benadeel het nie, gelewer moet word.

Sake waarna verwys is:

Mafuleka teen Dinga, 1945, N.A.H. (T. & N.), 54.

Cebekhulu teen Cebekhulu, 1947, N.A.H. (T. & N.), 78.

Appèl van die Hof van die Naturellekommissaris, Utrecht.

Steenkamp (President): Dissentiente:—

In die saak is daar geen twyfel dat eiser aan verweerder sekere beeste as *lobolo* betaal het nie. Die eiser beweer dit was sewe beeste maar verweerder gee aan die hand dat dit net vyf beeste was. Die Naturellekommissaris, in sy feite wat hy bewys gevind het, meld net dat 'n sekere aantal beeste betaal was as deel van *lobolo*. Die huwelik het nie plaasgevind nie en daarom moes die verweerder die beeste terugbetaal die hy ontvang het as *lobolo*.

Die verweerder gee aan die hand dat hy eers twee beeste terugbetaal het en na dit 'n derde bees oorhandig het aan die Induna, Suzela, en dat Suzela die bees geslag het, die vleis verkoop het vir £8. 10s. en die geld aan eiser se vrou oorhandig het. Die verweerder gaan verder in sy getuienis en doen aan die hand dat die £8. 10s. terugbetaal was in die plek van die drie beeste.

Die Naturellekommissaris, so blyk dit vir my, het sy uitspraak meer baseer op die feit dat die eiser vertraag het in die uitreiking van proses. Dit is waar, die eiser het baie jare gewag voor hy die dagvaarding uitgereik het, maar hy gee 'n goeie rede hiervoor en dit is dat na verweerder twee beeste terugbetaal het en belowe het om die ander terug te gee hy verdwyn het. Alhoewel die Hof in die verlede kennis geneem het waar 'n onnodige vertraging plaasgevind het, dit nie vergeet moet word nie dat met Naturellesake vertraging heelwaarskynlik plaasvind omdat die verweerder nie die skuld ontken nie. Toe die verweerder die twee beeste aan eiser terugbetaal het het hy nie ontken dat hy verdere beeste skuldig is nie en my ondervinding is dat waar 'n verweerder nie 'n skuld ontken nie die eiser hom altyd tyd sal gee om die skuld te vereffen en net wanneer 'n verweerder dit ontken sal 'n eiser stappe doen om 'n saak teenoor die verweerder in die Hof te begin.

Ek kan nie die getuienis van die verweerder, waar hy sê dat eiser tevrede was met een bees wat vir £8. 10s. verkoop was in plaas van drie beeste, glo nie. Die getuienis van die verweerder klink vir my nie waar nie. Volgens die geding wat ingestel was het die eiser beweer dat net vyf beeste betaal was maar gedurende die verhoor van die saak het hy dit gewysig na sewe en dat daar nog 'n balans van vyf aan hom terugbetaal moet word. Ek is nie so seker dat die balans vyf beeste was nie, maar ek is tevrede op een aspek van die saak en dit is dat die verweerder ten minste die eiser nog drie beeste skuld.

Die verweerder het goed geweet dat wanneer hy *lobolo* beeste moet terugbetaal hy dit net aan die betaler kan doen. Sy getuienis, waar hy beweer dat hy die beeste aan Suzela, 'n Induna, terugbetaal het, kan ek nie glo nie. Myns insiens is eiser geregtig op die terugbetaling van drie beeste en ek reken die appèl moet met koste gehandhaaf en die Naturellekommissaris se uitspraak verander word na—

„ Vir eiser vir drie beeste en koste ".

Die meerderheid van die Hof is egter van mening dat die appèl van die hand gewys moet word.

Balk (Permanente Lid):—

Die bestrede feite kom te voorskyn uit die uitspraak van die geleerde President.

Ek is die mening toegedaan dat, soos deur die Naturellekommissaris *a quo* bevind, die teenstrydighede en onwaarskynlikheid in die getuienis vir die eiser, waarna deur die Naturellekommissaris in sy redes vir uitspraak verwys word, sulks is dat daardie getuienis nie aanneemlik is nie. Gevolglik kan die eiser se verduideliking vir die vertraging van menige jare by die instelling deur hom van die teenwoordige geding ook nie aangeneem word nie. Bowendien blyk dit uit die getuienis dat twee van die veweerder se hoofgetuies in die tussentyd oorlede is. Dit volg dat die gemelde vertraging tot die nadeel van die verweerder gestrek het.

Soos deur hierdie Hof herhaaldelik vasgestel in geval van eise soos die onderhawige wat menige jare gelede ontstaan het en wat kragtens Naturellereg, waarin verjaring nie van toepassing is nie, behoort beslis te word, is die vereistes dat—

(*a*) die duidelikste bewys dat die eis gegrond is gelewer moet word;

(*b*) genoegsame redes vir die vertraging by die instelling van die geding aangevoer moet word; en

(*c*) dat bewys dat die gemelde vertraging nie die teenparty benadeel het nie gelewer moet word.

[Sien Mafuleka teen Dinga, 1945, N.A.H. (T. & N.), 54, Cebekhulu teen Cebekhulu, 1947, N.A.H. (T. & N.), 78, en die sake daar aangehaal.]

Dit volg dat die appèl behoort met koste van die hand gewys te word.

King (Lid): Ek stem saam met my broer Balk.

Namens Appellant: Mnr. D. B. Hine in opdrag van mnre. S. E. Henwood & Kie., Vryheid.

Namens Respondent: Mnr. H. L. Myburgh in opdrag van mnr. H. T. W. Tromp, Utrecht.

NORTH EASTERN NATIVE APPEAL COURT.

N.A.C. CASE No. 23/53.

KUNENE *v.* KUNENE.

PIETERMARITZBURG: 17th July, 1953. Before Steenkamp, President, Balk and Bridle, Members of the Court.

COMMON LAW.

Immovable property—Acquisition by unexempted major Native woman—Actions involving ownership of immovable property arise out of Common Law.

Natal Code of Native Law: Sections twenty-seven (2) *and* twenty-eight (1).

Summary: Plaintiff, an unexempted unmarried major Native woman, alleged that she had purchased a certain piece of land, but in order to overcome certain difficulties raised by the Registrar of Deeds, the land was registered in the name of Alpheus Kunene, in trust for her. She now claims an order compelling Alpheus' estate to have the land registered in her name. The Native Commissioner having given judgment for defendant with costs, plaintiff noted an appeal to the Native Appeal Court.

In a majority judgment, with which Balk, Permanent Member, dissented:—

Held: That section *twenty-eight* (1) of the Natal Code of Native Law (1932) indicates that a Native woman may acquire immovable property and if she has acquired it she may apply for emancipation, and that it was never the intention that a Native woman must first apply for emancipation before she could acquire immovable property.

Held further: That there is no doubt that the plaintiff is a major spinster and that she acquired the property in question for her own benefit and not for the benefit of the person in whose name it was transferred.

Held further: That plaintiff's claim amounts to a claim for the rectification of the title deed and that the Court is entitled to rectify any deed of sale or any agreement concerning immovable property.

Cases referred to:

Mzimande *v.* Phungula, 1, N.A.C. (N.E.), 386.

Ngwenya *v.* Manzini, N.A.C. (N.E.), Case 98/52, not reported.

Ex parte Minister of Native Affairs: *in re* Yako *v.* Beyi, 1948 (1), S.A. 388 (A.D.).

Statutes, etc., referred to:

Section *eleven* (3) of the Native Administration Act, 1927.

Section *two* of Act No. 12 of 1884 (Natal).

Section *six* of Act No. 49 of 1898 (Natal).

Sections *twenty-seven* (2), *twenty-eight* (1) and *one hundred and forty-four* (2) of the Natal Code of Native Law, 1932.

Appeal from the Court of the Native Commissioner, Pietermaritzburg.

Steenkamp (President):—

It is not necessary at this stage to set out the summons and pleadings in detail. It is sufficient to state that the plaintiff bases her claim on the allegation that some years ago she acquired certain property at Edendale in the district of Pietermaritzburg. She, being a woman, there were certain difficulties raised by the Registrar of Deeds in transferring immovable property to a woman. Arrangements were then made for the property to be transferred into the name of Alpheus Kunene (hereinafter referred to as "the deceased") who, in the present proceedings, is cited as the defendant, but since the issue of the summons he has died and his heir, Micah Mzimela, has been substituted as the defendant.

The property in question was duly transferred into the name of the deceased during the year 1936—*vide* Deeds Registration No. 1136/1936.

In the proceedings before the Native Commissioner, after the point was raised, one Ngila Kunene was appointed as *curator ad litem* to assist the plaintiff in her action.

The Native Commissioner, in granting judgment for defendant with costs, has stated in his written judgment that plaintiff being an unexempted and unemancipated Native woman, and subject to the Natal Code of Native Law, she could not and cannot have any proprietary rights in the property in dispute. This opinion of the Additional Native Commissioner would not appear to be correct and I wish to deal with that before the merits of the case are considered.

Now section *twenty-seven* (2) of the Natal Code of Native Law provides that a Native female is deemed a perpetual minor in law and has no independent powers save as to her own person and as specially provided in this Code. That section surely can only be invoked if and when we deal with an action arising out of Native Law.

Now questions involving ownership of immovable property can only arise out of Common Law and when we deal with a case of that nature then I think we should disregard any question of Native Law insofar as capacity is concerned. I am strengthened in this view by the provisions of section *six* of Act No. 49 of 1898 (Natal) where it is specifically stated *inter alia* that cases involving questions of ownership of immovable property or the question of present or future title thereto or rights therein, etc., shall not be deemed to be Native cases within the meaning of that Act.

I go further and wish to quote section *eleven* (3) of the Native Administration Act wherein it is mentioned that the capacity of a Native to enter into any transaction or to defend his rights in any Court of law shall, *subject to any statutory provisions affecting any such capacity of a Native, be determined as if he were a European.*

If it had been the intention that section *twenty-seven* (2) of the Code was to be applicable to all Native cases irrespective whether Native Law or Common Law should be applied, then it is not understood why section *twenty-eight* (1) of the Code should open with the following words:—

> "Any unmarried female, widow or divorced woman who is the owner of immovable property may apply to be emancipated."

That section indicates that a Native woman may acquire immovable property and if she has acquired it then she may apply for emancipation. I am therefore satisfied that it was never the intention that she must first apply for emancipation before she could acquire immovable property.

In the instant appeal there is no doubt that the plaintiff, an old woman of eighty-two, is a spinster and that she acquired this property for her own benefit and not for the benefit of the person in whose name it was transferred, and which was only done to overcome some difficulty raised by the Registrar of Deeds.

The Native Commissioner has, however, found proved that the property in dispute and the ownership therein is vested in the estate of the late Alpheus Kunene. He has also found proved that the plaintiff did not buy the property in dispute from the late C. H. Stott as alleged in her summons.

I do not agree with these findings by the Native Commissioner and I will deal with these in the light of the notice of appeal which was lodged by the plaintiff against whom the judgment had been granted.

The grounds of appeal read as follows:—

> "1. The judgment was against the weight of the evidence in that—
>
> (*a*) the Native Commissioner erred in finding that the appellant (plaintiff) did not buy the property in dispute as alleged in her statement of claim;
>
> (*b*) the Native Commissioner failed to appreciate that appellant (plaintiff) agreed to the property being registered in the name of Alpheus Kunene as trustee for her, and not as absolute owner thereof.
>
> 2. The judgment was contrary to law in that—
>
> (*a*) the Native Commissioner erred in law when he held that appellant, who is a spinster, being an unexempted and unemancipated Native woman could not and cannot have any proprietary rights in the property in dispute;
>
> (*b*) judgment should have been for the plaintiff (appellant) with costs."

The property in dispute is described as certain piece of freehold land, namely: Subdivision No. 6 of Lot No. 214 of Edendale No. 775, situate in the County of Pietermaritzburg, Province of Natal, in extent one (1) rood twenty-nine decimal three five (29·35) perches, registered in the Deeds Registry Office, Pietermaritzburg, in the name of Alpheus Kunene, under No. 1136/1936 (i.e. the deceased).

In the summons the plaintiff avers that she purchased this property on the 6th February, 1928, by written agreement from the late C. H. Stott, the said property being in extent one rood and 29·35 perches, for the sum of £12 upon which she built premises for her own occupation and accommodation and paid for the same in full and has resided on the said premises ever since.

She also avers that by reason of difficulties in regard to transfer to herself she asked that transfer be passed in favour of the deceased who, at the time, claimed to be her trustee and guardian and agreed thereto.

Now, plaintiff's prayer is for an order cancelling the transfer of the property in deceased's name; alternatively, by amendment showing the deceased as her trustee and holding the property in trust for herself; further alternatively, the defendant should be ordered to transfer the property direct to herself as may be required by the Deeds Office Laws and Regulations; alternatively, failing compliance with the Court's order defendant pay the plaintiff the sum of £300 for and as compensation for the property so wrongfully and illegally transferred to the deceased into his own name.

A written plea was not filed but there is recorded a verbal plea submitted by defendant's attorney and this reads as follows:—

"(1) Defendant denies that plaintiff is entitled to ownership of the property in dispute and contends that plaintiff is entitled to the usufruct thereof only.

(2) Defendant contends that the ownership of the property vests in the estate of the late Alpheus Kunene."

From the evidence adduced on behalf of the plaintiff I have no doubt in my mind that the probabilities are all in her favour that the property in question was purchased by her and as there were certain difficulties, already referred to, in obtaining transfer into her name, she gave Mr. Varley, the attorney who acted for her, permission to transfer the property to her brother, Alpheus Kunene, the deceased.

The absence of an effective written agreement between Mr. Stott, the seller, and the plaintiff on the one part is not such that it can be held that the deceased was the purchaser. It will be observed that no written agreement between Mr. Stott and the deceased had been handed in. What we have on the records are the declaration for seller, i.e. declaration signed by Mr. Stott that he had sold the property to the deceased, and a declaration signed by the deceased, as purchaser, that he had purchased the property from Mr. Stott, but we must not overlook the fact that these declarations were signed to enable the deceased to obtain the transfer into his name.

There is sufficient evidence on record to show that it was the plaintiff's intention to purchase the property for herself and the present action is really a claim for the rectification of the title deed. The Court is entitled to rectify any deed of sale or any agreement concerning immovable property as was laid down in a recent case decided by this Court, *vide* Ngwenya *v.* Manzini, decided at Pretoria on the 13th March, 1953, Case No. 98/52, not reported.

Defendant did not adduce any evidence and his attorney, who appeared for him in the Court below, mentioned that defendant knew nothing about the alleged agreement between the plaintiff and the deceased and that all other persons who could have given material evidence are since deceased.

The argument was also advanced that if plaintiff is genuine in her allegations she should have taken action some years ago to have the title deed rectified. In my opinion the delay, viz., five years, mentioned by the Additional Native Commissioner, is not so long that this should militate against the plaintiff, who after all, is an old woman of about eighty-two years. Although she says in cross-examination that Stephen Mini told her that the property would be registered in Alpheus' name in trust for her, her evidence as a whole gives the impression that she had left the matter in the hands of the late Alpheus Kunene and Mr. Varley, and was in her own mind satisfied that the transaction would be so arranged that she would still be the full and effective owner of the property in question. In other words that she only became uneasy about the position when she heard, about three years ago, that it was Alpheus' intention to sell the property. The mere fact that the deceased in his last will and testament mentioned that he leaves this property to the plaintiff to be used by her during her lifetime is already sufficient indication that he knew the property was purchased by her but he apparently wanted the property, after her death, to devolve on one of his own children.

The evidence as a whole points all in favour of the plaintiff. There are certain discrepancies in the evidence given by the plaintiff but sight must not be lost of the fact that she is an old woman and her memory, at this stage, might be faulty. The mere fact of Mr. Varley, the attorney, obtaining an authority from the plaintiff to transfer the land into the name of the deceased is an inescapable conclusion that she was the purchaser and entitled to transfer if certain difficulties had not been raised by the Registrar of Deeds, and Mr. Varley, to cover himself, obtained the authority from the plaintiff, who at the time, in the circumstances, had no other choice in the matter.

Whatever defects exist in the deed of sale (Exhibit "A") signed by the plaintiff are cured by the fact that there has been part performance by the plaintiff as envisaged in section *two* of Act No. 12 of 1884 (Natal).

In my opinion the appeal should be allowed with costs and the Native Commissioner's judgment altered to read as follows:—

"For plaintiff with costs and it is ordered that—

(1) the defendant, in his capacity as Executor Testamentary of the estate of the late Alpheus Kunene, is hereby ordered to cause the immovable property in question, namely certain piece of freehold land, namely: Subdivision No. 6 of Lot No. 214 of Edendale No. 755, situate in the County of Pietermaritzburg, Province of Natal, in extent one (1) rood twenty-nine decimal three five (29·35) perches, to be transferred from the estate of the late Alpheus Kunene, in his lifetime an unexempted Native, to Catherine Kunene (plaintiff), an unmarried major Native woman, within six (6) months from the date of this judgment;

(2) in the event of the defendant failing to perform all or any of such acts as are required to have the transfer specified in subparagraph (1) above effected within the period stipulated in that subparagraph, the Clerk of the Native Commissioner's Court at Pietermaritzburg is hereby authorised to perform all such acts on his behalf and to sign all the necessary documents required to give effect to the transfer involved;

(3) All transfer and other duty that might be payable to be borne by the defendant in his capacity as Executor Testamentary of the estate of the late Alpheus Kunene."

It is further ordered that, as regards costs of appeal, the fees under Items 4 and 5 of Table B contained in the Annexure to the Rules of this Court, published under Government Notice No. 2887 of 1951, should, be increased to £3. 3s. each in terms of the relative note at the foot of that table.

Bridle (Member): I concur.

Balk (Permanent Member): Dissentiente:—

The issues involved emerge from the learned President's judgment with which I regret I do not agree *in toto* in that, whilst I am also of the opinion that the Acting Additional Native Commissioner *a quo* misdirected himself in the instant case in so far as the legal aspect is concerned, it seems to me that he cannot properly be said to have erred in his judgment on the facts.

Dealing firstly with the ground of appeal relating to the legal aspect, the Acting Additional Native Commissioner commented as follows in regard thereto in his reasons for judgment:—

> "In any event, plaintiff being an unexempted and unemancipated Native woman, and subject to the Natal Code of Native Law, she could not and cannot have any proprietary rights in the property in dispute. Even if she had satisfied this Court that she did in fact buy the property in question, it would appear that action against defendant for the recovery thereof should have been instituted by the person whom she now alleges is her guardian, viz., Abraham, the son of Emily and Toute Kumalo (See page 25 of the original record)."

But the Acting Additional Native Commissioner, having, as noted by him in the relative record of the proceedings at the conclusion of the trial, applied Common Law in the determination of the instant case, should have held that the capacity of the plaintiff both to institute this action and to own immovable property also fell to be determined according to that system of law, se *ex parte* Minister of Native Affairs: *In re* Yako *v.* Beyi, 1948 (1), S.A. 388 (A.D.), at pages 401 to 403, and Nzimande *v.* Phungula, 1 N.A.C. (N.E.), 386 at page 387. Here it should be added that, as in the last-mentioned case so in the instant one, the exceptions to the rule that the system of law applied dictates the capacity of the parties, have no application. The exceptions to which I refer, arise from the use of the words "subject to any statutory provision affecting any such capacity of a Native" in sub-section (3) of section *eleven* of the Native Administration Act, 1927, as amended, and from proviso (*b*) to that sub-section. These exceptions do not obtain in the instant case firstly because no statutory provision of the nature in question, including the Natal Code of Native Law, published under Proclamation No. 168 of 1932, appears to be involved, that Code having no application in this instance by virtue of the provisions of section 144 (2) thereof; and secondly because neither

of the parties falls within the ambit of proviso (*b*) referred to above, i.e., neither is a Native woman who is a partner in a customary union and who is living with her husband, the plaintiff in the instant case being a major spinster and the defendant a male.

As under Common Law it is competent for a major spinster both to own immovable property and to bring an action in connection therewith in her own right, the Acting Additional Native Commissioner erred in not ruling accordingly. In this connection it must be added that the application by the Acting Additional Native Commissioner of Common Law in the instant case was not challenged on appeal.

Turning to a consideration of the merits of the appeal in so far as the facts are concerned, the plaintiff's testimony appears to me to be so unsatisfactory that it cannot be accepted in the absence of corroboration. That this is the position will be apparent from what follows. The plaintiff first stated that after she had paid the purchase price for the land in question she asked her late brother, Alpheus (hereinafter referred to as "the deceased") to assist her in effecting its transfer and that subsequently the deceased produced the relative title deed in his own name. She admitted that she had signed the document authorising the transfer of the land to the deceased (Exhibit "B") but added that she had only been requested to sign that document and that its contents had not been explained to her nor did she question them. Later in reply to the Court, she stated that she had been told that the document—(Exhibit "B")—was to arrange for the deceased to be her guardian and that the deceased had never shown her the relative title deed. Thereafter she stated under cross-examination that she had been told that the land would be registered in the deceased's name in trust for her and yet on her own admission she took no action to rectify the position for a number of years after learning that the land had been transferred to the deceased outright and not in trust for her. This factor to my mind indicates that the plaintiff on finding that she could not obtain transfer of the land in her own name, probably for the reason suggested by her witness, the conveyancer, Varley, i.e., because the Deeds Office then refused to register immovable property in the name of unexempted and unemancipated Native women, agreed to the transfer of the land outright to the deceased in accordance with the document (Exhibit "B") on the understanding that she was to have a life usufruct thereof as provided for in the deceased's will (Exhibit "D"). This conclusion also gains support from the fact that the plaintiff, according to her evidence, delayed in instituting the instant action for years and eventually brought it only after she had heard that the deceased had stated that he intended selling the land. Again the plaintiff stated in her evidence that at the discussion that took place after she had heard the deceased had said he intended selling the land and at which the deceased and she and her witnesses, Francis Kunene and her sister, Emma Kumalo, were present, the deceased undertook to have the land transferred to Emma's son to whom she (plaintiff) desired to bequeath it. Emma's evidence in this respect is somewhat different. She stated that at that interview the deceased had said he was holding the land on behalf of the plaintiff and that when the plaintiff intimated that she wished to bequeath the land to her (Emma) and her son, the deceased said she and her son should leave their names with him. It is hardly necessary to add that Emma's testimony falls to be treated with reserve as she obviously has an interest in the land. Moreover it is manifest from the evidence of the plaintiff's witness, Francis Kunene, that the deceased did not, at the interview in question, give the undertaking mentioned by the plaintiff and that the deceased also did not thereat intimate that he was holding the land for the plaintiff and did not then say that Emma should leave her and

her son's names with him. I do not think that Francis' further testimony that after the plaintiff refused to stay with the deceased as he had requested, he said he had nothing to do with the land and was not responsible for the rates thereon, advances the plaintiff's case, as that testimony is, as contended by Counsel for the respondent, also consistent with the proposition that a life usufruct of the land in the plaintiff's favour had been agreed upon between her and the deceased as provided for by the latter in his will (Exhibit " D "). The remaining witness for the plaintiff, viz., the conveyancer, Varley, after testifying that the land had been bought by the plaintiff, stated that he could only suggest that the land had been registered in the deceased's instead of the plaintiff's name because the Deeds Office at that time refused to register immovable property in the name of unexempted and unemancipated Native females (such as the plaintiff was at the time). Varley admitted that he could not recall why it was found desirable to register the land in the deceased's name, and this admission on his part is readily understandable in the light of the very lengthy interval that had elapsed between that registration and his giving evidence in the instant case, i.e., almost seventeen years. This factor together with Varley's suggestion referred to above indicates that he could not recollect on what terms the land had been transferred to the deceased. His evidence, thus, also does not advance the plaintiff's case. Accordingly the plaintiff's evidence, which cannot be regarded as satisfactory for the reasons given above, has not been corroborated. That being so and as there is nothing specific in the document (Exhibit " B ") indicating that the deceased was to hold the land in trust for the plaintiff on its transfer to him, the presumption that the deceased became owner of the land on such transfer stands and the plaintiff's claim thus fails. It follows that the Acting Additional Native Commissioner cannot properly be said to have erred in entering judgment for the defendant on the facts and the appeal should therefore be dismissed with costs.

For Appellant: Adv. J. Meachin, instructed by Mr. J. Hershensohnn, of Pietermaritzburg.

For Respondent: Adv. D. L. Shearer, instructed by Mr. D. Lowe, of Pietermaritzburg.

NORTH EASTERN NATIVE APPEAL COURT.

N.A.C. CASE No. 26/53.

NGUBO *v.* **BENGANI.**

PIETERMARITZBURG: 17th July, 1953. Before Steenkamp, President, Balk and Bridle, Members of the Court.

COMMON LAW.

Ejectment from immovable property—Estoppel by conduct in pais.

Damages for holding over—Tenant at will—Damages payable only after notice to vacate.

Summary: The facts, which are lengthy, appear fully from the judgment below.

Held: That as plaintiff, through his agent, had given the defendant reasonable opportunity to take any steps to prevent the transfer of the property to the former, any inaction on the part of the defendant, as is apparent in this case, must certainly act as an estoppel, and that the English principle of estoppel by conduct *in pais* is a principle of Roman Dutch Law.

Held further: That there can be no doubt that defendant and his wife were tenants at will during the time the property was registered in the name of L. P. Msomi and all this Court has to concern itself with is whether proper notice had been given to them to vacate the property in question.

Held further: That defendant did not deny that he had received the letter (notification to vacate) and therefore the preponderance of probability is that he and his wife duly received the notification to vacate the property.

Held further: That if there had been proper notice to vacate then the plaintiff is entitled to an order of ejectment and to damages which the Court below has found to have been suffered by the plaintiff to the extent of £3 per month being the rental value of the property.

Held further: That as there was no agreement to pay rent, damage can only be assessed after the termination of the period of notice to vacate.

Cases referred to:

Morum Bros. *v.* Nepgen, 1916, C.P.D. 392.

Nene *v.* Nene, 1948, N.A.C. (T. & N.), 14.

Appeal from the Court of the Native Commissioner, Pietermaritzburg.

Steenkamp (President):—

Plaintiff (now respondent) sued the defendant (now appellant) for—

(1) the payment of £69 being rental owing or alternatively which is a reasonable rental for the use and occupation of certain immovable property;

(2) ejectment; and

(3) damages for holding over estimated at £5 per mensem as from 1st March, 1952, to date of ejectment.

Plaintiff in his claim also avers as follows:—

"3. In or about April, 1950, plaintiff purchased a certain piece of land known as Lot 3, Block Q, Georgetown, County of Pietermaritzburg, from a certain L. P. Msomi. Defendant was at that time and still is in occupation of the said property.

4. At the time of the purchase plaintiff agreed to allow defendant to remain in occupation of the said property for a period of 12 months at a reasonable rental payable by defendant and defendant was notified that £3 was considered a reasonable rental.

5. On 24th November, 1951, plaintiff gave defendant, through his wife who has acted as his agent throughout, three months' notice to vacate the said premises on the grounds that he intended to occupy the property himself, but defendant had failed to comply with the terms of the said notice."

Defendant in his plea denies knowledge of the alleged sale of the property to plaintiff but admits he resides on the property. He denies that he ever entered into a lease with plaintiff. He does not admit the allegations in paragraph 5 of the claim and avers that the said L. P. Msomi was never the owner of the property but merely held it on behalf of one Mathilda Jane Gumede (since deceased) and in trust for her. Defendant pleads further that despite demands made, the said L. P. Msomi failed and neglected to have the said property registered in the name of the deceased.

Paragraphs 7, 8, 9 and 10 of the plea read as follows:—

"7. The heirs to her Estate are defendant's wife, to whom defendant is married out of community of property, and her two sisters.

8. Defendant has ascertained from the Registrar of Deeds that the plaintiff has obtained transfer of the said property and avers that the said L. P. Msomi fraudulently disposed of the property to plaintiff. The said L. P. Msomi having no rights, title or interest in the property at the time he sold it to plaintiff.

9. Defendant further avers that plaintiff acquired no better title to the property than L. P. Msomi possessed himself.

10. Defendant prays for stay of these proceedings until his wife and sisters have brought an action against L. P. Msomi for the necessary relief."

The Native Commissioner entered judgment as follows:—

"Order of ejectment as prayed. Damages awarded to Plaintiff in the sum of £3 per month as from 1st December, 1951, to date of ejectment. Defendant to pay costs."

An appeal has been noted against the finding of the Native Commissioner and the grounds read as follows:—

"1. (*a*) Plaintiff failed to prove that defendant was and is still in occupation of the property.

Alternatively:—

(*b*) The plaintiff failed to discharge the onus of proving that defendant had received notice to vacate the property.

2. The Assistant Native Commissioner erred in refusing to grant a stay of the proceedings at the commencement of the trial.

3. The Assistant Native Commissioner erred in awarding damages to the plaintiff on the claim for 'holding over' since there never had been an agreement of lease between plaintiff and defendant.

4. In any event the amount awarded is upon the evidence excessive.".

Counsel for appellant *in limine* applied for the adjournment of the hearing of appeal on the grounds that an action is now pending in another Court in connection with the same property. A similar application was made in the Court below for stay of proceedings until defendant's wife and her sisters have brought an action against L. P. Msomi for the necessary relief. That application was refused and it formed ground 2 of the notice of appeal.

This Court likewise refused the application made *in limine* as no good purpose could possibly be served by an adjournment of the appeal as will be seen later on in this judgment.

Counsel thereupon intimated that he will not argue on the question of the stay of proceedings, i.e. he is not pressing ground 2 and will confine his arguments to ground 4 of the notice of appeal.

The undisputed facts are that on 28th March, 1950, a deed of sale was entered into between Lancelot Peter Msomi and the plaintiff, Redvers Robert Bengani, whereby plaintiff purchased Lot 3, Block Q, situate in Georgetown, County of Pietermaritzburg, Province of Natal, in extent 1 rood 10·9 perches, held under Deed of Transfer No. 654/1934, dated 5th March, 1934. The title deed in respect of this property was in the name of the seller, the said L. P. Msomi (hereinafter referred to as " the seller ").

On 26th April, 1950, the estate agent, acting for both the plaintiff and the seller, notified Janet Ngubo, the wife of the defendant, that plaintiff had purchased the property in question and that in accordance with verbal arrangements made with the seller the purchaser (i.e. the plaintiff) is to allow her to remain on the property for a period not exceeding twelve months during which time a reasonable rental will be payable by her. She was invited by the agent, Mr. Forsyth, to call on him so that the matter may be discussed and arrangements made.

A response to that letter was a communication, dated 17th May, 1950, from Messrs. C. C. C. Raulstone & Co., Attorneys acting on behalf of Janet Ngubo.

The material contents of that letter (Exhibit " G ") read as follows:—

> " Briefly the position is that L. P. Msomi sold the said property to our client's late mother during 1934, but transfer was never registered in the Deeds Office. We hold receipts issued by Mr. Varley of Varley and Whitelaw, who acted on behalf of L. P. Msomi at the time, for payments on account of the purchase price of the property. Under the circumstances we deny that our client is liable for any rent in respect of the property ".

On 19th May, 1950, the receipt of Exhibit " G " was acknowledged by Mr. Forsyth with the promise that the seller will be communicated with. On 7th October, 1950, Messrs. Raulstone & Co. wrote Exhibit " I " to Mr. Forsyth enquiring whether the seller has as yet been contacted. That letter was replied to on 13th October, 1950 (Exhibit " J ").

It is necessary to set out reply " J ", which reads as follows:—

> " We are in receipt of your letter of the 7th instant. We have written to L. P. Msomi, stating that R. R. Bengani is making arrangements for the liquidation of the balance of the purchase price, and telling him that he must be in a position to make a declaration to the effect that there has been no previous sale. To this letter we have received no reply.
>
> Have you a copy of the agreement entered into by your client's mother and Msomi?
>
> It would appear to us that your client should take steps to compel Msomi to pass transfer of the property to your client's mother's Estate, or else claim damages."

Messrs. Raulstone & Co. then wrote a letter, dated 9th November, 1950 (Exhibit " K "). That letter reads as follows:—

> " We acknowledge receipt of your letter of the 3rd instant and have to advise that our client has instructed us to take action in the matter.
>
> As far as payment of the purchase price is concerned we have to advise that we have in our possession a receipt issued by Mr. E. Varley for £15 being on account of the purchase price of the property at Georgedale bought from L. P. Msomi. This receipt is in favour of Janet Hazel and Doreen Gumede, and our client states that apart from this amount various other amounts were paid in reduction of the purchase price.

We would also point out that as far as we are aware the Deeds Office will allow an unexempted Native woman to take transfer of property, so that the sale would not be abortive as mentioned in your letter."

After this letter no further action was taken by the defendant or his attorneys and on 6th November, 1951, i.e. practically a year after Exhibit "K" was written, the property was transferred to plaintiff.

In this connection Mr. Forsyth, in his evidence on behalf of plaintiff, states in cross-examination:—

"In spite of all the letters claiming ownership by Janet Ngubo I still proceeded with the transfer. I have given every opportunity for her to take action to prevent the transfer" . . . I waited nearly 13 months before effecting transfer because Raulstone in Exhibit 'K' had said they had received instructions to take action."

Earlier in his evidence in chief Mr. Forsyth states that prior to receipt by him of Exhibit "K" he communicated telephonically with Raulstones urging them to do something about the matter as he proposed proceeding with the transfer from the seller to plaintiff.

It seems to me that the defendant, when it was discovered that the seller proposed transferring the property to the plaintiff, should have taken immediate steps to obtain an interdict against the transfer to the plaintiff but he, for reasons not known to the Court, remained passive and only when the present action for ejectment and payment of damages is taken is the defence raised that the seller had no right to transfer the property and that plaintiff consequently did not obtain good title to the property. The plaintiff, through his agent, gave the defendant reasonable opportunity to take steps and any inaction on the part of the defendant, as is apparent in this case, must certainly act as an estoppel. In the case of Morum Bros. *v.* Nepgen, 1916, C.P.D., 392, it was held that the English principle of estoppel by conduct *in pais* has been accepted by our Courts and is a principle of the Roman Dutch Law. It is however observed that no appeal is lodged against the finding that plaintiff obtained good title to the property.

Ground 1 of the appeal would appear to be frivolous as the whole case is based on the averment that defendant and his wife is in occupation of the property and that they refuse to vacate it.

I fail to see how the Native Commissioner's refusal to grant a stay of the proceedings at the commencement of the trial (as alleged in ground 2 of the notice of appeal) could possibly have assisted the defendant. Even assuming that the defendant in an action against the seller could establish that the seller had no right to sell the property, this could not effect plaintiff's title to the ground—registration of which was obtained by him after the defendant by his conduct, had acquiesced thereto.

Ground 3 is also without substance as we cannot get away from the fact that plaintiff was entitled to occupy the property on registration of transfer and any deprivation of that right calls for damages and I think damages based on rental value are reasonable. There is evidence that £3 a month is a fair rental value and in the absence of any rebutting evidence, I am not prepared to hold that the amount awarded is excessive provided I am satisfied that due notice had been given to the defendant to vacate the property.

There can be no doubt that defendant and his wife, Janet, were tenants at will during the time the property was registered in the name of L. P. Msomi and all this Court has to concern itself with is whether proper notice had been given to them to vacate the property in question.

There is uncontroverted evidence on record that plaintiff and his witness, Sonny Nduli, went to defendant's house and there delivered a letter from plaintiff's attorney addressed to defendant's wife, Janet Ngubo. A copy of this letter was handed in as Exhibit "L" and is a notification that plaintiff is now the registered owner of the ground in question and possession will be required on the 1st March, 1952.

Considerable argument has been advanced as to whether there had been proper delivery of the letter. The evidence is clear that the plaintiff and Sonny knocked at the door of the house, were invited to enter by a small child; the envelope was given to the child to hand over to her parents who were, on information given by the child, still in bed. They remained in the house for a considerable period but neither the plaintiff nor his wife appeared.

Defendant did not deny that he had received the letter and therefore the preponderance of probability is that he and his wife duly received the notification to vacate the property. Once this Court is satisfied that there had been proper notice to vacate then the plaintiff is entitled to an order of ejectment and to damages which the Court below has found to have been suffered by the plaintiff to the extent of £3 per month being the rental value of the property.

The basis on which the Court below assessed the damages seems to have been the only course that could have been followed. Nor can it be said that an amount based on £3 a month rental value is in any way excessive and in my opinion the appeal should be dismissed with costs.

As, however, there was no agreement to pay rent, damages can only be assessed after the termination of the period of notice to vacate namely the 28th February, 1952. Accordingly the date "1st March, 1952" is substituted for the date "1st December, 1951" appearing in the Native Commissioner's judgment.

Bridle (Member): I concur.

Balk (Permanent Member): Dissentiente:—

The issues involved emerge from the learned President's judgment with which I regret I do not agree.

The defendant stated in his plea that he did not admit that the plaintiff had, as averred in his summons, given him notice to vacate the premises in question and that he put the plaintiff to the proof thereof. The onus of proof in this respect thus rested on the plaintiff.

It is manifest from the evidence for the plaintiff that L. P. Msomi, the former registered owner of the premises who sold and transferred them to the plaintiff, had given the defendant and his wife the right to occupy those premises rent-free apparently for an indefinite period and that Msomi had advised the plaintiff thereof at the time of that sale. It follows that the defendant was a lawful occupier of the premises and that to found an action for the defendant's ejectment therefrom or for damages against him for holding over, the plaintiff had, after he became the registered owner of the premises, to give the defendent notice to vacate them, see Nene *v.* Nene, 1948, N.A.C. (T. & N.) 14 and the authorities there cited. Here it should be added that there is no evidence that Msomi either personally or through the agency of the plaintiff or any other person terminated the right he had given to the defendant to occupy the premises.

It is also manifest from the evidence of the plaintiff and his witness, Sonny Nduli, that the letter (Exhibit "L"), i.e. the letter written at the plaintiff's instance to the defendant's wife giving her notice to vacate the premises, and the copy of that letter intended for the defendant apparently for his information, were handed by the plaintiff to a child in the house occupied by the defendant and his wife for delivery to them; and there appears to be no proof that the child delivered that letter or the copy thereof to the defendant or his wife; nor that the contents of that letter or the copy thereof came to the latters' notice prior to the trial of the instant action; nor is there any indication in the evidence as to the age of the child. The defendant's and Sonny's testimony regarding the child's statements to them are hearsay and as such inadmissible in evidence. Moreover the letter (Exhibit "L") was directed solely to the defendant's wife in her personal capacity and not as the defendant's agent as averred in the summons. The reason therefore is given by the plaintiff's witness, Forsyth, an estate agent, who, after confirming in his testimony that he had written the letter (Exhibit "L") at the plaintiff's instance, stated that he did not think that notice had been given by him to the defendant as he had been informed that the defendant's wife was the occupier of the premises. And in all the other evidence the only mention of notice to vacate the premises having been given by the plaintiff is that contained in the letter (Exhibit "L") and the copy thereof.

Counsel for the respondent contended that, as it has not been denied in the evidence for the defendant that he and his wife had received the letter (Exhibit "L") and the copy thereof, the probability was that they did receive them. But to my mind such an inference is not justified since the defendant's wife, who was his only witness, does not appear to have been asked either by the defendant's or the plaintiff's attorney any question in regard to that letter or the copy thereof so that it may well be that her omission to deny their receipt in her evidence was inadvertent and not deliberate.

It therefore seems to me that it was not established that the defendant received notice to vacate the premises and since, as pointed out above, such notice to the defendant was essential to found the plaintiff's claims for the defendant's ejectment from the premises and for damages against him for holding over, it was not competent for the Acting Additional Native Commissioner *a quo* to have made the order for the defendant's ejectment nor to have awarded damages against him. The Acting Additional Native Commissioner does not appear to have given judgment on the first claim, i.e. on the claim for rent for the premises. As it is clear from the evidence that neither the defendant nor his wife agreed to pay such rent that claim also fails.

In the result I am of opinion that the appeal should be allowed with costs and that the Acting Additional Native Commissioner's judgment should be altered to read:—

> "On the first claim for defendant with costs. On the remaining two claims absolution from the instance with costs.".

For Appellant: Adv. J. H. Niehaus instructed by C. C. C. Raulstone & Co., Pietermaritzburg.

For Respondentt: Adv. N. James instructed by Francis Becker & Co., Pietermaritzburg.

NORTH EASTERN NATIVE APPEAL COURT.

N.A.C. CASE No. 33/53.

TSHABALALA *v.* TSHABALALA.

PIETERMARITZBURG: 17th July, 1953. Before Steenkamp, President, Balk and Bridle, Members of the Court.

LAW OF PROCEDURE.

Practice and Procedure—System of Law to be applied in Native Commissioner's Court.

Depositum—Deposit to be restored at some fixed future time or whenever depositor demands it.

Prescription—Extinctive prescription runs from date on which the right of action first accrued against the debtor.

Summary: Plaintiff sued defendant for £20 which he alleges was handed to defendant for safe keeping in or about 1935. Defendant pleaded that the claim had become prescribed. The pleadings did not reflect when demand for the return of the money was made.

The Native Commissioner, without any evidence having been adduced, entered judgment for defendant with costs.

In a majority judgment with which Balk, Permanent Member, dissented:—

Held: That the question of whether the Native Commissioner was correct in applying Common Law is beside the point and that it may well be that after evidence has been adduced it would be found that some other doctrine of law is applicable.

Held further: That in the contract of "*depositum*", the identical thing must be restored either to the depositor himself or to some third person at some fixed future time, or *whenever the depositor demands it.*

Held further: That the main plea lacks substance and defendant, if he was to succeed on the plea in bar, should have averred that summons was issued beyond the period allowed under the laws of prescription and that the depositor had delayed issue of summons to such an extent that prescription, reckoned from the date of demand for the return of the deposit, is applicable.

Cases referred to:

Cassimjee *v.* Cassimjee, 1947 (3), S.A., 701 (N.P.D.).

Ex parte Minister of Native Affairs: *in re* Yako *v.* Beyi, 1948 (1) S.A., 388 (A.D.).

Statutes, etc., referred to:

Section *three* (*c*) (1) of Act No. 18 of 1934.

Section *five* (1) (*d*) of Act No. 18 of 1934.

Appeal from the Court of the Native Commissioner, Ixopo.

Steenkamp (President):—

In the Native Commissioner's Court the plaintiff sued the defendant for £20 and costs.

The particulars of the claim read as follows:—

"2. Plaintiff avers that in or about the year 1935 defendant was handed the sum of twenty pounds (£20) by a woman named Matimosi Tshabalala for safe keeping.

3. The said money is the property of plaintiff, but defendant notwithstanding demand made, neglects or refuses to return the said sum of £20 to plaintiff who is entitled to same.".

The following plea was filed:—

"Defendant pleads that *ex facie* the summons and, in fact, plaintiff's claim is prescribed in that being a claim based solely upon Common Law it is brought after the lapse of three years and is therefore prescribed.

Alternatively, and in the event of defendant's plea in bar not being upheld but not otherwise the defendant pleads:—

(1) That he received the sum of £20 from one Mpamba Mkize for safe keeping on behalf of plaintiff.

(2) The arrangement with plaintiff or his agent was that defendant was to act as gratuitous depository, the contract being for the benefit of plaintiff.

(3) While the money was in the possession of defendant it was stolen by some person unknown.

(4) Defendant denies that there was any negligence on his part in permitting such money to be stolen and pleads that if there was any negligence it was not that degree of negligence which would entitle plaintiff to succeed in an action against defendant.

(5) Plaintiff was well aware of the fact that the money was kept in a suitcase and was aware of the risks attendant on the money being kept in this manner and he accepted such risks.".

Thereafter arguments on the plea in bar were heard. These arguments were firstly confined to the question as to whether Common Law or Native Law should be applied. The Native Commissioner adjourned the case for evidence to be led on whether or not the custom of *depositum* is known to Native Law. On resumption neither the attorney for plaintiff nor the attorney for defendant wished to lead evidence.

The Native Commissioner thereupon held and this is recorded in the proceedings, that—

"(i) money is something unknown in Native Law *ab initio;*

(ii) Native currency was and still is cattle;

(iii) 'depositum' is unknown in Native Law;

(iv) Common Law of South Africa therefore applies to this case;

(v) section 3 (2) (*c*) (i) applies to this case and therefore the plea in bar must succeed.";

and he entered judgment for defendant with costs. In the judgment in brackets appear the words: "(Plea in bar—prescription upheld).".

It is manifest from the Native Commissioner's judgment that he applied the law of "Depositum". Whether he was correct in doing so is beside the point and it may well be that after evidence has been adduced it would be found that some other doctrine of law is applicable.

An appeal has now been noted to this Court on the following grounds:—

"1. The Native Commissioner was wrong to apply the Common Law in this case as there is a well recognised Native Custom and legal principle which gives a remedy under Native Law, and Native Law should have been applied.

2. Even if the Native Commissioner was correct in applying Common Law, the contract of depositum is not prescribed by section *three* (*c*) (1) of Act No. 18 of 1934, and the Native Commissioner was wrong on holding that section included *depositum*.

3. Defendant's Plea with respect to *depositum* was that he was not liable on the ground that the money was stolen without negligence on his part—not that the contract of *depositum* was prescribed in 3 years. If the latter was defendant's intention, the plaintiff says it is bad in law.".

It seems to me that the manner in which the summons and the pleadings are drawn up leave much to be desired as nowhere is it specifically stated in the summons that a prior demand for the return of the subject matter deposited had been made, nor in the special plea in bar is it stated that the period of prescription had elapsed after demand had been made by the depositor for the return of the deposit. All that is stated in the summons is that defendant, notwithstanding demand, neglects or refuses to return the said amount of £20. This demand might have been made within a reasonable time before issue of summons or might have been made some years previously.

Assuming that the Native Commissioner was correct in applying the Common Law of *depositum* then I think he correctly held that section *three* (*c*) (1) of Act No. 18 of 1934 is applicable but what he has overlooked is the provisions of section *five* (1) (*d*) of the Act wherein it is stated that extinctive prescription shall begin to run from the date on which the right of action first accrued against the debtor. Now surely a right of action for the return of a deposit cannot accrue until such time as the creditor makes demand and the debtor remains *in mora*.

In the definition of *depositum* on page 77, Maasdorp, Volume II, Sixth Edition, it is mentioned that the identical thing must be restored either to the depositor himself or to some third person at some fixed future time, or *whenever the depositor demands it*.

We have no evidence or averment in the pleadings that the *depositum* was for a fixed time or if no time had been fixed that the depositor had made a prior demand for the return of the subject matter.

Paragraph 3 of the grounds of appeal are badly drawn up and are unintelligible. I do not see how plaintiff (appellant) can aver that prescription was not specially pleaded. This in fact was the main plea and paragraphs 1 to 5 are alternative pleas. The main plea lacks substance and defendant, if he wants to succeed on the plea in bar, should have averred that summons was issued beyond the period allowed under the laws of prescription and that the depositor had delayed the issue of summons to such an extent that prescription reckoned from the date of demand for the return of the deposit is applicable. It would then have been a question of evidence to decide that issue.

Counsel for Respondent (defendant) has quoted the case of Cassimjee *v.* Cassimjee, 1947 (3) S.A., 701 (N.P.D.), but in my opinion that case which is inconnection with rents collected on behalf of a third person has no application in the present action which was decided by the Native Commissioner on the doctrine of *depositum*. That case is therefore distinguishable from the instant action.

In the circumstances and in the interests of justice I am of opinion that the appeal should succeed with costs and the Additional Native Commissioner's judgment be set aside and the record returned for disposal on the issue involved in the light of the above remarks.

Bridle (Member):—

I agree that the appeal should be upheld with costs and that, in the interests of justice, the matter should be remitted to the Native Commissioner for further hearing, but as I come to this conclusion on other grounds I consider it advisable to set them out briefly.

Ex facie the summons, it is, in my opinion, not possible to determine what the exact nature and terms of the alleged contract were.

Paragraphs 2 and 3 of the particulars of claim read:—

"2. Plaintiff avers that in or about the year 1935 defendant was handed the sum of £20 (twenty pounds) by a woman named Matimosi Tshabalala for safe keeping.

3. The said money is the property of plaintiff, but defendant notwithstanding demand made neglects or refuses to return the said sum of £20 to plaintiff who is entitled to same.".

It will be noted that there is no averment that the woman, Matimosi Tshabalala, handed the money to defendant for safe keeping *on behalf of plaintiff*. The mere fact that in paragraph 3 of the claim plaintiff avers that the money was his property does not imply that either he or the woman, Matimosi Tshabalala, intended that defendant should hold the money on behalf of plaintiff.

That being so it was not possible for the Native Commissioner to decide whether or not Common Law should be applied and if so, whether or not the claim is prescribed, before hearing evidence as to the circumstances of the transaction alleged.

Balk (Permanent Member): Dissentiente.—

The averments in the plaintiff's (present appellant's) summons in so far as they are here material are that "in or about the year 1935 defendant was handed the sum of twenty pounds (£20) by a woman named Matimosi Tshabalala for safe keeping" and that "the said money is the property of plaintiff".

It is not clear to me from these meagre particulars what the true nature of the contract, if any, was between the parties to this action or, assuming that there was a contract between them, when that contract came into being; for it is not specified whether the deposit by Matimosi of the £20 with the defendant for safe keeping was on the plaintiff's behalf nor whether this money was the plaintiff's property prior to that deposit and, if not, how it became his property. It follows that there was no proper basis for determining *ex facie* the summons whether Common Law or Native Law should be applied in the instant case nor whether the plaintiff's right of action had become prescribed seeing that the latter event was contingent on the former. In this connection attention is invited to *Ex parte Minister of Native Affairs: In re* Yako *v.* Beyi, 1948 (1), S.A., 388 (A.D.) and in particular the following passage appearing in that judgment at page 397 of the relative report:—

> "I think that he (the Native Commissioner) should only finally decide which system of law (i.e. Common Law or Native Law) he is going to apply after considering all the evidence and argument as part of his eventual decision on the case."

However, the foregoing aspects are, to my mind, immaterial since they are not covered by the grounds of appeal and were not argued in this Court.

Here it should be mentioned that the Additional Native Commissioner *a quo* afforded the attorneys for both parties an opportunity of leading evidence as to whether the alleged contract was known to Native Law and that both declined to take advantage thereof.

Dealing with the grounds of appeal, it seems to me that it cannot properly be held that on the meagre information referred to above the Additional Native Commissioner erred in applying Common Law. That being so and as to my mind Cassimjee *v.* Cassimjee, 1947 (3), S.A., 701 (N.P.D.), is apposite as regards the point emerging from the second ground of appeal, both that ground and the first ground of appeal fail.

The third and last ground of appeal is without substance in that the first part thereof is based on a misconception of the significance of the defendant's alternative pleas and the remainder is bad for want of particularity.

It follows that in my view the appeal falls to be dismissed with costs and I therefore regret that I am unable to agree with the majority judgment of this Court.

For Appellant: Adv. J. H. Niehaus instructed by Mr. H. L. Bulcock of Ixopo.

For Respondent: Mr. G. S. Clulow of Ixopo.

NORTH EASTERN NATIVE APPEAL COURT.

N.A.C. CASE No. 29 OF 1953.

MKIZE AND ANOTHER *v.* **MKIZE.**

PIETERMARITZBURG: 17th July, 1953. Before Steenkamp, President, Balk and Bridle, Members of the Court.

LAW OF PROCEDURE.

Practice and Procedure—Default judgment—Periods within which recission may be applied for—Defective service of summons—Recission granted against No. 1 *defendant—Effect on judgment against No.* 2 *defendant who is sued in his capacity as dowry holder of No.* 1 *defendant—New Rules apply to applications brought after* 1*st January,* 1952.

Summary: Judgments by default were granted against two defendants, defendant No. 1 being plaintiff's wife and defendant No. 2 being her protector, in an action for dissolution of a customary union and for the refund of the *lobolo* paid.

Applications for the recission of the default judgments were refused by the Native Commissioner.

Held: That under Rule 74 (1) of the Rules for Native Commissioners' Courts application for the rescission of a default judgment must be made within *one month* after such judgment has come to the knowledge of the party against whom it was given.

Held further, however, as the service of the summons on defendant No. 1 was defeetive and therefore invalid the application for rescission in the instant ease falls to be dealt with under Rule 74 (9) which lays down a period of *one year* within which application for rescission may be made.

Held further: That to all intents and purposes the litigation between plaintiff and the two defendants coneluded when default judgment was granted on 22nd Oetober, 1953, and any application made after the 1st January, 1952, being the date the new Rules commeneed, falls to be dealt with under the new Rules.

Held further: That as the serviee of the summons on defendant No. 1 did not comply with requirements of Rules 31 (3) read With Rule 31 (8) of the Rules for Native Commissioners' Courts, it was not competent to find a default judgment thereon and that default judgment was thus void *ab origine.*

Held further: That if the default judgment against defendant No. 1 is reseinded, it automatically affects defendant No. 2 who cannot be ealled upon to refund the *lobolo* cattle unless a divorce had been granted, and consequently the default judgments against both defendants should be rescinded.

Cases referred to:

Vermeulen *v.* Vermeulen, 1940, O.P.D. 25.

Statutes, etc., referred to:

Rules 31 (3), 31 (8), 74 (1) and 74 (9) of the Rules for Native Commissioners' Courts.

Appeal from the Court of the Native Commissioner, Pietermaritzburg.

Steenkamp (President):—

On 28th May, 1951, the plaintiff sued his wife, defendant No. 1, assisted by Nduluzane Lombo, who is cited as her guardian for a dissolution of the customary union entered into by them on 11th November, 1942.

Nduluzane Lombo is also cited as defendant No. 2 and against him the claim is for the return of eight head of cattle or their value £40, being a portion of the *lobolo* refundable.

The first service of the summons was defective and when the case was first heard on 11th September, 1951, the Court *a quo* eommented adversely on the ineffieient serviee of the summons and ordered re-service on both defendants. The case was postponed to 22nd October, 1951. In the meantime on 28th September, 1951, the summons was re-served by delivery of a copy for eaeh defendant at the plaee of employment of the second defendant at M.E. Office, S.A.R. and H. to seeond defendant personally.

The ease was ealled on 22nd Oetober, 1951, when both defendants were in default and the Court, after hearing *viva voce* evidenee by the plaintiff, entered a default judgment against both defendants dissolving the customary union, ordering first defendant to return to the kraal of seeond defendant, who is ordered to refund eight head of cattle or their value £40. There is also an order against first defendant to return to plaintiff certain household articles. Costs were awarded against second defendant.

On 25th January, 1952, applieation was made to the Native Commissioner for the rescission of the default judgment. There was a dispute afterwards whether the applieation was made by both defendants but the uncertainty eoncerning this was eventually reetified so that for the purposes of this appeal the question for determination is whether or not the Native Commissioner was corrreet in refusing the applieation made by both parties for rescission of the judgment.

There is filed of record two affidavits dated 17th January, 1952, and 20th March, 1952, respectively made by defendant No. 1. i.e., the woman. She also gave *viva voce* evidence on 15th September, 1952, in support of her application.

In the first affidavit she states that she had only recently learnt that summons was served on defendant No. 2 to appear in Court on 24th October, 1951, and that he had informed her he had forgotten to notify her.

In the second affidavit which is more specific she states that some days after 22nd October, 1951, on a Sunday the second defendant handed her a summons stating that he had absolutely forgotten to hand it to her, but on being handed this summons she made enquiries and found that default judgment had already been given against her.

Here I think it is necessary to give a ruling as to what defendant No. 1 meant by "some days". In my view this must be interpreted as meaning that less than a week after the 22nd October, 1951, she received a copy of the summons and that the enquiries she made must have been undertaken by her soon thereafter when she discovered a default judgment had been granted. By being very liberal I will go so far as to state that according to the contents of her affidavits defendant No. 1 must have been aware of the default judgment before the middle of November.

According to Rule 74 (1) of the Native Commissioners' Courts Rules published under Government Notice No. 2886, dated 9th November, 1951, application should have been made within *one month* after such judgment has come to the knowledge of the party against whom it was given but as the service of the summons on defendant No. 1 was defective and therefore invalid the application for rescission falls to be dealt with under Rule 74 (9) which lays down a period of one year within which application may be made.

There is the question whether the old Rules or the new Rules just mentioned, should be applied in the instant appeal.

To all intents and purposes the litigation between plaintiff and the two defendants concluded when default judgment was granted on 22nd October, 1951, and any application made after 1st January, 1952, being the date when the new Rules commenced. falls to be dealt with under the new Rules. There has not been proper service of summons on defendant No. 1 and that is sufficient reason for the rescission of the default judgment against her.

I will now deal with the application made by defendent No. 2. His affidavits and evidence given *viva voce* are of such a nature that the facts dealing with the reasons for his default, are absolutely unacceptable.

Service of the summons was effected on him personally and his reason that he forgot all about it rings untrue. He also submitted two affidavits and in his evidence given *viva voce* he states—

> "I did go to Randles and Davis on 5th January, 1952, and requested them to offer C. C. C. Raulstone & Co. (Attorneys for plaintiff) £3 a month in settlement of judgment debt. This offer was accepted. I agree I accepted judgment of Court and thereafter changed my mind and applied for rescission."

There is, however, this peculiarity in the present case that if a rescission of the judgment is allowed in respect of the judgment against defendant No. 1, then it automatically affects defendant No. 2 who cannot be called upon to refund the *lobolo* cattle unless a divorce had been granted. It therefore follows if the divorce judgment is rescinded then the judgment against defendant No. 2 falls away.

In my view the appeal should be allowed with costs and the Native Commissioner's judgment altered to read:—

> "Default judgments against both defendants are rescinded with costs."

Balk (Permanent Member):—

The issue involved emerges from the learned President's judgment.

It is manifest from the Messenger of the Court's return that when he re-served the summons against the first defendant (now first appellant) he handed it to the second defendant (now second appellant) at the latter's place of employment and as it is implicit in the evidence that the first defendant was at that time neither resident nor employed at the second defendant's place of employment, the re-service of the summons in question did not comply with the requirements of Rule 31 (3) read with Rule 31 (8) of the Rules for Native Commissioners' Courts published under Government Notice No. 2886 of 1951. It follows that that service was bad and that it was not competent to found a default judgment thereon. The default judgment against the first defendant was thus void *ab origine*, see Vermeulen *v.* Vermeulen, 1940, O.P.D. 25; and as the first defendant's application for rescission of that judgment was, *inter alia*, based on its invalidity, it was competent for her to make that application within one year after she first had knowledge of such invalidity; see Rule 74 (9) of the above-mentioned Rules and Vermeulen's case (*supra*). Her application was thus made timeously and should have been granted by the Court *a quo*.

The default judgment against the second defendant for the refund of the *lobolo* cattle to the plaintiff (present respondent) obviously cannot stand alone as it is contingent upon the default judgment against the first defendant decreeing the dissolution of her customary union with the plaintiff. Accordingly the second defendant's application for the rescission of the default judgment against him should also have been granted by the Court *a quo*.

In my opinion therefore, the appeal should be allowed with costs and the Acting Additional Native Commissioner's judgment should be altered to read as follows:—

> "The default judgments against both defendants are rescinded with costs."

Bridle (Member): I concur.

For Appellant: Adv. J. A. Meachin, instructed by Mr. J. Hershensohnn, of Pietermaritzburg.

For Respondent: Mr. J. B. Tod, of Messrs. C. C. C. Raulstone & Co., of Pietermaritzburg.

SOUTHERN NATIVE APPEAL COURT.

N.A.C. CASE No. 19/1953.

TULUMANE *v.* NTSODO.

KING WILLIAM'S TOWN: 20th July, 1953. Before Sleigh, President, Warner and Pike, Members of the Court.

TEMBU CUSTOM.

Widow—Enticement from kraal head's kraal and cohabiting with —no fine payable for unless Ngenaed—*status of—Tembu Custom.*

Plaintiff, the kraalhead of a family sued defendant for three head of cattle or £30 as damages for enticing plaintiff's brother's widow away from plaintiff's kraal at Engcobo and living with her in Cape Town.

Held:

(1) That as a widow is a major and not under the guardianship of her husband's relatives, she is entitled to live where she pleases.

(2) That no fine is payable at the suit of her husband's people in respect of cohabitation with another man, unless the widow has been duly *ngenaed.*

(3) That *ngena* is not practised in the Tembu tribe to which the parties belong.

Appeal fails.

Cases referred to:

1. Nbono *v.* Manoxoweni (6 E.D.C. 62).
2. Kabi and Ano. *v.* Cwana [1 N.A.C. (S) 84].

Appeal from the Court of the Native Commissioner, Salt River.

Sleigh (President).

Plaintiff (now appellant) sued respondent for three head of cattle or their value £30. The allegations in the particulars of claim are to the effect that appellant is the kraalhead and guardian of his brother's widow, Nongamile, and that in July, 1952, respondent wrongfully and without appellant's consent had her removed from appellant's kraal in Engcobo district and brought to Cape Town where he is living with her. Appellant claims that he is entitled according to Native Law and Custom to three head of cattle as damages for the wrongful act. Appellant's attorney stated in the Court below that the action was based on unlawful enticement.

Respondent denies in his plea that he enticed the woman from her late husband's kraal, but I shall assume that he did. The Native Commissioner entered judgment for respondent and appellant has appealed.

I know of no authority in support of appellant's claim and his counsel has been unable to refer us to any. In Nbono *v.* Manoxoweni (6 E.D.C. 62) it was held that a widow was a major and not under the guardianship of her husband's relatives and that she was entitled to live where she pleased. In Kabi and Ano. *v.* Cwana [1. N.A.C. (S) 84] it was held that if a widow cohabited with another man no fine was payable in respect of such cohabitation at the suit of her husband's people unless she had been duly *ngenaed* according to Native custom. Nongamile was not *ngenaed*. In fact the parties belong to the Tembu tribe which does not practise the *ngena* custom.

Appellant, therefore, has no cause of action either on the ground of enticement or in respect of the illicit intercourse.

The appeal is dismissed with costs.

Warner (Member): I concur.

Pike (Member): I concur.

For Appellant: Mr. B. Barnes, King William's Town.

For Respondent: Mr. R. Stanford, King William's Town.

NORTH EASTERN NATIVE APPEAL COURT.

KANYILE *v.* MAHAYE.

N.A.C. CASE No. 19 OF 1953.

ESHOWE: 21st July, 1953. Before Steenkamp, President, Balk and Oftebro, Members of the Court.

LAW OF PROCEDURE.

Damages: Assault: Loss of seven teeth.

Practice and Procedure—Defendant's case closed on advice of Native Commissioner before any defence evidence led—Costs of appeal.

Summary: Plaintiff sued defendant for £100 damages sustained in an assault in which plaintiff lost seven teeth, suffered a fractured jaw and was detained in hospital for 3 months. In a Chief's Court plaintiff was awarded damages in the amount of £2. He appealed against that judgment to the Native Commissioner's Court. The Native Commissioner, after the close of plaintiff's case advised defendant to close his case without leading any evidence. The Native Commissioner thereupon dismissed the appeal and confirmed the Chief's judgment.

Held: That as the defendant had a case to meet at the conclusion of the evidence for the plaintiff, the Native Commissioner was not justified in intimating that he did not wish to hear the defendant.

Held further: That the Native Commissioner's judgment should be set aside and the case remitted to him for such evidence as the defendant may wish to adduce and thereupon for a fresh judgment.

Held further: That the costs of appeal and the costs already incurred in the Court *a quo* should be costs in the cause.

Cases referred to:—

Fischer *v.* Pieters, 1952 (2) S.A. 488 (S.W.A.).

Appeal from the Court of the Native Commissioner, Nkandhla.

Steenkamp (President):—

In the Chief's Court the plaintiff sued the defendant for £100 damages by reason of defendant having assaulted him as a result of which he lost seven teeth and broke his jaw.

The defendant admitted liability before the Chief and the plaintiff was awarded £2 damages with costs.

The plaintiff was not satisfied with the quantum of damages awarded and he appealed to the Native Commissioner who dismissed the appeal and confirmed the Chief's judgment. He made no award as to costs.

The plaintiff has now appealed to this Court on the following grounds:—

"1. (*a*) That the evidence establishes that the defendant assaulted plaintiff and inflicted grievous injury upon him.

(*b*) That the record discloses no circumstances disentitling plaintiff from substantial damages.

(*c*) That the learned Native Commissioner's award is therefore grossly inadequate."

Before dealing with the appeal as such it is observed that when the case commenced before the Native Commissioner, plaintiff explained that the summons should read seven teeth and not two teeth. The summons was then accordingly amended. It is not at all clear whether in drafting the summons a mistake had been made by inserting therein two teeth instead of seven teeth. It is possible that when the Chief heard the case, seven teeth were mentioned. As this matter is only one of detail I am not prepared to comment as to whether the Native Commisisoner was justified in allowing the plaintiff to amplify his claim as under the amendment of the Rule, recently promulgated, a plaintiff may now amplify his claim.

In the Native Commissioner's Court the defendant applied that the summons be dismissed with costs because the blow which caused the injury to plaintiff was not struck deliberately but in warding off a blow from the plaintiff. Defendant further explained in his plea that it was this "warding off" blow that caused plaintiff to lose his teeth and fractured his jaw.

From the evidence it appears that the plaintiff, who is defendant's father-in-law, had a dispute with him about an axe. This dispute started on the Tuesday and on the Wednesday, when they met again, the dispute was continued. There is a conflict of evidence as to whether the blow was struck on the first day of the quarrel or during the quarrel on the second day, but that appears to me to be immaterial as the defendant has admitted that plaintiff lost his teeth and had his jaw fractured as the result of a blow inflicted by the defendant, and all this Court is concerned with is whether the blow was deliberate and whether is was justified in the circumstances.

Defendant did not give evidence and while on this aspect of the case it should be remarked that the Native Commissioner informed the defendant that he did not wish to hear him for the following reasons:—

"1. He has not cross-appealed.

2. The only matter for decision is as to whether or not the damages should be increased, the damage inflicted is severe and it is by a son-in-law on an aged father-in-law.

3. The witnesses have not told the same story and there is therefore danger in laying too much weight on their evidence.

4. It is safer to regard the assault as not intentional."

I do not think the Native Commissioner was justified in giving this advice to the defendant as, according to plaintiff's case, there is sufficient *prima facie* evidence to justify the Court in granting damages in excess of £2. Now surely, to use a stick with such severity to repel a threatened blow by a fist would appear to be out of all proportion and I think where a defendant has done so on an aged father-in-law and has caused the injuries mentioned, he should be liable for damages in excess of the amount awarded.

In perusing the evidence of the plaintiff, which he gave under cross-examination, there are several matters on which defendant should have given evidence. To quote only a few we come across the following piece of evidence given by the plaintiff under cross-examination:—

"I deny that the previous day I had assaulted defendant with a hoe."

"I admit that my daughter, wife of the defendant, said that the axe was the property of defendant and I should leave it. I had claimed it as my property but had not taken it into my hand.

"I deny that the blow received from the defendant was struck accidentally in warding off my blow and in trying to escape. He struck me deliberately."

This last piece of evidence certainly calls for a denial or an admission by the defendant. In the absence of a denial the Court must accept the plaintiff's evidence that the blow was not accidental and the Court must accept the defendant struck him deliberately.

The plaintiff, as a result of the blow he received, lost seven teeth, his jaw was fractured and he was in hospital for three months in Durban after he had been in hospital at Eshowe, where the local doctor referred him to the Durban hospital. An amount of £2 would appear to be very poor compensation for all the pain and suffering the plaintiff must have endured as a result of that assault.

This Court is in this difficult position that defendant's case was closed on the advice of the Native Commissioner and, as remarked before, the Native Commissioner had no right, on the evidence adduced before him, to give the defendant that advice.

I am of opinion that the appeal should be allowed, that the Native Commissioner's judgment should be set aside and that the case should be remitted to him for such evidence as the defendant may wish to adduce and thereupon for a fresh judgment.

Costs of appeal to this Court and costs already incurred in the Court *a quo* to be costs in the cause.

Balk (Permanent Member):

The issue involved emerges from the learned President's judgment.

The Native Commissioner *a quo* found that the following facts had been proved:—

"1. That plaintiff suffered injury during a quarrel with defendant when it would appear that plaintiff raised his clenched fist threatening to strike defendant.

2. That the injury was caused by the stick of the defendant.

3. That plaintiff has failed to prove that the blow was struck deliberately and that it was not an accident as pleaded by defendant."

It would seem from the first fact found proved by the Native Commissioner that he accepted the evidence of the plaintiff's witness, Headman Mlanduli Xulu, as the latter is the only one who testified that the plaintiff raised his fist and threatened to strike the defendant. That being so the Native Commissioner should have accepted the remainder of Mlanduli's evidence and found that the defendant had not run away from the plaintiff and that the defendant had struck the plaintiff with the knobstick not by accident but deliberately. Furthermore, I do not agree with the Native Commissioner's statement in his reasons for judgment that the blow delivered by the defendant with the knobstick would be justified even if deliberate; for the severity of that blow was out of all proportion to the danger threatening as is evident from the fact that all that the defendant apprehended was a blow with the fist from the plaintiff, an aged man, whereas the grievous bodily harm suffered by the plaintiff as a result of the blow delivered by the defendant with the knobstick indicates that that blow was a very severe one and wholly unjustified in the circumstances.

It follows that the defendant had a case to meet at the conclusion of the evidence for the plaintiff and accordingly the Native Commissioner should not have intimated that he did not wish to hear the defendant.

I therefore agree that the appeal should be allowed, that the Native Commissioner's judgment should be set aside and that the case should be remitted to him for such evidence as the defendant may wish to adduce and thereupon for a fresh judgment. Costs of the appeal to this Court should, as conceded by Council for appellant, be costs in the cause as the irregularity on which the appeal to this Court turned, was occassioned by the Native Commissioner *meru moto* so that neither of the parties was in any way responsible therefor; and the matter could not be rectified otherwise than by bringing the appeal to this Court, which was not opposed by the respondent; see Fischer *v.* Pieterse, 1952 (2) S.A. 488 (S.W.A.).

Costs already incurred in the Court *a quo* should also be costs in the cause.

Oftebro (Member): I concur.

For Appellant: Mr. W. E. White of Eshowe.

Respondent in default.

NORTH EASTERN NATIVE APPEAL COURT.

N.A.C. CASE No. 16/52.

MTIMKULU *v.* MTIYANE AND OTHERS.

ESHOWE: 21st July, 1953. Before Steenkamp, President, Balk and Oftebro, Members of the Court.

LAW OF PROCEDURE.

Practice and Procedure—Application for consent to apply for leave to appeal—Withdrawal of—Application for Re-instatement—No notice given to respondents.

Summary: Applicant lodged an application for the consent of the Native Appeal Court to apply for leave to appeal to the Appellate Division. He advised the Registrar on the 29th May, 1953, that the application be regarded as withdrawn. On the 8th July, 1953, he wrote asking that the application be reinstated. He did not give notice thereof to the respondents.

Held: That as no notice was given to respondents, the application for re-instatement be struck off the roll and the application for this Court's consent to apply for leave to appeal to the Appellate Division of the Supreme Court of South Africa be regarded as withdrawn.

Appeal from the Court of the Native Commissioner, Ingwavuma.

Steenkamp (President):—

The applicant, who was the plaintiff in the Court below and the appellant in an appeal disposed of by this Court on the 22nd April, 1953, filed an application dated the 16th March, 1953, for consent to apply for leave to appeal to the Appellate Division of the Supreme Court.

On the 29th May, 1953, the applicant advised the Registrar of this Court that it is his intention to withdraw the application but without prejuduce to his intended appeal to the Appellate Division. He ends his letter with the words: "and therefore request that same be regarded as withdrawn". This withdrawal was duly communicated to the respondents.

On the 8th July, 1953, applicant dispatched the following letter to the Registrar of this Court:—

> "Acting on legal advice I now respectfully apply for the reinstatement of my late Petition on the Roll of the Hon. N.A.Court for the North Eastern Division.
>
> I had petitioned the above-mentioned Court for leave to appeal to the Appellate Division of the S.A.
>
> I enclose herein form N.A. 149 duly signed as previously requested."

Applicant appeared before this Court on the 21st July, 1953, and admitted that he had not notified the Respondents, who did not put in an appearance, of his intention to have his application re-instated.

The application for re-instatement is not in order as the Respondents should have been notified. Applicant has conceded this and accordingly that application is struck off the roll and the application for this Court's consent to apply for leave to appeal to the Appellate Division of the Supreme Court of South Africa is regarded as withdrawn.

Balk (Permanent Member): I concur.

Oftebro (Member): I concur.

Applicant in Person.

Respondent: No appearance.

NORTH EASTERN NATIVE APPEAL COURT.

N.A.C. CASE No. 28/53.

GUMEDE *v.* NXUMALO.

ESHOWE: 21st July, 1953. Before Steenkamp, President, Balk and Oftebro, Members of the Court.

LAW OF PROCEDURE.

Appeal from Chief's Court: Cross-appeal.

Chief's reasons sine qua non *in appeals from Chiefs' Courts.*

Summary: Defendant noted an appeal against a judgment of "for eight head of cattle" given by a Chief's Court. At the hearing of the appeal, plaintiff informed the Native Commissioner that he is cross-appealing for the full amount of his claim, viz, eighty head of cattle.

No reasons for judgment filed by the Chief.

Held: That the Chief's reasons are *sine qua non* in all appeals from a Chief's Court and only if these reasons are unobtainable, after steps under Rule 11 (2) had been taken, should a Native Commissioner use his discretion, which is judicial and not arbitrary, in dispensing with the reasons, and he must note on the record his reasons for such dispensation.

Held further: That a cross-appeal against a Chief's judgment should be noted in the same manner as an appeal, i.e. in writing and the various implications thereanent must be complied with.

Cases referred to:

Mbata *v.* Mdhluli, 1944, N.A.C. (T. & N.), 44.

Statutes, etc., referred to:—

Rules Nos. 9, 11 (2) and (3), 12 (1), (2) and (3) of the Rules for Chiefs' Civil Courts.

Appeal from the Court of the Native Commissioner, Mtubatuba.

Steenkamp (President):—

In the Chief's Court the plaintiff sued the defendant for eight head of cattle and their increase of seventy-two cattle, which cattle were alleged to have been *sisaed* by plaintiff's late father, Gcikwe, to the defendant about thirty-eight years ago.

Defendant denied liability but the Chief gave judgment in favour of plaintiff for eight head of cattle with costs.

The judgment was given on 26.1.1953 and on 9.2.53 the defendant noted an appeal to the Native Commissioner. The appeal was heard on 10.3.1953 when plaintiff verbally informed the Native Commissioner that he is counter appealing (sic) for the full amount of his claim and not for eight head of cattle only. By this it must be understood that plaintiff was not satisfied with the judgment for eight head of cattle and averred that the Chief should have given judgment in his favour for eighty head of cattle.

It is observed that the Chief filed no reasons for his judgment nor is there any indication that the Native Commissioner dispensed with the reasons as permitted by Rule 11 (3) of the Chiefs' Courts rules.

It should be emphasized that the Chief's reasons are *sine qua non* in all appeals from a Chief's Court and only if these reasons are unobtainable after steps under Rule 11 (2) had been taken should a Native Commissioner use his discretion, which is judicial and not arbitrary, in dispensing with the reasons and he must note on the record his reasons for such dispensation.

The Native Commissioner after hearing evidence dismissed the appeal with costs and allowed the cross-appeal and altered the Chief's judgment to read:—

> "Judgment for plaintiff for eighty head of cattle with costs."

Defendant (now appellant) has noted an appeal to this Court on the following grounds:—

> "1. The judgment is against the weight of evidence and is bad in law that the Respondent failed to prove the original sisa contract. Should it be held that there was a sisa contract then he failed to prove that the 80 head of cattle he claimed were in fact the increase of the original beasts sisaed.
>
> 2. The Learned Native Commissioner erred in allowing Respondent to note a cross appeal at the hearing of the appeal without the necessary notice as provided by the Rules."

Ground 2 is well taken as in the case of Mbata *v.* Mdhluli 1944, N.A.C. (T. & N.), 44 this Court held that the Native Commissioner erred in allowing the cross-appeal to be entered on the day of hearing.

There is nothing in the existing rules published under Government Notice 2885/1951 (Chiefs' and Headmen's Civil Courts regulations) from which it may be surmised that a cross-appeal may be noted in the manner apparent in the present appeal.

Rule 12 (1), (2) and (3) deals with the amplification of a claim, defence and submission of a counterclaim and can in no way be interpreted to cover a cross-appeal.

Rule 9 deals with appeals and it is clear that a cross-appeal should be noted in the same manner as an appeal i.e. in writing and the various implications thereanent must be complied with.

The irregularities referred to are such that in my opinion this Court should set aside the judgment of the Native Commissioner and the proceedings in this Court in such a manner as to give the plaintiff an opportunity to comply with the rules of Court concerning the cross-appeal. I am not certain that the parties have explored all possible avenues with a view to placing before the Court all the evidence necessary to arrive at a proper determination of the case. In the circumstances I agree with the remarks of my brother Balk as to the form of the judgment of this Court.

Balk (Permanent Member):—

I agree that the cross-appeal was not properly noted for the reasons given by the learned President in his judgment. But as on the day of the hearing in the Native Commissioner's Court of the appeal brought by the defendant, the time for the noting by the plaintiff of a cross-appeal, had not yet expired, it was open to the Native Commissioner when the plaintiff advised him on that day that he wished to cross-appeal, to have adjourned the hearing of the case for the plaintiff to note his cross-appeal in

terms of the relevant regulations i.e. those for Chiefs' Civil Courts published under Government Notice No. 2885 of 1951, instead of proceeding to hear the case on the basis that the cross-appeal had been properly noted which, as pointed out above, was erroneous. That being so and as to my mind it cannot properly be said that the plaintiff has no prospect of success on cross-appeal, I am of opinion that the appeal to this Court should be allowed, that all the proceedings in the Native Commissioner's Court subsequent to the noting of the appeal by the defendant, including the Native Commissioner's judgment, should be set aside and that the case should be heard afresh in the Native Commissioner's Court on a day to be fixed by the Clerk of that Court and notified to the parties. This leaves it open to the plaintiff to note his cross-appeal in the manner provided by the above-mentioned Regulations and to apply for condonation of the late noting thereof. Costs of appeal to this Court and costs already incurred in the Native Commissioner's Court to be costs in the cause as agreed to by the parties.

Oftebro (Member): I concur.

For Appellant: Mr. H. H. Kent, of Eshowe.

Respondent in Person.

NORTH EASTERN NATIVE APPEAL COURT.

MANQELE *v.* MANQELE.

N.A.C. CASE No. 48/53.

ESHOWE: 22nd July, 1953. Before Steenkamp, President, Balk and Oftebro, Members of the Court.

ZULU CUSTOM.

Lobolo: Etula.

Affiliation: Objects of.

Summary: Plaintiff sued defendant for a declaration that plaintiff is entitled to the *lobolo* rights in the fourth of plaintiff's four full sisters. Defendant is heir in the *Indlunkulu* and general heir whereas plaintiff, defendant's half brother, is heir in a minor house of the late father of the parties.

Held: That it is admitted and clear that the eldest daughter in the junior house was married during the lifetime of the father of the parties and that out of her *lobolo* the *etula* debt was paid to the *Indlunkulu*.

Held further: That "affiliation" is an attachment of a junior *house* to a senior *house* for the purpose of providing against the failure of an heir in the senior *house* and not to increase the riches of the *house* to which there has been affiliation.

Held further: That the object of the affiliation in the instant case fell away.

Cases referred to:

Mafulela *v.* Qakaza 1917 N.H.C. 163.

Statutes, etc. referred to:

Section 1 (3) (*a*) of the Natal Code of Native Law of 1932.

Appeal from the Court of the Native Commissioner, Mtubatuba.

Steenkamp (President):—

This is an application for condonation of the late noting of an appeal and from what follows hereafter, in my opinion, the condonation should be granted and the appeal decided on its merits.

The evidence that was adduced before the Native Commissioner was mostly confined to an application by the defendant for the rescission of a default judgment. After the Native Commissioner had rescinded that judgment certain facts were admitted. These will be dealt with later on.

In the Chief's Court the plaintiff brought an action claiming that he, and not the defendant, was entitled to the *lobolo* rights in a certain girl, viz., a daughter of the second wife married by the late Qalakanye and full sister of the Plaintiff. The Chief gave judgment for Plaintiff.

On appeal to the Native Commissioner the appeal was allowed with costs and the Chief's judgment altered to:—

> "Judgment for defendant with costs", i.e. "defendant is entitled to the *lobolo* for the fourth girl which forms the subject matter of this claim."

An appeal has now been noted to this Court on the ground that the judgment is wrong in law inasmuch as the girls in question are plaintiff's full sisters and there being no debt due to the *Indlunkulu* for their mother's *lobolo,* no *etula* of their *lobolo* can be claimed by the defendant who is general heir and half-brother of plaintiff, whose house was affiliated to the *Indlunkulu* and the property in issue is the property of the second house.

To be able to ascertain the correct position it is necessary first of all to refer to the facts as admitted by both parties in the Native Commissioner's Court. These facts are that the defendant is the general heir and heir in the *Indlunkulu house* and that plaintiff's mother was affiliated to that *house* because defendant's mother was afraid of the family dying out. (Hereafter plaintiff's *house* will be referred to as 'the second *house*".) In the second *house* were born two boys and four girls, plaintiff being the eldest in the second *house* and because plaintiff's *house* had been affiliated to the *Indlunkulu* the defendant takes up the attitude that as he is the heir to the *Indlunkulu house* he is also heir to the second *house* insofar as the *lobolo* rights in these four girls, being full sisters of plaintiff, are concerned.

From the admitted facts it also seems clear that cattle from the *Indlunkulu* were taken to *lobolo* the second wife but these are not in dispute as it is admitted that the eldest daughter in the second *house* was married during the lifetime of the father of the parties and that out of her *lobolo* the *etula* debt was paid to the *Indlunkulu.*

Defendant, in the statement of facts admitted, avers that as an act of grace he permitted the plaintiff the *lobolo* rights in two of the girls and he need only, according to instructions he stated he had received from their late father, allow him *lobolo* rights in one girl as a concession.

The Native Commissioner, in his reasons for judgment, seems to have experienced great difficulty in deciding this case. He does not appear to have understood the full purport of the meaning of "affiliation". If he had done so I do not think he would have entered the judgment he did. He has quoted certain cases which have no bearing at all in the instant appeal.

If we look at the definition of "affiliation" as set out in section 1 (3) (*a*) of the Code, it will be found that this is an attachment of a junior *house* to a senior *house for the purpose of providing against the failure of an heir in the senior house.*

In the present case there is an heir in the senior *house* and therefore whatever the intention might originally have been in affiliating the plaintiff's mother to the *Indlunkulu,* the reason for that object fell away when an heir was born and survived in the *Indlunkulu house.*

Stafford on page 170 quotes that the object of affiliation is never to enrich the hut to which affiliation has been made. If we refer to the case of Mafukulela *v.* Qakaza 1917 N.H.C. 163 we will find that it was held in that case that the object of the affiliation of one *house* to another is to guarantee an heir and *not to increase the riches of the house* to which there has been affiliation, except where there is no son in the *house* affiliated. In the present case there is a son in the *house* affiliated, viz., the plaintiff, and therefore, if the Native Commissioner's judgment is correct, then the *Indlunkulu house* has been enriched at the expense of the heir in the second *house.* This is opposed to Native law.

The plaintiff is therefore entitled to the *lobolo* rights in the three remaining girls and as the *Indlunkulu* has been refunded the *lobolo* advanced for the second *house,* it has no further claim on the house property in the second *house.* That being the case the appeal to this Court must succeed with costs and the Native Commissioner's judgment altered to read as follows:—

> "Appeal from the Chief's judgment is dismissed with costs" but in order to clarify the Chief's judgment, I am of opinion that it should be altered to read—
>
> "For plaintiff with costs in respect of the *lobolo* rights in the one of his four full sisters concerned, the position in regard to the lobolo rights in his other three full sisters being as follows:—
>
> 1. The *lobolo* for his eldest sister has been paid, disposed of and is not in dispute.
>
> 2. The *lobolo* rights in his remaining two sisters have vested in the plaintiff as acknowledged by the defendant."

Balk (Permanent Member): I concur.

Oftebro (Member): I concur.

For Appellant: Mr. H. H. Kent of Eshowe.

Respondent in person.

NORTH EASTERN NATIVE APPEAL COURT.

MTEMBU AND ANOTHER *v.* ZUNGU.

N.A.C. CASE No. 88/52.

ESHOWE: 22nd July, 1953. Before Steenkamp, President, Balk and Oftebro, Members of the Court.

ZULU CUSTOM.

Damages—Defamation—Accusing a person of being an Umtakati *—Plaintiff's presence at* bulaing *ceremony not voluntary.*

Kraalhead liability: Residence at kraal of kraalhead.

Practice and Procedure: Jurisdiction of Native Commissioner's Court—Cause of action arising wholly within the area of Court's jurisdiction—No exception taken to summons in Native Commissioner's Court.

Summary: Plaintiff sued Defendant No. 1 for damages for defamation alleging that Defendant No. 1 had, at a *bula* gathering and in the presence of the people present at that gathering accused Plaintiff of being an *umtakati* and of bewitching their tribal Chief.

Defendant No. 2 is the husband of Defendant No. 1 and is sued in that capacity.

It was admitted that the Chief convened the gathering at his kraal and that all tribal people had to attend it.

Held: That the instant case was one of those cases where the plaintiff had no option but to attend the meeting called by the Chief and that he was not a party to the calling of that meeting.

Held further: That to accuse a person of witchcraft is a serious matter and where witchdoctors will falsely accuse persons of having poisoned or bewitched any other person, knowing perfectly well it is not true, then they must expect to be mulcted in substantial damages.

Held further: That as it emerges from Defendant No. 2's evidence that, at the time that his wife, Defendant No. 1, *bulaed* and stated that the plaintiff had bewitched the Chief concerned, she was ordinarily resident at her husband's kraal, she falls to be regarded as in residence at that kraal at that time for the purposes of section 141 (1) of the Natal Code of Native Law; and this position is not affected by her temporary absence from that kraal to perform the *bulaing* in question.

Held further: That as it is manifest from the evidence that the cause of action in the instant case arose wholly within the area of the jurisdiction of the Court *a quo,* that Court had jurisdiction.

Held further: That as defendants did not except to the summons in the Court below and as the defect in question therein was remedied by the evidence, they cannot be said to have been prejudiced thereby and cannot, at this stage, rely on that defect.

Cases referred to:

Sibisi *v.* Mtshali, 1939 N.A.C. (T & N) 137.

Zungu *v.* Zungu, 1942 N.A.C. (T & N) 4.

Mbata *v.* Ntanzi, 1945 N.A.C. (T & N) 98.

Miya *v.* Miya, 1947 N.A.C. (T & N) 108.

Hamlin *v.* Dunn & Co., 1908 N.L.R. 731.

Ex Parte Minister of Native Affairs, 1941 A.D. 53.

Statutes, etc. referred to:

Sections *ten* (3) and *fifteen* of the Native Administration Act, 1927.

Sections 129 and 141 (1) of the Natal Code of Native Law, 1932.

Appeal from the Court of the Native Commissioner, Mtubatuba.

Steenkamp (President):—

This is an application for reinstatement of the case on the roll, condonation of the late noting of the appeal and the amendment of the grounds thereof.

In the Native Commissioner's Court the plaintiff (now respondent) sued the defendants (now appellants) for £50 damages for defamation of character. Defendant No. 1 is an *Isangoma* and her husband, the defendant No. 2, is joined in his capacity as husband.

In his summons plaintiff alleges that defendant No. 1 accused him of being an *Umtakati* and of bewitching Chief Sentu Hlabisa and that these accusations were made by defendant in the presence of the people who attended the *bula* gathering.

Defendant No. 1 in her plea admits that Chief Sentu Hlabisa convened that gathering at his kraal and that all tribal people had to attend it. She also admits that she is an *Isangoma.* She however denies in her plea that she accused plaintiff of being an *Umtakati.*

Defendant No. 2's plea is to the effect that he did not attend the *bula* ceremony.

The Native Commissioner gave judgment for plaintiff for £25 and costs against defendants jointly and severally, the one paying the other to be absolved.

An appeal has been noted on the grounds that—

> "1. The judgment is against the weight of evidence and is bad in law in that the evidence of plaintiff is not corroborated in the detail it should be by his witness.
>
> 2. In any event as plaintiff was present at the *bula* ceremony and was a consenting party and took part therein, the award of damages in his favour is contrary to law."

The facts as found proved by the Native Commissioner are abundantly supported by the evidence and they are to the effect that defendant No. 1 is an *Isangoma* and that Sentu Hlabisa is a Chief in the district of Hlabisa. Plaintiff is one of his subjects and about Christmas time 1951 the Chief visited the plaintiff by whom he was given certain raw meat which he took away and subsequently ate. A few days later the Chief became ill. On the 13th March, 1952, a gathering was held to *bula* in connection with the Chief's illness. At this meeing defendant No. 1 was the *Isangoma.* Many people, including the plaintiff, were present. Defendant No. 1 *bulaed* and indicated plaintiff as the person responsible for the Chief's illness. She stated at the meeting he had used medicine called *msukawezulu* to bewitch the Chief and which he got from Madoda Zungu.

The question arises whether the plaintiff was a consenting party to the *bulaing* ceremony. It was a serious matter for the Chief to become ill; therefore it is well understood that when the services of defendant No. 1 were obtained to *bula* at his kraal he called upon all his people to be present and can it be said that plaintiff's presence is an indication that he consented to the *bulaing* ceremony. It seems to me it is one of those cases where the plaintiff had no option but to attend the meeting called by the Chief and he knew the purpose thereof.

The so-called supernatural powers which witchdoctors profess to possess can obviously not be countenanced by a Court of law. This question of *bulaing* has received the attention of this Court on several occasions and while in certain cases this Court has refused to grant damages in others again it has done so, every case being decided on its merits.

In the case of Sibisi *v.* Mtshali 1939 N.A.C. (T. & N.) 137 the *isangoma* did not attend the gathering but the people who consulted him made a report at a meeting called by the *Induna* to hear the result of that consultation. The Court in that case held that the meeting called by the *Induna* was not a lawful meeting and therefore any statements made thereat are defamatory.

The point came up again for decision in the case of Zungu *v.* Zungu 1942 N.A.C. (T. & N.) 4. In that case the Chief called a meeting of about 30 to 40 persons and there the Chief called on those who had attended the *Isangoma* to speak. Several men spoke. The defendant then reported that plaintiff and three others were smelt out by the *Isangoma.* In that case it was also claimed that the occasion was a privileged one as a statement was made to the Chief and his *Induna* at a meeting called by the Chief, and while the Court accepted that a Chief is a person in authority, it held that he was not acting within the scope of his authority when he summoned the meeting because the purpose was to hear the finding of the *Isangoma.* The Appeal Court confirmed the judgment of the Native Commissioner in which he granted the plaintiff £5 damages. Here it should be mentioned that under Section 129 of the Natal Native Code, the practice of *bulaing* is unlawful, and therefore the meeting connected with an unlawful matter is also unlawful.

In Mbata *v.* Ttanzi 1945 N.A.C. (T. & N.) 98 the witchdoctor was prevailed upon by the plaintiff and his cousin Robert to come to their kraal to ascertain the cause of illness in the family of Robert. It was held that plaintiff was a party to the proceedings and that he had no action against the witchdoctor who pointed him out as being responsible.

The present appeal can be distinguished from that case as here it cannot be said that plaintiff was a party in calling in the services of the *isangoma* in that he attended the *bula* gathering in question at the request of the Chief and there is no evidence that plaintiff contributed or in any way associated himself with the invitation to the *isangoma* to attend and to *bula* at the Chief's kraal.

There is still a later case of Miya *v.* Miya, 1947, N.A.C. (T. & N.), 108 in which the facts were that the plaintiff so associated himself with the consultation of the *isangoma* that he was not entitled to claim damages from those who had uttered the verdict of the *isangoma.* That case can therefore also be distinguished from the present appeal in which the plaintiff was not a party to the *bula* proceedings.

To accuse a person of witchcraft is a serious matter as pointed out in previous cases, and where these witchdoctors will falsely accuse persons of having poisoned or bewitched any other person knowing perfectly well it is not true, then they must expect to be mulcted in substantial damages.

There thus being no prospect of success in the contemplated appeal on the grounds dealt with above nor on those dealt with in my brother Balk's judgment, I am of opinion that the application should be refused with costs.

Balk (Permanent Member):—

This appeal was struck off the roll last January because it had not been properly noted and in the instant application re-instatement is sought as also condonation of the late noting of the appeal and the amendment of the grounds thereof by the addition of the following paragraph:—

> "That 2nd defendant is not liable in terms of the Code for the wrongful act of First Defendant who at the time of the commission of the delict alleged was not residing in 2nd defendant's kraal."

In support of the application Counsel for the Applicants took the following points:—

1. That *ex facie* the summons the Court *a quo* had no jurisdiction since both the defendants (present applicants) were shown therein as being resident outside of its area of jurisdiction and there was no averment therein that the cause of action arose wholly within that area.
2. That for the reason given in the proposed additional ground of appeal quoted above, defendant No. 2 was not liable for the damages awarded against him.
3. That the plaintiff (now respondent) was not entitled to damages as he had voluntarily attended the *bula* gathering in question.
4. That on the merits of the contemplated appeal on fact, the defendants had a reasonable prospect of success.

It is manifest from the evidence that the cause of action in the instant case arose wholly within the area of the jurisdiction of the Court *a quo*, so that the Court had jurisdiction, see Section 10 (3) of the Native Administration Act, 1927, as amended. The defendants did not except to the summons in the Court below and as the defect in question therein was remedied by the evidence, they cannot be said to have been prejudiced thereby and cannot therefore at this stage rely on that defect, see Section *fifteen* of the abovementioned Act, and Hamlin *v.* Dunn & Co., 1908, (Vol. 29), N.L.R. 731 at page 740.

It emerges from defendant No. 2's evidence that at the time that his wife, defendant No. 1, *bulaed* and stated that the plaintiff had bewitched the Chief concerned, she was ordinarily resident at her husband's kraal, so that she falls to be regarded as in residence at that kraal at that time for the purposes of Section 141 (1) of the Natal Code of Native Law, published under Proclamation No. 168 of 1932; and this position is not affected by her temporary absence from that kraal to perform the bulaing in question, see *Ex parte Minister of Native Affairs* 1941, A.D. 53 at pages 59 and 60. It should be added that the word "residence" is not defined in the said Code.

I agree that the facts as found proved by the Native Commissioner *a quo*, which appear from the learned President's judgment, are amply supported by the evidence, from which it is also clear that the plaintiff was instructed by his Chief to attend the *bula* gathering in question; and there is no evidence that the plaintiff contributed towards defendant No. 1's fees for the *bulaing* nor that he in any way associated himself voluntarily with the invitation to her to attend and *bula* at the kraal of the Chief concerned.

It follows that the points taken by Counsel for the applicants are not well founded and that the applicants have no prospect of success on appeal.

I therefore agree that the application should be refused with costs.

Oftebro (Member): I concur.

For Appellant: Mr. H. H. Kent of Eshowe.

Respondent in Person.

NORTH EASTERN NATIVE APPEAL COURT.

N.A.C. CASE No. 60/53.

KEKANA *v.* MOKGOKO N.O.

PRETORIA: 9th September, 1953. Before Steenkamp, President, Balk and De Souza, Members of the Court.

LAW OF PROCEDURE.

Practice and Procedure—Review of proceedings in Native Commissioner's Court—Native Appeal Court Rule 22 (1)*—No provision for condonation of late notice of intention to bring proceedings on review—Actions complained of taking place after case adjudicated upon.*

Summary: Applicant sought, in an application dated the 25th May, 1953, condonation for late notice of intention to bring on review certain irregularities alleged to have taken place (*a*) during the hearing on the 31st March, 1953, and the 1st April, 1953, of an *ex parte* application, and (*b*) subsequent to the trial, viz. on 22nd April, 1953.

Held: That Rule 22 (1) of the Rules for Native Appeal Courts is peremptory in its terms in respect of the period within which the notice required under that Rule is to be given.

Held further: That the Native Appeal Court is therefore, precluded, in the absence of any provision in the Rules, from permitting condonation sought in so far as the bringing on review of the proceedings of the Native Commissioner's Court in the *ex parte* application is concerned.

Held further: That as the *ex parte* application had already been adjudicated upon by the Native Commissioner on the 1st April, 1953, the Native Commissioner's actions on the 22nd idem did not appear to be relevant in the matter of the *ex parte* application.

Cases referred to:

De Villiers *v.* de Villiers 1947, (1), S.A., 635, (A.D.)

Statutes referred to:

Rules 22 (1) and 31 (2) of the Rules for Native Appeal Courts.

Appeal from the Court of the Native Commissioner, Hammanskraal.

The following extract from a judgment delivered by Balk, Permanent Member, with which Steenkamp, President and De Souza, Member, concurred, is relevant to this report. The rest of the judgment, dealing with other matters, has been omitted.

"In the instant application condonation is also sought of the delay in bringing on review before this Court firstly the proceedings in the Native Commissioner's Court in the *ex parte* application and secondly the actions of the Native Commissioner *a quo* on the 22nd April, 1953, in connection with the execution of the above-mentioned warrant of ejectment on that day.

It seems to me that since, as is implicit in the papers, the present applicant failed to give the notice required under Rule 22 (1) of the Rules for Native Appeal Courts, published under Government Notice No. 2887 of 1951 (hereinafter referred to as "the Rules"), within the period specified in that Rule and since that Rule is peremptory in its terms in that respect, this Court is precluded, in the absence of any provision in the Rules permitting condonation in such a case, from granting the condonation sought in so far as the bringing on review of the proceedings of the Native Commissioner's Court in the *ex parte* application is concerned.

As regards the question of the review of the Native Commissioner's actions on the 22nd April, 1953, he has explained in his further reasons for judgment that on that day when the Messenger of the Court proceeded with the Police to execute the warrant of ejectment referred to above at the instance of plaintiff's attorneys, he (the Native Commissioner) accompanied them in an administrative capacity with a view to preventing a breach of the peace which, according to his information, was threatening. In any event, I fail to see how the Native Commissioner's actions on the 22nd April, 1953, are relevant in the matter of the *ex parte* application seeing that it had already been adjudicated upon by him on the 1st idem."

For Appellant: Mr. Rootenberg of Messrs. Helman & Michel, Johannesburg.

For Respondent: Adv. W. J. Human instructed by Messrs. Nel & Nel, Pretoria.

NORTH EASTERN NATIVE APPEAL COURT.

N.A.C. CASE No. 53/53.

SHONGWE *v.* MHLONGO.

PRETORIA: 9th September, 1953. Before Steenkamp, President, Balk and De Souza, Members of the Court.

LAW OF PROCEDURE.

Practice and Procedure—Application for rescission of default judgment in Native Commissioner's Court—Bona fides *of applicant for recission—Failure to comply with Rule* 41 (1) *of the Rules for Native Commissioners' Courts.*

Customary Union: Order for return of wife to specify the period within which wife is to be returned.

Summary: Plaintiff obtained a default judgment in a Native Commissioner's Court against defendant. The latter, after unsuccessfully applying to that Court for a rescission of the default judgment, noted an appeal to the Native Appeal Court.

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Held: That whilst it is a matter for regret that the Rule 74 (2) of the Native Commissioners' Courts Rules was not strictly complied with, the instant case does not appear to be one in which the Court *a quo* should have taken up too strict an attitude.

Held further: That, in the absence of any replying affidavits by the plaintiff, the defendant's averment on oath that he has a good defence fell to be accepted and the fact of the decree of absolution in the former case did, in circumstances, afford an indication that the defendant had a *bona fide* defence.

Held further: That the decree of absolution in the former case indicates that the defendant did not acquiesce in the plaintiff's claim, but disputed it, and, moreover, there is nothing to show that the defendant brought the application *mala fide* but, on the contrary, the position as disclosed by the affidavits filed by him indicates his *bona fides*.

Held further: That the failure of the Clerk of the Court to comply with Rule 41 (1) is such an irregularity that the default judgment entered by him is void *ab origine*.

Held further: That the default judgment as entered by the Clerk of the Court is not definite in its terms in that the period within which the plaintiff's wife is to be returned to him is not specified therein.

Cases referred to:

Grant *v.* Plumbers (Pty.), Ltd., 1949 (2), S.A. 470 (O.P.D.).

Nyembe *v.* Zwane, 1946, N.A.C. (T. & N.), 26.

Statutes, etc. referred to:

Rules 39 (2), 41 (1), 73 (*b*), 74 (2) and 74 (9) of the Rules for Native Commissioners' Courts.

Appeal from the Court of the Native Commissioner, Ermelo.

Balk (Permanent Member):—

This is an appeal from the judgment of a Native Commissioner's Court refusing, with costs, an application by the defendant (present appellant) for the rescission of the default judgment given against him by that Court in a certain civil action.

The ground of appeal is that the judgment is bad in law "in that the Native Commissioner misinterpreted the meaning of Rule 74 (2) of the Native Commissioners' Courts Rules published in Government Notice No. 2886 of the 9th November, 1951."

This ground of appeal does not specify in which respect the Native Commissioner *a quo* misinterpreted the meaning of the Rule in question but, as it is clear from the relative record of the proceedings, that what is intended thereby is that the Native Commissioner applied that Rule too strictly insofar as it relates to the requirement that the applicant's affidavit shall set forth shortly the grounds of defence to the action, the appeal was heard on that basis.

The plaintiff (now respondent) did not file any affidavits in reply to those of the defendant but opposed the application in the Court *a quo* solely on the ground that it did not comply with the requirements of the above-mentioned Rule in that the grounds of defence were not set out in sufficient detail to enable the Court to conclude that there was a *bona fide* defence.

Admittedly the applicant did not strictly comply with the Rule in question in that he did not set out specifically in his affidavit embodying the application the grounds of defence to the action, but merely averred therein that he had a good defence in that in a former case brought against him by the present plaintiff on the same cause of action absolution from the instance with costs was decreed.

Whilst it is a matter for regret that the above-mentioned Rule was not strictly complied with particularly as the defendant was assisted by his Attorney in bringing the application, it seems to me that the instant case is not one in which the Court *a quo* should have taken up too strict an attitude; for it is clear from the affidavits filed by the defendant that he personally was not to blame for the entry of the default judgment against him and, in the absence of any replying affidavits by the plaintiff, the defendant's averment on oath that he has a good defence fell to be accepted and the fact of the decree of absolution in the former case did in the circumstances afford an indication that the defendant had a *bona fide* defence. Then also that decree indicates that the defendant did not acquiesce in the plaintiff's claim but disputed it. Moreover there is nothing to show that the defendant brought the application *mala fide*. On the contrary, the position as disclosed by the affidavits filed by him indicates his *bona fides*. To my mind therefore the Court *a quo* should have granted the application, see Grant *v.* Plumbers (Pty.) Ltd., 1949 (2), S.A. 470 (O.P.D.), in particular at pages 475 to 478.

In view of the fact that the defendant's attorney could, as is evident from his affidavit and from the date on which the written request for the default judgment was made, have avoided the default judgment in terms of Rule 39 (2) of the Rules referred to above, had he acted promptly after being instructed by the defendant, it seems no more than just that the defendant should be made to pay both the costs incurred by the plaintiff in obtaining the default judgment and the costs of the application.

Although Counsel for appellant stated in the course of his argument before this Court that in his opinion the costs of appeal fell to be borne by the appellant, even if the appeal succeeded, that statement was made in conjuction with Counsel's submission that the appeal could not succeed on the merits but only if this Court, as an indulgence, set the Native Commissioner's judgment aside and remitted the matter to him for rehearing on the basis that the defendant be permitted to amplify his application for rescission by setting out the grounds of defence to the action. But as the appeal has succeeded on the merits, it seems to me that, following the usual practice, the costs of appeal here should follow the event.

In the result I am of opinion that the appeal should be allowed with costs, and that the judgment of the Court *a quo* should be altered to read: "The application is granted and the default judgment herein is hereby rescinded. The applicant is to pay both the costs incurred by the plaintiff in obtaining the default judgment and the costs of the application.".

Certain unsatisfactory features in this case call for comment.

In the first place it is uncertain whether the Clerk of the Court concerned caused the defendant's name to be called in terms of Rule 41 (1) of the above-mentioned Rules to determine thereunder whether or not the defendant fell to be regarded as having failed to enter an appearance, since there is no entry on the relative record to that effect as required by that Rule. It follows that it is also uncertain whether the defendant could properly be regarded as having failed to enter an appearance so that the default judgment may have been void *ab origine*.

Secondly, the default judgment as entered by the Clerk of the Court is not definite in its terms in that the period within which the plaintiff's wife is to be returned to him is not specified therein so that it is uncertain precisely when the alternative provided for in that judgment, i.e. the refund of the *lobolo* in the sum of £37, comes into operation, see Nyembe *v.* Zwane 1946 N.A.C. (T. & N.), 26.

The Native Commissioner concerned will no doubt take the necessary steps, if he has not already done so, to obviate a recurrence of similar lapses.

De Souza (Member): I concur.

Steenkamp (President):—

I agree that the appeal be allowed with costs and that the Native Commissioner's judgment be altered as set out by my brother, Balk.

I am, however, not too certain that the appellant, in his application for the rescission of the default judgment, has strictly complied with the Rules, but there are the provisions in Rule 73 (*b*) of the Native Commissioners' Courts Rules that a default judgment which was void *ab origine* may be rescinded.

The fact that the Clerk of the Court had not complied with Rule 41 (1) is in my opinion such an irregularity that the default judgment entered by him is void *ab origine*.

It is rather surprising that the Attorney for applicant did not make use of that Rule and apply for a rescission on the grounds that the default judgment was invalid.

Even though the application was dismissed in the Court *a quo* there was still ample time for an application to be made in terms of Rule 73 (*b*) because according to Rule 74 (9) application may be made not later than one year after the applicant first had knowledge of such an irregularity.

For Appellant: Adv. J. J. Trengove instructed by Dr. M. M. Nolte, Ermelo.

For Respondent: Adv. R. H. Peart instructed by Jackson & Joubert, Ermelo.

SOUTHERN NATIVE APPEAL COURT.

N.A.C. CASE No. 20 OF 1953.

MNQONJANE *v.* MNQONJANE.

BUTTERWORTH: 23rd September, 1953. Before Warner, Acting President: Potgieter and Harvey, Members of the Court.

LAW OF SUCCESSION.

Native estate enquiry in terms of section 3 (3) *of Government Notice No.* 1664 *of* 1929—*Quitrent allotment in Native Location—Devolution of, when deceased holder married according to Christian rites in community of property—Heir is eldest son of the woman who was the deceased's wife when title to the land was acquired by deceased holder—"House", what constitutes-obiterdictum, what is.*

The claimants to the land in question are the eldest sons of the respective successive Christian marriages in community of property contracted by Zondani the late registered holder of the land.

Zondani married his second wife (after the death of the first) on 29th December, 1903. Eddie is the sole issue of the second marriage. The land in question was surveyed in 1905 and title was issued on 4th May, 1910 in terms of Proclamation No. 227 of 1898, as amended, in the name of the late Zondani who died in 1934.

The widow of the second marriage occupied the land until her death in 1952.

The Assistant Native Commissioner declared Samuel, the eldest son of the first marriage, heir to the property. The eldest son of the second marriage has appealed against this judgment.

Further facts appear from the judgment.

Held:

(1) That the word "house" in the table of succession published in the 3rd schedule to Proclamation No. 142 of 1910 must be regarded as having the same meaning as "wife".

(2) That where the deceased registered holder was married more than once by Christian rites in community of property, quitrent land falling within the purview of section 23 (2) of Act 38 of 1927 must devolve on the eldest son of the woman who was the wife when title to the land was acquired by the deceased.

Appeal succeeds.

Legislation referred to:

Act, No. 38 of 1927—Sections 23 and 35.

Proclamation No. 227 of 1898.

Proclamation No. 142 of 1910—Sections 9 and 10.

Government Notice No. 2257 of 1928.

Cases referred to:

Tonjeni *v.* Tonjeni, 1947 N.A.C. (C. & O.), 8.

Dlalo *v.* Ndwe and Ors. (4, N.A.C. 189).

Works of Reference: Bell's Legal dictionary.

Appeal from the Court of the Native Commissioner, Tsomo.

Warner (AG. President):—

This is an appeal against a decision in an enquiry in terms of section 3 (3) of Government Notice No. 1664 of 1929 to determine the person entitled to succeed to Garden Lot No. 358 in Location No. 7, called Lutuli, in the District of Tsomo and registered in the name of the Late Zondani Mnqonjane.

The facts are not in dispute. The late Zondani married two women in succession, each by Christian rites. By his first wife he had four sons, John who died unmarried, Samuel who has four sons (Slingsby, Pritchard, Archibald and Bachelor), Abel who has two sons and Siqotolo who died while still a minor. After the death of his first wife, Zondani married his second wife on 29th December, 1903. By her he had one son Eddie, who has four sons. The land in question was surveyed in 1905 and title issued on 4.5.1910, in terms of Proclamation No. 227 of 1898 as amended, in the name of the late Zondani. Zondani died in 1934 and his widow of the second marriage occupied the land until her death in 1952.

According to the cover of the case, the claimants are (1) Samuel, eldest son of the late Zondani by his first marriage, and (2) Eddie, eldest son of the late Zondani by his second marriage. The Assistant Native Commissioner entered the following judgment: "Claimant No. 1 declared heir to this property." According to a statement made by Samuel, however, he is already in possession of an allotment held under title and has elected to remain in possession of the allotment held by him in terms of section *ten* of Proclamation No. 142 of 1910. It would seem therefore, that the Assistant Native Commissioner intended to award the property to Slingsby, the eldest son of Samuel, who is married and has no land.

Claimant No. 2, Eddie Mnqonjane, has appealed against the judgment on the grounds that (1) the judgment is not in accordance with law and (2) the Court erred in holding that the issue was distinguishable from the previous cases on the subject decided by the Native Appeal Court.

If the Assistant Native Commissioner had followed previous decisions of this court he would have awarded the land to second claimant who is married and landless. He did not do this but decided that previous decisions of this court were wrong. It is incumbent on him to give sound reasons for this decision and I must therefore examine his reasons for judgment to see whether he has done so. His proper course was to have given judgment in accordance with previous decisions and he could then have expressed his disagreement with them if an appeal had been noted.

In the case of Tonjeni *v.* Tonjeni [1947, N.A.C. (C. & O.), 8], the facts were similar to those in the present case except that, in that case, deceased had married two wives by native custom and then had married another woman by Christian rites. In dealing with the claim of the eldest son of the woman married by Christian rites, and the status of his mother, the Court stated: "Property acquired by her husband after her marriage would devolve on her son." The Assistant Native Commissioner refers to this statement as "*obiter dicta*" and states that he can find no decision that expects him blindly to follow *obiter dicta.* Now in Bell's Legal Dictionary *obiter dictum* is defined as "an opinion which a judge expresses in the course of his judgment, but which is not essential to the decision of the matter." Because there was, in Tonjeni's case, no evidence as to whether the land was acquired before or after the Christian marriage, this court ordered that the record be returned with directions to obtain evidence as to when the land was allotted to the deceased, when the latter married his third wife and when he died, and to give a fresh judgment in the light of such evidence. The statement that property acquired by the husband after his marriage with his third wife would devolve on her son was therefore essential to the decision of the case and cannot be regarded as *obiter dictum.*

The statement quoted from the judgment in Tonjeni's case was based on the judgment in the case of Dlalo *v.* Ndwe and Others (4 N.A.C. 189). In that case the deceased had married a woman by native custom and then, after he had acquired the land in question, he married another woman by Christian rites. The Court held that the woman married by Native Custom was entitled to the use and occupation of the land and that her son would succeed to it and his right vested in him prior to deceased's marriage by Christian rites. In this case there was also a claim for movables and in regard to them the Court stated: "There will be absolution from the instance in so far as the articles enumerated in clause 12 of the summons are concerned, it not being clear whether these were acquired before or after the

Christian marriage and by whom they were used". The Assistant Native Commissioner described this statement as "*obiter dicta*" also and seems to be under the impression that the judgment in Tonjeni's case was based on this statement for he says: "In the whole of the Ndlalo *v.* Ndwe decision there is nothing else stated to found authority for the judgment quoted in the Tonjeni case and relied on in the Magqabi case." He also states: "The learned Judge President did not say that he had to succeed by virtue of the fact that "the property was acquired during the subsistence of the customary union". These statements cannot be reconciled with the clear statement (at the foot of page 190) in Ndlalo's case: "This court is of opinion that the wife within the meaning of section 9 (1) of the Proclamation must be held to be the wife who was such *when title to the land was acquired by deceased.* It is clear that her son should, by virtue of sub-sections 2 and 3 of section 9 of the Proclamation, succeed to this property." This statement was made in deciding the issue in the case so that it cannot be regarded as *obiter dictum.*

The Assistant Native Commissioner has devoted portion of his reasons for judgment to setting out what the position would be under what he calls "our law". These statements are irrelevant as the legislature has made special provision for the devolution of land in a location held in individual tenure upon quitrent conditions by a native [section 23 (2) of Act No. 38 of 1927] and the land which is the subject matter of this case must devolve according to these provisions. In the Transkeian Territories the land must devolve in accordance with the Table of Succession provided in the Third Schedule to Proclamation No. 142 of 1910.

The Assistant Native Commissioner has found difficulty in the fact that section *one* of the Table of Succession reads: "His eldest son of the principal house or such eldest son's senior male descendant" whereas "house" is defined in section *thirty-five* of Act No. 38 of 1927 as "the family and property, rights and status, which commence with, attach to, and arise out of, the customary union of each Native woman" so that a "house" is not created in the case of a marriage by Christian Rites. The Assistant Native Commissioner states that, to give effect to the intention of the legislature, section *one* of the Table of Succession must be read in the case of Christian Marriages, as if the words "of the principal house" were non-existent and this section would in this case, then read in effect: "His eldest son or such eldest son's senior male descendant.". He does not state on what grounds he assumes this to have been the intention of the legislature. It seems to me that, if the legislature had had such an intention, there would have been no difficulty in inserting the necessary words in order to give effect thereto. It might be argued that the Table of Succession contained in the schedule to Proclamation No. 142 of 1910 was framed before Act No. 38 of 1927 was promulgated but Government Notice No. 2257 of 1928 was promulgated in terms of Act No. 38 of 1927 and section *one* of the Table of Succession contained in the schedule to this Government Notice, which is applicable to the Cape Province, excluding the Transkeian Territories, reads: "The deceased's eldest son of the principal house, or, if he be dead, such eldest son's senior male descendant, according to Native Custom."

In my view, the word "house" in the table of succession must be regarded as having the same meaning as "wife" because, under Native Custom, a Native establishes a "house" by taking a wife. At the time when deceased acquired the property, his second wife was his sole or principal wife. If this were not the case, she would have had no right to the use and occupation of the property when deceased died in 1934. If, as held by the

Assistant Native Commissioner, the eldest son of the first marriage is entitled to succeed to the land in spite of the fact that it was acquired during the subsistance of the second marriage, he must be regarded as the eldest son of the principal house and, in terms of section 9 (2) of Proclamation No. 142 of 1910, the widow of the second marriage would not then have been entitled to the use and occupation of the land.

I come to the conclusion, therefore, that previous decisions of this Court which laid down that, in a case such as this, the eldest son of the woman who was the wife when title to the land was acquired by the deceased is entitled to succeed to the land, should be followed.

The appeal is allowed with costs and the judgment of the Court below is altered to read: "Claimant No. 2 (Eddie Mnqonjane) is declared to be the heir to Garden Lot No. 358 in Location No. 7 called Lutuli in the District of Tsomo."

Potgieter (Member): I concur.

Harvey (Member): I concur.

For Appellant: Mr. Kockott, Nqamakwe.

For Respondent: Mr. Mahoud, Butterworth.

INDEX OF SUBJECT MATTER: 1953 (3).

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INDEX OF LITIGANTS. 1953 (3):

SOUTHERN NATIVE APPEAL COURT.

NOMQONDE *v.* LUPONDWANE.

N.A.C. CASE No. 21 OF 1953.

PORT ST. JOHN'S: 1st October, 1953. Before Warner, Acting President, Midgley and Wilkins, Members of the Court.

PONDO CUSTOM.

Native Appeal Case—Seduction and Pregnancy—Damages—Death of plaintiff during trial—Substitution of heir as plaintiff—Pondo custom.

Summary: Plaintiff, Porter Lupondwana, sued the two defendants, jointly and severally for damages for the seduction and pregnancy of his daughter Nompuko. Second defendant was sued in his capacity as head of the kraal of which defendant was an inmate. First defendant did not defend the action and judgment was entered against him by default. Second defendant denied that first defendant was an inmate of his (second defendant's) kraal and the case proceeded to trial. Plaintiff led evidence and closed his case and second defendant gave evidence. Thereafter the case was postponed. A month before the matter was due to come up for further hearing plaintiff's attorney gave notice that application would be made at the next hearing for the substitution of plaintiff's heir as plaintiff, the original plaintiff having died.

Second defendant, against whom judgment was given then appealed *inter alia* on the ground that the Court erred in holding that in an action for seduction and pregnancy, the action does not lapse on the death of either party.

Held: (1) That according to Pondo custom, a claim for damages for seduction and pregnancy is not extinguished by the death of the father or guardian of the girl seduced.

Appeal fails.

Cases referred to:

Mgadlwa *v.* Makupula, 1947, N.A.C. (C. & O.), 22.
Ngesi *v.* Mcuta, 1 N.A.C. (S), 1.

Appeal from the Court of the Native Commissioner, Ngqeleni.

Warner (Acting President):—

Plaintiff sued the two defendants, jointly and severally for five head of cattle or their value £50, alleging that first defendant had seduced and rendered pregnant his (plaintiff's) daughter Nompuko and that second defendant was the head of the kraal of which first defendant was an inmate and thus liable for the latter's torts.

First defendant did not defend the action and on the 23rd November, 1951, judgment was entered against him by default for £50 and costs £3. 5s.

Second defendant denied that first defendant was an inmate of his (second defendant's) kraal and the case proceeded to trial.

After several postponements, hearing commenced on 29th January, 1953, when plaintiff led evidence in support of his allegation that first defendant was residing at the kraal of second defendant at the time when the tort was committed. Plaintiff closed his case and second defendant gave evidence.

After second defendant had given his evidence, the case was postponed to 7th May, 1953, no reason being given for the postponement.

On 7th April, 1953, plaintiff's attorney gave notice that, at the trial on 7th May, 1953, application would be made for the substitution of Tamsanqa Lupondwana, the heir of Porter Lupondwana, who had died, as plaintiff in place of the said Porter Lupondwana.

On 7th May, 1953, application was made in terms of this notice. Defendant's attorney did not raise any objection and the application was granted, plaintiff being ordered to pay the costs of application.

Second defendant then led further evidence to refute the allegation that first defendant was an inmate of his kraal when the tort was committed and closed his case.

The Assistant Native Commissioner gave judgment for plaintiff against second defendant for five head of cattle or their value £50 as prayed with costs.

Second defendant has appealed against this portion of the judgment on the following grounds:—

1. That the Court erred in holding that in an action for damages for seduction and pregnancy, the action does not lapse on the death of either party.
2. That as the original plaintiff, Porter Lupondwana, had died whilst the action was pending, then the action should have died with him as, under Pondo custom, a personal action of the nature of seduction or adultery dies with the death of either party even after judgment has been delivered.

In the case of Mgadlwa *v.* Makupula, 1947, N.A.C. (C. & O.), 22, it was held that, under Pondo custom, upon the death of either the plaintiff or the tort-feasor liability for damages for adultery lapses, and this even after judgment has been given.

The question that this Court has to decide is whether this ruling of Pondo law in regard to actions for damages for adultery applies also to actions for damages for seduction and pregnancy.

The case of Ngesi *v.* Mcuta, 1, N.A.C. (S), 1, was one dealing with Tembu law but in the course of his judgment the learned President referred to Mgadlwa's case and stated: "it was made clear in the latter (Mgadlwa's) case that, according to Pondo custom, the death of the party to an action for damages for adultery or seduction not merely barred the action, but extinguished the liabilty, even to the extent of a judgment debt".

It seems to me that the words "or seduction" were inserted inadvertently because the claim in Mgadlwa's case was one for damages for adultery and not for seduction. In any case, the statement quoted was not essential for the decision of the case so that it must be regarded as "*obiter dictum*".

The question has been referred to the Native assessors and it appears from their replies, which are appended, that a claim under Pondo custom for damages for seduction and pregnancy is not extinguished by the death of the father of the girl seduced. In my opinion, there are sound reasons for placing a claim for damages for adultery on a different footing from a claim for seduction and pregnancy. A claim for damages for adultery is brought by the husband and, if he should die, the status of the woman is altered as she is no longer a wife but a widow. A claim for damages for seduction and pregnancy, on the other hand, is brought by the father or guardian of the girl and, if he should die, his heir takes his place as guardian and the status of the girl is unaltered. For these reasons, I consider that the opinion of the Native assessors should be accepted.

The appeal should be dismissed with costs but the judgment requires to be amended as the Native Commissoiner in giving judgment against second defendant has not made it clear that the judgment is joint and several to a certain extent with that against first defendant. The judgment given on 28th May, 1953,

should be amended to read: "Judgment for plaintiff against second defendant, jointly and severally with first defendant, for five head of cattle or their value £50 as prayed with costs to 23rd November, 1951. Second defendant to pay costs subsequent to 23rd November, 1951."

Midgley (Member): I concur.

Wilkins (Member): I concur.

For Appellant: Mr. Birkett, Port St. Johns.

For Respondent: Mr. Vabaza, Libode.

Appeal from the Court of the Native Commissioner, Ngqeleni.

ASSESSORS' OPINION.

The facts of the case are put to the assessors and they are asked to state the position according to Pondo Custom.

Per Tolikana Mangala (Libode): A girl is not in the same position as a wife. If the father of a girl who has been seduced dies, the heir can proceed. In the case of a wife who has been rendered pregnant there is no heir to the damages.

All agree.

Names of Assessors: Tolikana Mangala (Libode); Johnson Hlwatika (Ngqeleni); Madlanya Tantsi (Tabankulu); Lamayi Langa (Flagstaff).

NORTH-EASTERN NATIVE APPEAL COURT.

QWABE d.a. *v.* QWABE.

N.A.C. CASE No. 30 OF 1953.

ESHOWE: 21st July, 1953. Before Steenkamp, President, Balk and Oftebro, Members of the Court.

CUR. AD. VULT.

VRYHEID: 5th October, 1953. Judgment of the Court delivered by Steenkamp, Esq., President.

ZULU CUSTOM.

Customary Union—Dissolution on grounds of wilful desertion—Protector not cited as a party—Question of return of lobolo *not in issue.*

Summary: Plaintiff sued the defendant, her husband, for the dissolution of their customary union on the ground of wilful desertion, alternatively by reason of the fact that their continued living together had become insupportable or dangerous. The Native Commissioner gave judgment for defendant with costs.

In a majority judgment with which Steenkamp (President) dissented:—

Held: That plaintiff had discharged the onus of proof resting on her in her main cause of action, i.e. the onus of proving that her husband, the defendant, had wilfully deserted her.

Held further: That as the plaintiff's protector was not cited as a party to the action, but merely appeared therein to assist the plaintiff, the question of the return of any of the *lobolo* cattle paid by the defendant for the plaintiff was not in issue, and it was therefore not competent to make an order thereanent.

Cases referred to:

Masoka *v.* Mcunu 1 N.A.C. (N.E.) 327.
Dikazana *v.* Nozinga 1916 N.H.C 211.

Statutes, etc. referred to:

Sections 76 (1) (*f*), 78, 80 and 81 of the Natal Code of Native Law of 1932.

Appeal from the Court of the Native Commissioner, Eshowe.

Balk (Permanent Member):—

This is an appeal from the judgment given by a Native Commissioner's Court for the defendant (now respondent) with costs, in an action in which his wife, the plaintiff, who is the present appellant, claimed the dissolution of their customary union with costs of suit, on the ground of wilful desertion or alternatively by reason of the fact that their continued living together had become insupportable or dangerous.

The defendant in his plea stated that he resisted the plaintiff's claim.

The grounds of appeal are:—

"1. That the judgment is against the evidence and the weight of the evidence.

2. That the learned Native Commissioner erred in his interpretation of Section 76 (1) (*f*) of the Natal Code of Native Law in that he interpreted the word 'Insupportable' as being synonymous with the word 'dangerous' or the word 'impossible' or otherwise failed to apply the true meaning and intention of the provision of that section to the evidence adduced.

3. That the learned Native Commissioner erred in rejecting the evidence adduced for the plaintiff and in accepting the evidence adduced for the defendant.

4. That the order for Costs against the appellant was not justified."

The parties to this action are subject to the Natal Code of Native Law published under Proclamation No. 168 of 1932, as amended.

It seems to me that the plaintiff discharged the onus of proof resting on her in her main cause of action, i.e. the onus of proving that her husband, the defendant, had wilfully deserted her. For whilst the defendant in his testimony denied the plaintiff's allegations and stated that he loved her and wanted her to come back to him, he admitted therein that not once during the three years that she had been away from him on the last occasion had he gone to her protector's kraal with a view to securing her return. He explained that she had left him and gone to her protector's kraal to bear a child after he had refused her permission to do so and that he made no attempt to get her back because he had not done anything wrong. But this attitude, on the part of the defendant, is not in keeping with Native custom, according to which, it is the recognised practice for a husband who desires his wife back, to go to her protector with a view to securing her return even though it was through no fault of his that she left him. Moreover it is implicit in the defendant's evidence that he has no hut available for the plaintiff's occupation. Then there is the uncontroverted evidence of the plaintiff's protector, Gabangani, that he had at the meeting convened to attempt a reconciliation between the parties, told the defendant to take the plaintiff to his kraal and that the defendant had replied that he had not come to fetch his wife but merely in consequence of the Court's suggestion that a reconciliation between him and his wife should be attempted.

The plaintiff's version on the other hand impresses me as straight-forward and in keeping with Native custom. She stated in her evidence that the defendant had failed to maintain her and had ultimately chased her away from his kraal after he had taken another wife. She reported to her Chief and at the Native Commissioner's office. It is true that she first stated under cross-examination that she had gone back to the defendant and he had refused to have her and that immediately thereafter she said "I now admit I did not go back to the defendant". But it

seems to me that this discrepancy is more seeming than real since it is clear from the defendant's evidence that the plaintiff returned and lived with him after she had left him on a former occasion and she may well have had that occasion in mind when she stated that she had gone back to live with the defendant and that he refused to have her. It is also true that the plaintiff did not communicate to her protector her intention to seek the dissolution of her customary union with the defendant but then, as is manifest from the record of the proceedings in the Court *a quo*, her protector was away at work at the time and she reported to the adult male person apparently nearest related to him.

For these reasons I am of opinion that the probabilities as were disclosed by the evidence to have been material, weigh heavily in favour of the plaintiff's version and that the Native Commissioner *a quo* erred in not finding accordingly.

In my view therefore the appeal should be allowed with costs and the Native Commissioner's judgment should be altered to read as follows:—

> "It is ordered that the customary union between the plaintiff and the defendant be and is hereby dissolved, that the plaintiff shall be under the guardianship of her protector, Gabangani Biyela, that she shall reside at his kraal and that she is to have the custody of the three minor children of that union until further order of Court. The defendant is to pay the costs of this suit."

As the plaintiff's protector was not cited as a party to this action but merely appeared therein to assist the plaintiff, the question of the return of any of the *lobolo* cattle paid by the defendant for the plaintiff is not in issue and it is therefore not competent to make any order thereanent, see Masoka *v.* Mcunu 1 N.A.C. (N.E.) 327 at pages 329 and 330 and sections 80 and 81 of the said Code, as amended by Proclamation No. 176 of 1952.

Steenkamp (President):—

In the Native Commissioner's Court the plaintiff, duly assisted, sued her husband, the defendant, for the dissolution of a customary union existing between herself and the defendant on the grounds of wilful desertion or, alternatively, by reason of the fact that the continued living together of the parties has become insupportable or dangerous.

Defendant resisted the divorce and the Native Commissioner granted judgment in his favour with costs.

An appeal has been noted to this Court on the following grounds:—

> "1. That the judgment is against the evidence and the weight of evidence.
>
> 2. That the learned Native Commissioner erred in his interpretation of section 76 (1) (*f*) of the Natal Code of Native Law in that he interpreted the word 'Insupportable' as being synonymous with the word 'dangerous' or the word 'impossible' or otherwise failed to apply the true meaning and intention of the provision of that section to the evidence adduced.
>
> 3. That the learned Native Commissioner erred in rejecting the evidence adduced for the plaintiff and in accepting the evidence adduced for the defendant.
>
> 4. That the order for costs against the appellant was not justified."

In her evidence the plaintiff states "Defendant chased me away and was not maintaining me . . . My guardian told defendant he better take me home and he refused to do so". Under cross-

examination the same witness states that the Chief ordered her to return to her husband and she was also so ordered by the Clerk in the Native Commissioner's Office. She first states that she did

go back to defendant but he refused to have her, but later in her evidence she admits she did not go back to defendant when ordered to do so. She also admits under cross-examination the defendant assaulted her at the beginning of their quarrels but not lately. The assault could not have been serious because there is no evidence that she ever complained to anybody that the defendant assaulted her and she says nobody saw defendant assault her except his other wife.

The evidence by the plaintiff's guardian does not assist her case. He only gave evidence on the attempted reconciliation of the parties and he has been unable to do so and he does not think the parties can be reconciled. Under cross-examination he denies that plaintiff stated she refused to go back to defendant, but he admits she remained silent.

The defendant in his evidence states that his wife had made a complaint about the dog belonging to him and after she had been ordered by the Chief to return to him she stayed a year; she again left him and said she was going home for her confinement, but he refused to give her permission to do so. She left of her own free will and he states he has not done anything wrong and cannot appreciate why he should take steps to get her back to his kraal if he gave her no reason to leave. He denies that he assaulted her.

The Native Commissioner, in his reasons for judgment, states that the evidence shows that the plaintiff left of her own accord and he came to the conclusion that plaintiff had no legitimate reason to leave her husband's kraal. He also states that no evidence was called to prove that the continued living together of the parties has become dangerous or insupportable and he came to the conclusion that plaintiff's claim was frivolous and without reasonable grounds. These findings by the Native Commissioner are supported by the evidence.

If plaintiff is not able to live with her husband because she probably has no more affection for him, then she may only succeed in an action for the dissolution of a customary union on the grounds that life has been insupportable and then her father should have been joined as second plaintiff to enable the Court to make an order as to the number of cattle returnable to the husband. In this respect the remarks in Stafford's Book on Principles of Native Law (2nd Edition) page 130 would appear to sum up the position correctly where it is in fact stated that this ground viz. living together is insupportable or dangerous, will enable the Court to grant the divorce even when the blame cannot be laid at the door of either party and a fair order can be made regarding the *lobolo* to be returned to the husband.

The remarks by Mr. Justice Chadwick in Dikazana *v.* Nozinga 1916 N.H.C. on page 211 may well be followed where he states that when it comes to the knowledge of the Court that a man and woman cannot live together in harmony, it is much better that they should be separated.

Plaintiff's alternative claim was not competent as the Court could not consider a divorce on the grounds that life has become insupportable unless her father is joined as a party.

From the evidence adduced I am not satisfied that the separation of the parties is entirely due to the misdeeds or omissions of the defendant, as envisaged in section 81 of the Code and that being the case a divorce on that ground cannot be granted.

Ground two of the appeal is not appreciated as nowhere in his reasons for judgment has the Native Commissioner found that the word "insupportable" is synonymous with the words "dangerous" or "impossible". There is no evidence that at any time it is dangerous for plaintiff to live with the defendant. She herself admits that he had not assaulted her lately and assuming for a moment that he did assault her. I do not think it can be found from the evidence that assaults at any time have been of such a nature that her life is in danger.

Ground three of the notice of appeal can be disposed of very briefly. The Native Commissioner had the parties before him and he is able to judge their demeanour in the witness box and this Court is not in a position nor has any argument of substance been advanced for the Court to hold that he should have preferred the plaintiff's evidence to that of the defendant.

There is the question of costs mentioned in paragraph four of the notice of appeal and while I do not see how the plaintiff can recover costs against his wife where no divorce has been granted, yet I see no harm in costs being granted against her. It is observed that the plaintiff's guardian is not cited as a party, he only assisted her, and therefore the order of costs is not a judgment against him personally.

In the circumstances, in my opinion, the appeal fails but to enable plaintiff to bring a fresh action for the reason that divorce should be granted on the grounds that life has become insupportable I hold the view that the Native Commissioner's judgment should be altered to one of absolution from the instance. The plaintiff may then bring an action in which her guardian is joined as second plaintiff.

Oftebro (Member):—

Plaintiff sued defendant for a dissolution of their customary union on the grounds of wilful desertion or alternatively that living together has become intolerable or dangerous. In her evidence plaintiff avers that her last child was born at her uncle's kraal where she was then living, having been chased away by defendant who failed to provide the necessaries of life. She is supported in her evidence by her guardian who states that he was unable to reconcile the parties as is required by Section 78 of the Natal Code of Native Law. The guardian states in his evidence "I told Deft., to take Plaintiff to his kraal, Deft., replied that he had not come to fetch his wife, etc.," and in cross-examination denies that plaintiff refused to return.

Defendant, on the other hand, states that he knows of no quarrel with his wife and does not know why she had left him, that he loves her and wants her to come back.

I cannot reconcile this with his attitude since he has taken no steps whatever to endeavour to get his wife to return. He has completely disregarded her for a period of three years and done nothing whatever to get her to return. His attitude is in direct conflict with Native Custom. In fact he also corroborates plaintiff inasmuch that he states he is prepared to build a hut for her if she will return; clearly therefore she had no hut in his kraal and he was not properly maintaining her and had to all intents and purposes abandoned her.

In the circumstances I am of opinion that there has been constructive desertion by the defendant and I agree that appeal should be allowed with Costs and the Native Commissioner's judgment altered as set out by my brother Balk.

For Appellant: Mr. W. E. White.

Respondent in Person.

NORTH-EASTERN NATIVE APPEAL COURT.

NGOBESE v. MAKOBA.

N.A.C. CASE No. 54 OF 1953.

VRYHEID: 5th October, 1953. Before Steenkamp, President, Balk and Strydom, Members of the Court.

LAW OF PROCEDURE.

Practice and Procedure—Appeal against Native Commissioner's judgment—Application for written judgment to be lodged within seven days after judgment—Period of fourteen days after written judgment delivered to Clerk of Court within which appeal may be noted only obtains if a written judgment has been applied for within seven days after the date of the judgment.

Summary: Appellant applied for a written judgment in terms of Native Appeal Courts Rule 2 (1) but the application was not received by the Clerk of the Court within seven days after the date of the judgment. A written judgment was then delivered to the Clerk of the Court by the Native Commissioner and appellant lodged his notice of appeal with the Clerk of the Court within fourteen days after such delivery of the written judgment, but more than twenty-one days after the date of the judgment. No application for condonation of late noting of appeal was made.

Held: That an appellant may note an appeal within fourteen days after a written judgment has been delivered to the Clerk of the Court, but that period only obtains if a written judgment has been applied for within seven days after the date of the judgment.

Held further: That as this was not done in the instant case, and, as more than twenty-one days had elapsed between the date of the judgment and the noting of the appeal, the appeal was not noted timeously.

Held further: That in the absence of an application for condonation, the appeal was not properly before the Native Appeal Court and was struck off the roll with costs.

Statutes, etc., referred to:

Rules 2 (1) and 4 of the Rules for Native Appeal Courts.

Appeal from the Court of the Native Commissioner, Babanango.

Steenkamp (President):—

In this case evidence and arguments were concluded before the Native Commissioner on the 21st April, 1953, when he postponed the case for judgment to the 21st May, 1953. Both plaintiff and defendant were represented by Attorneys, who, however were not resident at the seat of the Court, namely, Babanango. Judgment was duly delivered by the Native Commissioner on the 21st May, 1953, and according to the record, neither of the Attorneys was present. A note, however, appears on the record that the Attorneys were to be advised of that judgment. This was done by the Clerk of the Court concerned on the 22nd May, 1953, when he also informed the appellant's Attorney that the appellant had intimated that he intended appealing against the Native Commissioner's judgment whereupon he had been advised to contact his Attorney.

In a letter dated the 27th May, 1953, appellant's Attorneys wrote to the Clerk of the Court and stated that the appellant had called on them and instructed them to note an appeal but before submitting a formal notice of appeal they would be pleased to receive a written judgment in terms of Rule 2 of the Native Appeal Court Rules. According to the date stamp impressed on that letter, it was received by the Clerk of the

Court on the 3rd June, 1953, i.e. the application for a written judgment was not received by the Clerk of the Court within seven days after the date of judgment as prescribed by Rule 2 of the Native Appeal Court Rules.

The Native Commissioner filed a written judgment with the Clerk of the Court on the 18th June, 1953. On the next day a copy of that judgment was dispatched to appellant's Attorneys.

The notice of appeal dated the 29th June, 1953, was received by the Clerk of the Court, together with the prescribed security, on the 1st July, 1953.

It is true that an appellant may note an appeal within fourteen days after a written judgment has been delivered to the Clerk of the Court as prescribed in Rule 4 of the Native Appeal Court Rules, but that period only obtains if a written judgment has been applied for within seven days after the date of the judgment, as provided by Rule 2. As this was not done in the instant case and, as more than the twenty-one days allowed by Rule 4 had elapsed between the date of judgment and the noting of the appeal, the appeal was not noted timeously and, in the absence of an application for condonation, it is not properly before this Court and therefore, in my opinion, it should be struck off the roll with costs.

Balk (Permanent Member): I concur.

Strydom (Member): I concur.

For Appellant: Mr. H. L. Myburgh i/b Acutt & Worthington.

For Respondent: Mr. C. J. Uys of Bestall & Uys.

NORTH-EASTERN NATIVE APPEAL COURT.

SIBIYA *v.* **NDHLELA.**

N.A.C. CASE No. 56 OF 1953.

VRYHEID: 6th October, 1953. Before Steenkamp, President, Balk and Strydom, Members of the Court.

LAW OF PROCEDURE.

Practice and Procedure: Interpleader actions—Form to be used for interpleader summons—Onus of proof where cattle attached at kraal of judgment debtor rests on claimant—Points raised which were not covered by the notice of appeal.

Summary: Certain cattle were attached at the kraal of the judgment debtor under a warrant of execution issued by the respondent.

The claimant claimed the cattle as his property and instituted an interpleader action using form N.A. 140 which was the form prescribed under the old Rules for Native Commissioners' Courts.

After the Native Commissioner had given judgment for respondent, the claimant noted an appeal to the Native Appeal Court.

Held: That as there was no doubt that the cattle had been attached at the kraal of the judgment debtor, the Native Commissioner had correctly placed the onus of proof on the claimant.

Held further: That the Native Commissioner had correctly found that the claimant had not discharged the onus of proving that the cattle were his property.

Held further: That as the two legal points raised by Counsel for appellant were not covered by the notice of appeal, they could not be considered in the absence of an application in terms of Rules 16 read with Rule 14 of the Rules for Native Appeal Courts.

Cases referred to:

Mcwabe *v.* Mbuyiswa, 1, N.A.C. (N.E.), 13.
K & D Motors *v.* Wessels, 1949, (1), S.A. 1, (A.D.).

Statutes etc. referred to:

Rule 36 of G.N. 2253 of 1928.
Rule 70 (2) of the Rules for Native Commissioners' Courts.
Rules 14 and 16 of the Rules for Native Appeal Courts.

Appeal from the Court of the Native Commissioner, Mahlabatini.

Steenkamp (President):—

The interpleader summons in the instant case was issued on form N.A. 140, being the form prescribed by Rule 36 of the Native Commissioners' Courts Rules published under Government Notice No. 2253 of 1928. But these Rules have since been repealed and superseded by those published under Government Notice No. 2886 of 1951, which came into force on the 1st January, 1952. Under the lastmentioned Rules, new forms have been prescribed and form No. 39 (Interpleader Summons) is the one that should have been used in the present action, see Rule 70 (2) of those Rules.

Notwithstanding the use of the wrong form, I am of opinion that neither the claimant nor the respondent have suffered any prejudice and in this connection I wish to refer to the case of Mcwabe *v.* Mbuyiswa, 1, N.A.C. (N.E.) 13 in which it was held that the issue of a writ of execution in the wrong form was a technicality and the case was decided on the merits. I am constrained to remark that officers of the Court should be more careful and comply with the Rules as this Court cannot continue to countenance errors in this respect.

In the instant appeal there is no doubt that the cattle concerned were attached at the kraal of the judgment debtor and therefore the Native Commissioner correctly placed the onus of proof on the claimant, see K & D Motors *v.* Wessels 1949, (1) S.A. 1 (A.D.) at pages 11 to 13. Ground 1 of the notice of appeal, which reads that the learned Native Commissioner erred in placing the onus of proof upon the claimant is therefore without substance. It should be added that this ground of appeal was not pressed by Counsel for appellant. Ground 2 of the notice of appeal reads that the learned Native Commissioner erred in rejecting the evidence for the appellant (claimant) and that his decision was against the evidence and the weight of evidence. The claimant wishes the Court to believe that he had *sisaed* the cattle in question to the wife of the judgment debtor. That evidence must be viewed with suspicion especially as the judgment debtor resides with his wife and although there is evidence that he is often away from home to work elsewhere, yet there is also evidence that he returns home every weekend. There is no need to consider the evidence in detail as, in my opinion, the Native Commissioner has correctly found that the claimant has not discharged the onus of proving that the cattle are his property and to me it seems that this is an attempt by the claimant unjustly to deprive the judgment creditor of cattle which were properly attached as the judgment debtor's property in satisfaction of the judgment debt concerned.

Two legal points which were not covered by the notice of appeal were raised by Counsel for appellant. These, however, could not be considered in the absence of an application in terms of Rule 16 read with rule 14 of the Rules of Native Appeal Courts, published under Government Notice No. 2887 of 1951, and therefore do not call for further comment.

In the circumstances the appeal should, in my opinion, be dismissed with costs.

Balk (Permanent Member): I concur.

Strydom (Member): I concur.

For Appellant: Mr. C. J. Uys instructed by Mr. W. E. White.

For Respondent: Mr. G. Havemann of G. D. Havemann & Co.

NORTH-EASTERN NATIVE APPEAL COURT.

NTOMBELA *v.* NTOMBELA.

N.A.C. CASE No. 52 OF 1953.

VRYHEID: 6th October, 1953. Before Steenkamp, President, Balk and Strydom, Members of the Court.

ZULU CUSTOM.

Succession—Affiliation where customary union contracted prior to coming into force of 1932 *Natal Code of Native Law—Determination of heir in accordance with primogeniture—In absence of affiliation* houses *taken to rank in chronological order of their establishment.*

Summary: In an estate inquiry under Section 3 (2) of Government Notice No. 1664 of 1929, a son of the third *house* established claimed to be heir on the ground that his mother's *house* was affiliated to the *indhlunkulu* in which there was no surviving male issue.

Held: That as the customary union between the deceased and appellant's mother was entered into prior to the coming into operation of the Natal Code of Native Law of 1932, the deceased had the right to effect the affiliation in question at any time from the celebration of that union until prior to the 1st November, 1932, when the provisions of that Code came into force.

Held further: That consequently, in determining who the deceased's general heir is, in accordance with primogeniture, the four *houses* must be taken to rank in chronological order of their establishment by the customary unions concerned.

Held further: That as there is no evidence on record to the effect that respondent's elder brother, Ntsimbini, died unmarried, the finding that respondent is the deceased's general heir should be set aside and the inquiry be remitted to the Native Commissioner to hear evidence on the question whether the late Ntsimbini left any male descendants, and thereupon for a fresh finding.

Cases referred to:

Mzimela *v.* Mzimela 1940 N.A.C. (T & N) 1.
Radebe *v.* Radebe 1943 N.A.C. (T & N) 56.
Dhludhla *v.* Dhludhla 1952 N.A.C. 263 (N.E.).

Statutes, etc., referred to:

Rules 14 and 16 of the Rules for Native Appeal Courts.
Section 3 (2) of Government Notice No. 1664 of 1929.

Balk (Permanent Member):—

This is an appeal from a Native Commissioner's finding in favour of the present respondent in an inquiry held in terms of Section 3 (2) of the Regulations for the Administration and Distribution of Native Estates, published under Government Notice No. 1664 of 1929, as amended, to determine whether he or the present appellant, who were the only claimants concerned, was the general heir of the late Pindela Ntombela (hereinafter referred to as "the deceased").

The grounds of appeal, inclusive of the two additional grounds approved by this Court in terms of Rule 16 read with Rule 14 of the Rules for Native Appeal Court, published under Government Notice No. 2887 of 1951, are—

"1. That the judgment is against the evidence and the weight thereof and contrary to law.

2. That the evidence establishes that appellant and not respondent is the general heir.

3. That there are further witnesses whom the Native Commissioner, in the interests of justice, should have called and whose evidence would have supported appellant's claim to be the general heir.
4. That the evidence clearly establishes that the late Pindela affiliated his third house, of which appellant is the eldest son, to his indhlunkulu.
5. That the learned Native Commissioner failed to take into account and to enquire into the possibility that the aforesaid conferment of status to the third house by the said late Pindela could have taken place before 1932, in which event the affiliation would be valid, even though made in manner other than one of the two ways contemplated by the Native Commissioner in his reasons for judgment."

The following facts, emerging from the evidence, are not in dispute:—

1. That the deceased entered into four customary unions, the first being with Nonhlupo, the second with Nomajele, the third with Gilosi and the fourth with Mqamase.
2. That the deceased had—
   (*a*) only one son by his first wife, Nonhlupo, viz., Situtu, who died unmarried;
   (*b*) three sons by his second wife, Nomajele, viz., Ntsimbini, who died, Mbulaleni, who is the respondent and Titiyana, who is also still alive;
   (*c*) two sons by his third wife, Gilosi, viz., Mandhlakayise, who is the appellant, and Mdulinde, who is also still alive;
   (*d*) three sons by his fourth wife, Mqamase, all of whom are still alive.
3. That the deceased did not divide his kraal into sections i.e. the *indhlunkulu, ikohlo* and *iqadi* sections.
4. That the *lobolo* paid for Gilosi by the deseased consisted of cattle which he had purchased.
5. That the deceased did not declare the status of any of his wives when his customary unions with them were celebrated.

It is signficant that the appellant, according to his evidence, founds his claim to the heirship in question not on the basis of the affiliation of his mother's *house* to Nonhlupo's *house* but on the ground that he was placed in Nonhlupo's *house* on the death of his mother.

The lastmentioned ground appears to postulate that the appellant's claim is founded on his translation from his mother's *house* to that of Nonhlupo to become heir therein, a practice not countenanced under Native law, see Radebe *v.* Radebe 1943 N.A.C. (T. & N.) 56.

Turning to the evidence of the witnesses called at the instance of the appellant, Camcam Ntombela stated that the appellant was the deceased's general heir because his (appellant's) mother's *house* had been affiliated to that of Nonhlupo, which constituted the *indhlunkulu*. But Camcam admitted that the deceased had not told him of this affiliation and that he had first heard thereof from Nonhlupo after the deceased's death. Camcam did not explain why this should have been so and, in the absence of a satisfactory explanation in this respect, his admission makes it improbable that the alleged affiliation ever took place since, being the deceased's eldest brother, he should, in keeping with custom, have been aware of the alleged affiliation before the deceased's death if there had, in fact, been such an affiliation.

Here it should be mentioned that as it appears from Camcam's evidence that the customary union between the deceased and the appellant's mother was entered into prior to the coming into operation of the Natal Code of Native Law, published under Proclamation No. 168 of 1932, the deceased had the right to effect the affiliation in question at any time from the celebration of that union until prior to the 1st November, 1932, when the provisions of that Code came into force, see Dhludhla *v.* Dhludhla, 1952 N.A.C. 263 (N.E.).

The fact that the *lobolo* for Gilosi was paid with purchased cattle, which is referred to above, indicates, of course, that there was no automatic affiliation of her *house* to that of Nonhlupo as would have been the case if the *lobolo* for Gilosi had been paid with property belonging to Nonhlupo's *house.*

Nonhlupo's evidence obviously does not establish the alleged affiliation. First she stated that the appellant was the deceased's general heir because he was put into her *house* when her son, Situtu, died. The she stated that when Situtu died the deceased had not entered into the customary union with the appellant's mother, Gilosi, but that the deceased had told her before he had contracted that customary union that he would take another wife and put her into her (Nonhlupo's) *house.* She also stated that the deceased's brothers did not know the status of any of his wives other than herself, which is not in keeping with custom if status was in fact conferred on any of them. She admitted that although the deceased had told her after the appellant's mother had died that she must take the appellant who was then about two years of age, the latter had since then continued to live with his grandmother and had only come to the deceased's kraal after the dispute in question came into being, which is also not in keeping with custom, if there had in fact been an affiliation such as is alleged. Again, she stated that the appellant came to the deceased's kraal of his own accord whereas the appellant stated in his evidence that he had been brought to that kraal and placed in the great *house,* i.e. Nonhlupo's house.

The evidence of Siteshi Ntombela, a half-brother of the deceased, also does not establish the alleged affiliation. He stated that the appellant was the deceased's general heir because of the alleged affiliation; further, that when the deceased returned home with Gilosi, he put her in Nonhlupo's *house;* he asked the deceased why he did so and he replied that she should stay in Nonhlupo's house and that Gilosi's son would be his general heir. This evidence conflicts with that of Nonhlupo who stated that none of the deceased's brothers were aware of the status of any of his wives other than herself and that Gilosi stayed in her (Nonhlupo's) *house* only temporarily. Moreover, Siteshi admitted under cross-examination by the respondent, that during the deceased's illness shortly before his death, he (Siteshi) suggested to the deceased's brothers that they should go and ask him who his general heir was, which postulates that he (Siteshi) did not then know that the appellant was the deceased's general heir. Siteshi did explain that he made the suggestion in question to the deceased's brothers because he (Siteshi) was the only person to whom the deceased had mentioned that the appellant would be his general heir and he wanted them to know it. But this explanation is obviously puerile. Siteshi also admitted under cross-examination by the respondent that although he was at the family meeting held to determine who the deceased's general heir was, he did not speak thereat. His failure to mention the alleged affiliation at this meeting and to state thereat that the deceased had told him that the appellant was the general heir, is, in the absence of any explanation by him for refraining from doing so, obviously conduct at variance with his evidence that he knew of the alleged affiliation and the appellant's being the deceased's general heir before the family meeting in question was held.

Mqembula Zulu's evidence that the deceased had told her of the alleged affiliation when he was speaking generally of his kraal affairs, does not impress me as convincing as she admitted under cross-examination by the respondent that she had not mentioned this matter at the family meeting referred to above but had reported it to Camcam, who, however, stated in his evidence that he had obtained the information from Nonhlupo. Then Mqembula's evidence that the alleged affiliation took place before the respondent was born conflicts with Nonhlupo's testimony that the respondent was born before the deceased entered into his customary union with Gilosi.

The evidence of Jalimani Ntombela, a half-brother of the deceased, that he knew of the alleged affiliation from the deceased's general talk, appears to me to be unacceptable, not only on account of vagueness, but also because he admitted under cross-examination by the respondent that he did not mention the matter at the family meeting referred to above and gave no good reason for having refrained from doing so.

This concludes the evidence of the witnesses called at the instance of the appellant.

The Native Comminssioner states in his reasons for judgment that Mali Ntombela, who is a half-brother of the deceased and was the only witness called at the instance of the respondent, gave his evidence with such candour that he did not in the least doubt his veracity.

Mali's testimony strikes me as convincing on the face of it and finds corroboration from the admissions by the other witnesses and the inconsistencies in their evidence dealt with above.

From Mali's evidence, it seems clear to me that the appellant's mother's *house* was not affiliated to that of Nonhlupo and that the alleged affiliation is a fabrication by the latter with whom, according to the respondent's evidence, the trouble started when she refused to live with his elder brother, Ntsimbini. In addition there is the respondent's evidence that the deceased's cattle were, on his death, registered in the name of Ntsimbini, who died later. This registration, which was admitted by Nonhlupo, is, in the absence of any other acceptable explanation therefor, an indication that Ntsimbini was then regarded as the deceased's general heir.

In the circumstances there can, to my mind, be no doubt that on the probabilities as were disclosed by the evidence to have been material, the only finding that was justified was that the appellant's mother's *house* was at no time affiliated to Nonhulpo's *house*.

Consequently, in determining who the deceased's general heir is, in accordance with primogeniture, the deceased's four *houses* must be taken to rank in chronological order of their establishment by the customary unions concerned, so that, failing an heir in Nonhlupo's house, the deceased's eldest son by his second wife, Nomajele, is his general heir, see Mzimela *v.* Mzimela 1940 N.A.C. (T & N) 1 at page 2.

It follows that the first, second and fourth grounds of appeal fail and that the fifth ground falls away.

The third and only remaining ground of appeal was abandoned by Counsel for Appellant at the outset of his argument and properly so as it seems clear that the witnesses called by the Native Commissioner from amongst the deceased's kin were, owing to their close relationship to him and their age, best qualified to testify to his domestic affairs and as, in the absence of any indication from the evidence to the contrary, it falls to be accepted that their number sufficed to enable the Native Commissioner properly to decide the issue involved.

But this does not dispose of the matter for it is only failing any sons of the respondent's late elder brother, Ntsimbini, that the respondent would be the general heir of the deceased, and whilst the Native Commissioner states in his reasons for judgment that Ntsimbini died unmarried, there is no evidence to that effect on record nor that Ntsimbini died leaving no male issue. Incidentally the respondent mentioned in the course of his argument that the late Ntsimbini had left a son.

In the result I am of opinion that the appeal should be dismissed with costs but that the Native Commissioner's finding that Mbulaleni is the general heir of the deceased should be set aside and the inquiry remitted to him to hear evidence only on the question whether the late Ntsimbini left any male descendants and thereupon for a fresh finding.

Steenkamp (President): I concur.
Strydom (Member): I concur.
For Appellant: Mr. C. J. Uys of Bestall & Uys.
Respondent in person.

NORTH-EASTERN NATIVE APPEAL COURT.

KUMALO *v.* SIBIYA.

N.A.C. CASE No. 43 OF 1953.

PIETERMARITZBURG: 13th October, 1953. Before Steenkamp, President, Ashton and Balk, Members of the Court.

ZULU CUSTOM.

Practice and Procedure—Appeal from Chief's Court—Application to restate defence—Cost of adjournment—Costs of appeal where wrong judgment occassioned by Native Commissioner acting meru moto.

Land in Native Location: dispute as to occupation

Summary: Plaintiff sued defendant in a Chief's Court for damages for interference by defendant with plaintiff's wattle plantation. At the hearing of the appeal against the Chief's judgment, defendant verbally applied for an amendment of his plea. The Native Commissioner granted the amendment whereupon plaintiff applied for a postponement of the hearing to enable him to consider his position in the light of the defendant's amended plea. The postponement was granted and plaintiff was ordered to pay the wasted costs of the day.

At the resumed hearing the Native Commissioner *meru moto* dismissed plaintiff's claim.

Held: That the plaintiff was entitled to an adjournment to consider his position in the light of defendant's amended plea without being mulcted in wasted costs on that account, as the application for the amendment of the plea was only made on the day of the hearing of the appeal.

Held further: That apart from the fact that the pleadings in the instant case do not disclose that the wattle plantation concerned is situate in a Native location which is subject to the provisions of Proclamation No. 123 of 1931, as amended, it is not clear from the pleadings that the dispute concerns the occupation of land.

Held further: That as neither of the parties seems to have been responsible for the wrong judgment which appears to have resulted solely from the Native Commissioner having acted *meru moto,* and as the position could not have been cured by the defendant's abandoning the Native Commissioner's judgment, costs of appeal to this Court and costs already incurred in the Native Commissioner's Court in the instant case should be costs in the cause.

Cases referred to:

Ngubane *v.* Ngubane, 1, N.A.C. (N.E.), 255.
Mnyandu *v.* Zulu, 1952, N.A.C. 201 (N.E.).

Statutes etc. referred to:

Proclamation No. 123 of 1931.
Rule 12 of Rules for Chiefs' and Headmen's Civil Courts.

Appeal from the Court of the Native Commissioner, Estcourt.

Balk (Permanent Member):—

This is an appeal from the judgment of a Native Commissioner's Court allowing, with costs, an appeal against the judgment of a Chief's Court, given for plaintiff (present appellant) in the sum of £3. 10s. with costs, and altering the last mentioned judgment to one dismissing the claim with costs.

The claim and the defendant's reply thereto, as formulated in the Chief's Court, read:—

"*Claim:* £20 damages for interference by defandant with plaintiff's wattle plantation. Defendant chopped down trees in plantation after being told that he had no right to do so.

Defendant's reply to Claim: Admitted cutting down the trees, but pleaded he did not know that his action was injurious to plaintiff's rights."

On the day of the hearing of the appeal in the Native Commissioner's Court, the defendant's Attorney, *in limine*, applied for the amendment of the defendant's plea in the Chief's Court to read

"Admitted cutting down trees but pleads that they were not growing in plaintiff's allotment."

This application, which was opposed by the plaintiff's Attorney, was granted by the Court.

The plaintiff's Attorney hereupon applied for a postponement of the hearing of the case to enable him to consider the plaintiff's position in the light of the defendant's amended plea.

This adjournment was granted by the Court which, however, ordered the plaintiff to pay the wasted costs of the day.

At the resumed hearing of the case, the Native Commissioner *a quo* entered, apparently *mero motu*, the judgment specified above without any evidence having been adduced then or at the previous hearing.

The grounds of appeal are:—

"1. That the Native Commissioner erred in allowing the Appeal without hearing any evidence.

2. That the claim is for damages done to plaintiff's trees on his own allotment.

3. That there is no legal obligation on plaintiff to first have it arbitrated whether the trees were damaged on his own allotment.

4. That in Law plaintiff's case should have been heard as there is no dispute as to occupation of land.

5. That the order for costs of the postponement on 28th April, 1953, to be paid by plaintiff after defendant was granted amendment of his plea was judicially a wrong order. Defendant did not avail himself of the privileges of Rule 12 (2) of Government Notice No. 2885 of 1951

6. That the whole of the Judgment is unsupported in Law, or by evidence and is not in accord with substantial justice."

In his reasons for judgment the Native Commissioner states that as it is clear from the pleadings that the dispute is one in connection with the occupation of land in a location, he held that it should first be settled administratively (under Proclamation No. 123 of 1931, as amended) on the authority of Ngubane *v.* Ngubane, 1 N.A.C. (N.E.) 255.

But apart from the fact that the pleadings in the instant case do not disclose that the wattle plantation concerned is situate in a Native Location which is subject to the provisions of Proclamation No. 123 of 1931, as amended, it is not clear from these pleadings that the dispute concerns the occupation of land. That being so and in the absence of any evidence or admissions, it is manifest that the Native Commissioner based his judgment on wrong premises and that the appeal accordingly falls to be allowed on that ground.

As regards costs of appeal to this Court, neither of the parties seems to have been responsible for the wrong judgment in that it appears from the relative record of the proceedings that it resulted solely from the Native Commissioner's having acted *mero moto;* nor could the position have been cured by the defendant's abandoning the Native Commissioner's judgment since justice demands that that judgment should be set aside and the case remitted to the Native Commissioner for determination afresh on such evidence as may be properly adduced by the parties and/or at the instance of the Court. Accordingly, following the usual practice in such cases, costs of appeal to this Court and costs already incurred in the Native Commissioner's Court in the instant case should be costs in the cause, see Mnyandu *v.* Zulu, 1952, N.A.C. 201 (N.E.).

Turning to a consideration of the fifth and last remaining ground of appeal, it seems to me that the granting of the amendment to the defendant's plea in the instant case was tantamount to his having been allowed to re-state his defence in terms of section 12 (3) of the Regulations for Chiefs' and Headmen's Civil Courts, published under Government Notice No. 2885 of 1951, as amended. That being so and as the defendant failed to file with the Clerk of the Court concerned and to serve upon the plaintiff the written re-statement of his defence not less than seven days before the date fixed for the hearing of the appeal, as provided by section 12 (2) of the above-mentioned Regulations, but only made the application for the amendment of his plea on the day of the hearing of the appeal, the plaintiff was entitled to an adjournment to consider his position in the light of the defendant's amended plea without being mulcted in wasted costs on that account. Accordingly there should have been no order in regard to those costs. It should be added that there is nothing in the relative record of the proceedings indicating that the plaintiff's Attorney asked for wasted costs occasioned by the adjournment.

In the result I am of opinion that the appeal should be allowed, that the Native Commissioner's judgment should be set aside and the case remitted to him for trial afresh to a conclusion on such evidence as may be properly adduced. Costs of the appeal to this Court and costs already incurred in the Native Commissioner's Court to be costs in the cause. The Native Commissioner's order that the plaintiff is to pay the wasted costs of the day occasioned by the granting of the adjournment at his instance should also be set aside, leaving those costs also to be costs in the cause.

Steenkamp (President): I concur.

Ashton (Member): I concur.

For Appellant: Adv. J. H. Niehaus instructed by Hellet & de Waal.

For Respondent: Adv. D. Shearer instructed by Hugh L. Kidman.

NORTH-EASTERN NATIVE APPEAL COURT.

MKIZE *v.* CONCO.

N.A.C. CASE No. 50 OF 1953.

PIETERMARITZBURG: 13th October, 1953. Before Steenkamp, President, Ashton and Balk, Members of the Court.

LAW OF DELICTS.

Damages—Defamation—Under Natal Code of Natives Law statement must be malicious and it must allege evil conduct on the part of a person—Meaning of "malicious".

Practice and Procedure: System of law to be applied.

Summary: Plaintiff sued defendant for damages for defamation alleging that defendant had called him a thief. The statement was made to the *ibandla,* convened by plaintiff to enquire into the matter of the loss of two goats by one, Umsutu. A Chief's Court having given judgment for plaintiff, defendant successfully appealed to the Native Commissioner's Court, whereupon plaintiff took the matter on further appeal.

Held: That the Native Commissioner, should, in the exercise of his discretion, have applied Native law in the determination of the case.

Held: That for the purposes of this case, the word "malicious" contained in Section 132 of the Natal Code of Native Law is assumed to mean any improper or indirect motive.

Held: That the circumstances of the instant case indicate clearly that the defendant made the statement complained of in good faith; in other words that those circumstances negative malice on the part of the defendant in making that statement and therefore, in the absence of any evidence showing or suggesting any improper or indirect motive on the defendant's part in making that statement, it cannot be said to be malicious.

Cases referred to:

Basner *v.* Trigger, 1946, A.D., 83.
Ex Parte Minister of Native Affairs: in re Yako *v.* Beyi, 1948 (1) S.A., 388 (A.D.)
Blumenthal *v.* Shore, 1948 (3) S.A., 671 (A.D.)
Mkize *v.* Mkize, 1 N.A.C. (N.E.), 39.

Statutes, etc., referred to:

Section 12 (1) (*a*) of Native Administration Act, No. 38 of 1927.
Section 132 of the Natal Code of Native Law of 1932.

Appeal from the Court of the Native Commissioner, Weenen.

Balk (Permanent Member):—

This is an appeal from the judgment of a Native Commissioner's Court allowing, with costs, an appeal against the judgment given by a Chief's Court for the plaintiff (present appellant) for one beast and costs and altering the lastmentioned judgment to one for the defendant (now respondent) with costs.

The pleadings in the Chief's Court read:—

"*Claim:* Claim £10. Plaintiff alleges that defendant accused him of being a thief.
Defendant's reply to claim: Defendant admitted accusation."

The appeal to this Court is brought by the plaintiff on the following grounds:—

"1. Before the Ibandhla, at which no person of authority was present defendant admitted having called plaintiff a thief.

2. Before the Chief who tried the case defendant pleaded that he admitted having called the plaintiff a thief.

3. On appeal before the Native Commissioner of Weenen, defendant admitted having called plaintiff a thief but amplified his plea to the effect that he had not defamed him, but did not plead either of the defences provided for by Section 132 of the Code of Native Law.

4. The Native Commissioner erred in upholding the appeal and altering the Chief's judgment to one of judgment for defendant with costs."

Before proceeding to a consideration of the grounds of appeal to this Court, it is necessary to deal with another aspect, viz., the plaintiff's intimation under cross-examination that his claim was based not on the defendant's statement before the ibandla that he (plaintiff) had stolen Umsutu's two goats but on a statement made to him (plaintiff) by Umsutu when the latter was searching for his goats that he (Umsutu) had been told by the defendant that the plaintiff had stolen his (Umsutu's) goats.

Now at the hearing of the appeal in the Native Commissioner's Court the only admission made by the defendant as regards his having said that the plaintiff had stolen goats was that he had said so before the *ibandla*. Umsutu did not testify at that hearing and no evidence whatsoever was adduced thereat to show that the defendant made the statement complained of to Umsutu when the latter was looking for his goats, the plaintiff's intimation to that effect under cross examination being hearsay and therefore inadmissible; nor is there any evidence indicating that the defendant was present when Umsutu is alleged to have told the plaintiff that the defendant had said that the plaintiff had stolen the goats; and the pleadings in the Chief's Court do not take the matter further. It follows that the plaintiff established no case on that basis. However as the plaintiff stated on re-examination that he also complained of the defendant's statement before the *ibandla* that he (plaintiff) had stolen the goats and as the plaintiff's appeal to this Court is confined to that aspect of the case, it seems to me that this appeal falls to be dealt with on that basis.

Although the Native Commissioner *a quo* does not specifically state which system of law he applied in arriving at his judgment in this case, i.e. common law or Native Law, it would appear that he had recourse to the lastmentioned system since otherwise he should in allowing the appeal have altered the Chief's judgment to one dismissing the claim with costs on the ground that the latter's jurisdiction was, in terms of Section 12 (1) (*a*) of the Native Administration Act, 1927, as amended, limited to the determination of civil claims arising out of Native law and custom which are brought by Natives against Natives resident in his area of jurisdiction.

In any event I incline to the view that the Native Commissioner should in the exercise of his discretion have applied Native law in the determination of the appeal as that appears to be the best system to reach a just decision between the parties; firstly because all the surrounding circumstances as disclosed by the evidence denote the observance of Native custom by the parties and defamation is, in terms of section *one hundred and thirty-two* of the Natal Code of Native Law, published under Proclamation No. 168 of 1932, as amended, an actionable wrong under Native law in the Province from which this case emanates; and secondly because the defendant does not appear to have raised or to have any defence peculiar to common law, see *Ex Parte Minister of Native Affairs: in re Yako* v. *Beyi,* 1948 (1) S.A. 388 (A.D.)

Except for the defendant's evidence that the *ibandla* had been convened by the plaintiff who was not an Induna, there is nothing to indicate whether there was a person in authority amongst that assembly. It follows that the defence specified in the second proviso to sub-section (2) of section *one hundred and thirty-two* of the above-mentioned Code cannot be relied upon

in the instant case; nor on the facts, as disclosed by the evidence, has the defence specified in the first proviso to that sub-section any application here so that the question of the defendant's failure to plead either of these defences is irrelevant.

But this aspect does not conclude the matter since the question of whether the statement complained of falls within the definition of "defamation" contained in section *one hundred and thirty-two* of the Code referred to above, which summarises this branch of Native Law in Natal, including Zululand, remains to be considered, see Mkize *v.* Mkize, 1 N.A.C. (N.E.), 39 at page 40.

In terms of this section, to constitute defamation, there are two requirements, viz. firstly that the statement must be malicious and secondly that it must allege evil conduct on the part of a person.

There can be no doubt that the statement complained of here viz. that the plaintiff had stolen the goats, meets the second requirement but it seems to me that it does not meet the first in that it was not malicious, as will be apparent from what follows.

The word "malicious" used in the said section *one hundred and thirty-two* has not been defined but for the purposes of this judgment I will assume in favour of the appellant that it bears the wider meaning indicated in Basner *v.* Trigger, 1946 A.D., 83 at pages 93 to 96 viz. that of any improper or indirect motive.

It is common cause that the statement complained of was made by the defendant before the *ibandla* and that the *ibandla* was convened by the plaintiff; and it is implicit in the evidence that the purpose for which the *ibandla* was convened was to enquire into the matter of the loss of Umsutu's two goats.

The Native Commissioner found, and to my mind properly so for the cogent reasons given by him, that the plaintiff had taken Umsutu's two goats whilst they were in the lawful custody of the defendant, in circumstances which amounted to theft. It follows that not only was there a duty cast on the defendant to inform the *ibandla* of the position but that it was necessary for him to do so to protect his own interests. Here it should be added that as is manifest from the defendant's evidence, which was properly accepted by the Native Commissinoer for the reason referred to above, the defendant witnessed the theft by the plaintiff of Umsutu's two goats concerned whilst they were in his (defendant's) custody.

In my view these circumstances indicate clearly that the defendant made the statement complained of in good faith, as found by the Native Commissioner; in other words these circumstances negative malice on the part of the defendant in making that statement and therefore in the absence of any evidence showing or suggesting any improper or indirect motive on the defendant's part in making that statement it cannot be said to be malcious, see Basner's case (*supra*) and Blumenthal *v.* Shore, 1948 (3) S.A. 671 (A.D.), which, although dealing with the common law defence of qualified privilege which has no application in the instant case, are nevertheless here instructive as an indication in what circumstances malice may be regarded as having been negatived.

It follows that the statement complained of does not constitute defamation in the instant case and that the appeal therefore falls to be dismissed with costs.

Steenkamp (President): I concur.

Ashton (Member): I concur.

For Appellant: Adv. J. H. Niehaus (instructed by J. M. K. Chadwick).

For Respondent: Adv. O. A. Croft-Lever (instructed by A. M. Buchan).

SOUTHERN NATIVE APPEAL COURT.

SINAMA *v.* **FANA.**

N.A.C. CASE No. 22 OF 1953.

KOKSTA : 14th October, 1953. Before Sleigh, President, Warner and Kelly, Members of the Court.

LAW OF PROCEDURE..

Res judicata—*When competent to plead to an entire cause of action.*

Summary: This is an appeal against the judgment upholding a plea of *res judicata* and subsequent dismissing of plaintiff's summons.

In the present case plaintiff claims £20 as damages for breach of contract alleging that many years ago he bought a certain ox from defendant who failed to deliver it to him and eventually delivered it to one Mbedeni who slaughtered it. A plea of *res judicata* was upheld and plaintiff's summons was accordingly dismissed. Plaintiff has appealed against the upholding of the plea.

In the previous case plaintiff alleged that he was the owner of the ox in question which he had bought from Mbedeni while it was in defendant's possession. He claimed delivery of the beast or payment of its value £25. Judgment was entered for defendant with costs.

Further facts are evident from the judgment.

Held: (1) That as the action in the present case is not one for delivery of the ox, but one for damages for breach of contract, a plea of *res judicata* cannot succeed.

The appeal succeeds.

Works referred to:

Schlosberg on Evidence 2nd Edition p. 46.

Appeal from the Court of the Native Commissioner, Umzimkulu.

Sleigh (President):—

This is an appeal against a judgment upholding a plea of *res judicata* and dismissing plaintiff's summons.

Where *res judicata* is pleaded by way of estoppel to an entire cause of action it amounts to an allegation that the whole legal rights and obligations of the parties were decided in an earlier action. The requirements are that the action in respect of which judgment has been given must have been between the same parties or their privies concerning the same subject matter, and founded on substantially the same cause of complaint as that in which the defence is raised. The test as to what was the real matter at issue in the previous action must be sought from the pleadings and not from the evidence. (See Schlosberg on Evidence, 2nd Ed. p. 46.)

Now in the present case, plaintiff claims £20 as damages and in his particulars of claim he alleges that many years ago he bought a certain ox from defendant who failed to deliver it to him and eventually delivered it to Mbedeni who slaughtered it. He further alleges that the value of the ox when it was slaughtered was £20 which amount he claims as damages for breach of contract.

In the previous case (No. 42 of 1952), however, plaintiff alleged that he was the owner of the ox in question which he had bought from Mbedeni while it was in defendant's possession. He claimed delivery of the beast or payment of its value £25. To these allegations defendant pleaded that the ox was his own property and that it was never the property of Mbedeni who had no right to dispose of it to plaintiff or to anyone else. In that case judgment was entered for defendant with costs.

Now it is clear from the pleadings in the previous case that plaintiff was seeking to recover his own property. The matter which the Court had to decide was whether the beast belonged to plaintiff or defendant; or, to put it in a different way, whether Mbedeni, in selling and delivering the beast (in one of the manners in which delivery may be made) to plaintiff, had transferred ownership to the latter. The judgment in that case gives a complete answer to the question. It is obvious that the trial court held that ownership had not passed to plaintiff. The cause of action in that case was that defendant was in wrongful possession of a beast of which plaintiff was the owner.

The cause of action in the present case is entirely different. Plaintiff relies on a contract of purchase and sale and his cause of complaint is that defendant had broken that contract. He admits, in effect, that the ox was never his property but that it belonged to defendant. He avers, however, that defendant was, in terms of the contract, under the obligation to deliver the ox and pass ownership to him. The question which the Court has to decide is not who was the owner (ownership in defendant is admitted) but whether there was a contract of sale between plaintiff and defendant, and, if so, whether defendant had broken the contract and, if he had, the *quantum* of damage suffered by plaintiff. It is obvious that these issues were not raised nor decided in the previous action. Plaintiff is, therefore, not barred from raising them now.

The appeal is allowed with costs and the judgment of the Court below is altered to read "The special plea is dismissed with costs." The record of the case is returned to the Court below for trial on its merits.

Warner (Member): I concur.

Kelly (Member): I concur.

For appellant: Mr. Elliot, Kokstad.

For Respondent: Mr. Eagle, Kokstad.

SOUTHERN NATIVE APPEAL COURT.

DLAMINI *v.* KUBONI AND ANOTHER.

N.A.C. CASE No. 23 OF 1953.

KoEstad: 14th October, 1953. Before Sleigh, President, Warner and Kelly, Members of the Court.

HLANGWINI CUSTOM.

Native appeal case—Desertion by wife—Christian marriage—Liability for payment of balance of dowry whilst wife still at parents' kraal—Hlangwini custom—Absolution judgment granted to avoid plea of Res judicata *in subsequent action.*

Summary: Plaintiff sued defendants (son and father) for thirteen head of cattle or payment of their value at £8 being balance of dowry for his daughter Miriam who is married to first defendant by Christian rites. Defendants in their plea admitted owing six head of cattle but pleaded that, as Miriam had deserted and was living with the plaintiff, the balance was neither due nor payable, as long as Miriam persisted in her desertion.

The contention of defendants was upheld by the Court below and a full judgment entered in their favour. Plaintiff appealed against this judgment in respect of the six head of cattle admitted by defendants.

Held: (1) That according to Native Law the father must tender her return before he can sue for payment of the balance of the dowry; the fact that the marriage is one by Christian rites is no ground for departing from this principle.

Cases referred to:

Beneshe *v.* Sikweyiya and Ano. [1942 N.A.C. (C & O) 1].
Maqhekana and Ano. *v.* Lenata [1943 N.A.C. (C & O) 49].
Jas *v.* Mpunga and Ano. [1946 N.A.C. (C & O) 5].
Kanisa *v.* Ngodwane (5 N.A.C. 49).

The appeal succeeds.

Appeal from the Court of the Native Commissioner, Umzimkulu.

Sleigh (President):—

Appellant sued respondents (son and father) for 13 head of cattle or payment of their value at £8 each being balance of dowry for his daughter, Miriam, who is married to first respondent according to Christian rites. Respondents in their plea admitted that there was a balance of six head of cattle, but pleaded that this balance is neither due nor payable because Miriam has deserted her husband and is living with appellant who is not entitled to claim the balance of the dowry as long as she persists in her desertion.

The Assistant Native Commissioner upheld respondents' contention and entered a full judgment in their favour. From this judgment appellant appeals in respect of the six cattle admitted by respondents.

The facts in this case are not seriously in dispute. During the absence of first respondent Miriam obtained leave from his brother to visit her father (the appellant). She did not return and later gave birth to a child. Respondent denied paternity of this child and a prosecution for failing to maintain it was unsuccessful. Thereafter she sued him for maintenance for herself. The outcome of this case was that she was advised to return to her husband. A few days after she left for her husband's kraal but returned to appellant the same night saying that respondent had driven her away. Appellant there and then took her back to the kraal of respondent who denied that she had been to his kraal and offered to receive her. She stayed there that night, but the next morning she was crying and respondent sent for appellant. When he arrived she would not say why she was crying. He took her home for questioning. Later a messenger was sent to *putuma* her but she refused to return. Although she stated in court that she was willing to return it is doubtful whether she will do so having regard to her previous attitude.

In Beneshe *v.* Sikweyiya & Ano. [1942 N.A.C. (C. & O.) 1] the plaintiff sued for balance of dowry and alleged that his daughter had been driven away by her husband, but that she was willing to return to him and he offered to return her. One of the defences pleaded was that the action was premature inasmuch as no such action can be brought by a plaintiff whilst his daughter is away from her husband. This Court, however, did not accept this contention. It apparently accepted the position that the wife had been driven away and entered judgment in the plaintiff's favour for the balance of the dowry against handing over of his daughter to her husband. In Maqhekhana & Ano. *v.* Lenata [1943 N.A.C. (C. & O.) 49] the husband had rejected his wife on grounds which he failed to establish. He was ordered

to pay the balance of the dowry notwithstanding the fact that the wife was living with her dowry holder. In Jas *v.* Mpunga & Ano. [1946 N.A.C. (C. & O.) 5] the husband sued for the return of his wife or restoration of the dowry and the defendant counter-claimed for the balance of a Hlubi dowry. It was contended that a dowry holder could not hold the wife and at the same time sue for the balance of dowry payable under Hlubi custom. This Court rejected this contention and said that there may be cases where the circumstances are such that a dowry holder is barred from suing for the balance of dowry, for instance, where he is liable for the return of the dowry already paid without the option of returning the wife; but where the wife ha dleft her husband because of his treatment of her and he has not *putumaed* her, and her father has offered to return her and she is willing to return, the dowry holder could recover the balance of dowry.

In these three cases the parties were married according to Native custom and in each case the husband was the guilty party. I have been unable to find any case in which judgment was given in favour of the father for the balance of the dowry where the wife was the defaulting party. I have always understood Native Law to be that in cases in which action for the payment of balance of dowry is permissible, the father must tender the return of the woman before he can sue, and this view is supported by some of the Native assessors in the present case. (A record of their opinions is annexed.)

In the present case first respondent has at all times been ready to receive his wife, and although appellant has made a genuine effort to effect reconciliation, her previous conduct indicates that she does not desire to restore conjugal rights. If, therefore, I am correct in my statement of Native Law on the point, appellant is not entitled to recover the six head of cattle until he has offered the return of the woman and she is willing to return.

I can see no good ground from departing from this law merely because the first respondent is married to the woman according to Christian rites. It would, in my opinion, be inequitable to order payment of the cattle when the wife has deserted her husband. The appellant can suffer no prejudice, since he can with the co-operation of the woman return her to her husband. In my opinion, therefore, the Native Commissioner was correct in refusing to give judgment for appellant for the balance of the dowry admitted to be still owing.

The alternative ground of appeal is that the judgment should have been one of absolution. As I have indicated above appellant will be entitled to recover the balance of the dowry if the woman returns to her husband; but counsel for respondents contends that it is unnecessary to alter the judgment of one for defendants to one of absolution because if fresh action is brought a plea of *res judicata* would not be successful. I do not agree with this contention because if the particulars in the fresh action are identical with those in the present case, a plea of *res judicata* may succeed. This ground of appeal consequently succeeds and since respondents have not abandoned the judgment in terms of section 17 (3) of the Rules of this Court they must bear the costs of this appeal.

The appeal is allowed with costs and the judgment of the Court below is altered to one of absolution from the instance with costs.

Kelly (Member): I concur.

Warner (Member) Dissentiente:—

Plaintiff entered into a contract with defendants in terms of which he would allow first defendant to marry his daughter Miriam by Christian rites and, in consideration of this, defendants undertook to pay a certain number of cattle as dowry.

Plaintiff has fulfilled his obligations under the contract. Defendants have fulfilled their obligations in part by paying portion of the dowry agreed upon.

For the purpose of this appeal plaintiff has accepted defendants' admission that it was agreed that the dowry should consist of 20 head of cattle and that 14 have been paid.

It is not denied that defendants have been given a reasonable time within which to pay the balance of dowry but, on plaintiff's claim for such balance, the Assistant Native Commissioner gave judgment for defendants on the ground that Miriam had deserted her husband.

In the case of Kanisa *v.* Ngodwane 5 N.A.C. 49, it was held that, where a marriage has been contracted by civil rites, no claim for the restoration of the dowry can be entertained during the subsistence of the marriage. I am of opinion that it follows from this that a defence to a claim for dowry due in respect of a civil marriage, based on an allegation that the woman has deserted her husband, cannot be entertained during the subsistence of the marriage.

I consider that, if first defendant does not take action against Miriam on account of her desertion but allows the marriage to continue to subsist, he is liable for payment of dowry in spite of the fact that Miriam is residing with plaintiff.

First defendant can bring action against Miriam in the Native Divorce Court seeking an order compelling her to restore conjugal rights to him. He cannot, however, bring action against plaintiff with a view to obtaining an order against him that he should restore Miriam to first defendant or refund the dowry paid. It follows from this that, in claiming the balance of dowry, plaintiff cannot tender delivery of his daughter because he has no control over her while she is first defendant's wife.

I consider that my views are strengthened by the fact that it is by no means certain that defendants would have been able to evade liability for payment of balance of dowry if the union between first defendant and Miriam had been a Native customary one instead of a civil marriage. Of the five Native assessors consulted, the two representing Basuto Tribes state: "The husband must pay what he agreed to pay even if the woman refused to return." This case comes from the Umzimkulu district and Petros Jozana, who is best qualified to know the custom in that district (Andries Mafa is headman of a location consisting mostly of members of the Pondo tribe who do not have fixed dowries) states: "The husband must pay the cattle to the girl's father and thereafter sue for the return of his wife."

If defendants had paid the full dowry agreed upon at the time of the marriage they would not be able to obtain a refund of any portion of it, in spite of any desertion by Miriam, as long as the marriage subsists. I feel, therefore, that they should not be allowed to take advantage of their delay in paying the balance.

I agree that the appeal should be allowed with costs but consider that the judgment of the court below should be altered to read: "For plaintiff for six head of cattle or their value £30 and costs."

For Appellant: Mr. Elliot, Kokstad.

For Respondent: Mr. Eagle, Kokstad.

NATIVE ASSESSORS' OPINIONS.

Petros Jozana (Hlangwini—district of Umzimkulu); Andries Mafa (Hlangwini—district of Umzimkulu); Khorong Lebenya (Basuto—district of Mount Fletcher); Dodo Sipika (Hlubi—district of Matatiele); Ephraim Diaho-Monaheng (Basuto—district of Matatiele).

Question: A husband agreed to pay 20 head of cattle as dowry and delivered 14 head leaving a balance of 6 cattle. The wife deserted her husband and returned to her father. She was *putumaed* but she refused to return. The father then sued for the payment of the 6 cattle without offering to return the woman to her husband. Can he recover the cattle?

Answer (per Khorong Lebenya): According to Basuto custom the husband must pay the cattle even if the woman refused to return. If the husband dissolved the union we Basutos do not return the cattle if the woman has had children.

Diaho-Monaheng agrees.

(Per Dodo Sipika): If the wife rejects her husband and refuses to return the six cattle would not be payable. If the wife has had an adulterine child and discloses the name of the adulterer, the cattle are payable but if she fails to do so and refuses to return then the father cannot recover the balance of dowry.

(Per P. Jozana): The husband must pay the cattle to the girl's father and thereafter sue for the return of his wife.

(Per A. Mafa): The balance is only payable if the wife is at her husband's kraal.

SOUTHERN NATIVE APPEAL COURT.

MAKHETA *v.* **FARO.**

N.A.C. CASE No. 24 OF 1953.

KOK/STAD: 15th October, 1953. Before Sleigh, President, Warner and Kelly, Members of the Court.

COMMON LAW.

Native appeal case—Landlord and tenant—Cession of rental—plea of tender into Court—Exemplary damages—Noting of appeal automatically suspends execution.

Summary: During 1942, plaintiff (now respondent) let his farm to defendant at an annual rental of £100 payable half-yearly in advance. Ninety days' grace was allowed at the end of each half year in which to pay the instalments. The lease also provided for cancellation thereof and payment of damages should there be a breach of the agreement by the lessee. Plaintiff in 1949 ceded the rental to his attorneys, who advised defendant of the cession and warned him that any payment of rent to plaintiff would be of no effect.

In 1952 plaintiff sued defendant for ejectment, alleging that the lease had expired. The judgment in that case was one of absolution from the instance. In the present case plaintiff alleges that the rent for the half-year commencing 15th September, 1952, was not paid or tendered within the 90 days' grace and prays for judgment for an order of ejectment; an order cancelling the lease; an amount equal to the *pro rata* share of rent from 15/9/52 to date of service of summons, viz. 12/1/53, and exemplary damages at £1 per diem till defendant vacates the farm.

Defendant in his plea avers that he tendered the rent to plaintiff timeously and that plaintiff refused to accept the tender.

Judgment in the Court below was in favour of plaintiff in the following terms:—

(1) Orders made for cancellation of lease and ejectment of the defendant and those claiming under him from the farm Black Diamond situate in the district of Matatiele.

(2) Damages in an amount calculated *pro rata* on the amount of rent (£100) fixed in the deed of lease for the period up to the 23rd January, 1953, (the latest date on which the defendant could have paid the rent), and for a further amount from this date to the date of judgment, calculated *pro rata* on the rent of £110 per annum which plaintiff has shewn he could have commanded had defendant not been in occupation of the farm at that time.

(3) Costs of the case.

Defendant appealed on the ground that the judgment was bad in law for the reasons that the presiding officer erred in holding—

(*a*) that the tender of rent to plaintiff was invalid;

(*b*) that the tender should have been made to the cessionaries;

(*c*) that the amount of the tender should have been paid into Court; and that in any case plaintiff's attorney did not rely on the late payment into Court.

There was also a cross-appeal on the failure to grant exemplary damages, and the amount of ordinary damages awarded.

Held:

(1) That in terms of Rule 44 (6) (*b*) of the rules of the Native Commissioner's Court, a plea of tender is invalid unless it is accompanied by payment into Court.

(2) That the tender to plaintiff was in fact incompetent as the rental had been ceded and he, defendant, was aware of such cession.

(3) That as plaintiff did not rely on an invalid tender, defendant could not be regarded as a malicious trespasser and exemplary damages could therefore not be awarded.

(4) That damages as claimed, calculated up to the date on which the land was vacated should have been awarded as the noting of the appeal automatically suspended the execution of the judgment (i.e. order of ejectment).

Appeal fails—cross appeal succeeds in part.

Legislation referred to:

Government Notice No. 2886/1951 sections 44 and 86.

Cases referred to:

Odendaal *v.* du Plessis, (1918 A.D. 470).
Nicholson *v.* Myburg, (14 S.C. 384).
Weber *v.* Spira (1919 T.P.D. 331).
Makhubedu and Ano. v. Ebrahim, [1947 (3) S.A. 155 (T) 159].

Works referred to: Wessels on Contract.

Appeal from the Court of the Native Commissioner, Matatiele.

Sleigh (President):—

Plaintiff is the owner and lessor and defendant the lessee of the farm Black Diamond in the District of Matatiele. Clause 1 of the Agreement of Lease dated 17th August, 1942 provides as follows:—

That the lessee shall pay to the lessor at the office of Seymour & Seymour, Matatiele, the sum of one hundred pounds (£100) every year during the continuance of this lease, payable half-yearly in advance, namely fifty pounds (£50) on the 15th September, and fifty pounds (£50) on the 15th February, in each and every year during the continuance of this lease, but if the lessee cannot pay any one instalment on due date, excluding the first and last instalments, the lessor agrees to give the lessee ninety (90) days grace within which to pay such instalment.

Clause 11 provides that in the event of a breach of the lease by the lessee, the lessor shall be entitled to cancel the lease and claim such damages as he may have suffered.

On 2nd November, 1949, plaintiff, by written cession ceded the rent to Messrs. Seymour & Seymour who, on the 14th January, 1950, advised defendant of the cession and warned him that any payment of rent to plaintiff would be of no effect.

In 1952, plaintiff sued defendant for ejectment and damages on the ground that the lease had expired on 15th September, 1952. Defendant pleaded that plaintiff had granted him a renewal of the lease for a further period of five years as from 15th September, 1952. The judgment of the court in that case was one of absolution from the instance. In the present case plaintiff alleges that the rent for the half-year commencing 15th September, 1952 was not paid or tendered within ninety days of this date as is is provided in clause 1 of the agreement, and under the forfeiture clause prays for judgment for—

(*a*) an order cancelling the lease or confirming plaintiff's cancellation thereof;

(*b*) an order of ejectment;

(*c*) an amount equal to the *pro rata* share of the rent from 15th September, 1952 to date of service of summons, viz. 12th January, 1953, and from this date exemplary damages in the sum of £1 per day until defendant vacates the premises, and

(*d*) costs of suit.

Defendant in his plea, in so far as it is material to this appeal, avers that the rent was tendered to plaintiff before the expiration of the ninety days grace and that plaintiff had refused to accept the tender. He tenders the rent again in his plea.

The trial Court found that the rent was tendered to plaintiff in person before the expiration of the ninety days grace, but held that such tender was invalid, because, in view of the cession of the rent to Seymour & Seymour, plaintiff was not a competent or authorised person to receive the rent, and because the amount of the rent was not paid into court as is provided by section 44 (6) (*b*) of the rules of Native Commissioners' Courts. Judgment was accordingly entered in favour of plaintiff in the following terms:—

"(1) Orders made for cancellation of lease and ejectment of the defendant and those claiming under him from the farm Black Diamond situated in the district of Matatiele, as prayed.

(2) Damages in an amount calculated *pro rata* on the amount of rent (£100) fixed in the deed of lease for the period up to the 23rd January, 1953, (the latest date on which the defendant could have paid the rent), and for a further amount from this date to the date of judgment, calculated *pro rata* on the rent of £110 per annum which plaintiff has shewn he could have commanded had defendant not been in occupation of the farm at that time.

(3) Costs of the case."

From this judgment defendant has appealed on the ground that the judgment is bad in law for the reasons that the presiding officer erred in holding (*a*) that the tender of the rent to plaintiff was invalid, (*b*) that the tender should have been made to the cessionaries, (*c*) that the amount of the tender should have been paid into court and (*d*) that in any case plaintiff's attorney did not rely on the late payment into Court. There is also a cross-appeal on the measure of damages awarded.

Rule 44 (6) (*b*) is explicit. A plea of tender is invalid unless it is accompanied by payment into Court. In view of the Native Commissioner's finding that the tender was invalid, the failure to pay or the late payment of the rent into Court is immaterial. I confine myself, therefore, to the question whether there had been a breach of contract by defendant justifying cancellation of the lease and his eviction from the farm. The parties to an agrement are bound by the conditions thereof. One of the conditions of the lease is that defendant shall pay the half-yearly rent at the office of Messrs. Seymour & Seymour within ninety days of the due date. The rent for the half-year commencing 15th September, 1952 should, therefore, have been paid or at least tendered at the said office on or before the 15th December, 1952. It is admitted that this was not done but it is contended that the tender to plaintiff was sufficient notwithstanding the condition of the lease, the notification to defendant of the cession of the rent and the warning to him to pay to Seymour & Seymour.

In Roman-Dutch Law a debtor who desires to discharge his obligation under a contract can protect his interests by tendering to his creditor what is due. If the creditor refuses the tender he will be subject to all consequences which flow from his being *in mora* (Wessels on Contract para. 2332). In Holland, a debtor who was under an obligation to pay a sum of money, could discharge his debt by paying the amount into Court, but a judicial deposit before the commencement of the action is unknown in South African Law (see Odendaal *v.* du Plessis, 1918 A.D. 470.) In our law the tender of the money does not discharge the debtor's obligation under a contract; he must always be willing and ready to pay the amount due, but the effect of his tender is to place him in the same position he would have been in had the tender been accepted. *Wessels* says (para. 2341) that the tender must be made to the creditor personally and if the contract points out a person to whom payment is to be made, a valid tender may be made to him. The use of the word "may" seems to indicate that a valid tender may be made to either. In view of the cession, however, the person indicated in the contract and the creditor is the same person, viz. Messrs. Seymour & Seymour. Plaintiff has no right to sue for arrear rent since he had ceded this to his attorneys. It is, however, contended that plaintiff has misled defendant by accepting previous payments. This contention is untenable as plaintiff had not in fact accepted any payments since the cession in 1949. The tender to plaintiff was, therefore, incompetent and he was correct in refusing to accept the money to which he was not entitled. The appeal consequently fails.

I turn now to the cross-appeal. The first ground is that the Native Commissioner erred in not granting exemplary damages as claimed in the summons. Such damage is awarded only when the lessee wilfully and contumaciously continues to occupy the land after the expiration of his lease. (see Nicholson *v.* Myburg 14 S.C. 384). In that case the lessor gave the tenant notice to quit the premises and re-let them to one Duncan. The latter could not obtain occupation because the lessee refused to vacate. Duncan incurred certain hotel expenses which the lessor had to pay. It was held that the lessor could recover this amount from the lessee in addition to the rent for the month during which the latter was in unlawful occupation. In the present case it is admitted that the lease had been renewed for a further period

of five years and plaintiff alleged in his summons that defendant had not tendered the rent on or before the 15th December, 1952. To this defendant pleaded that he had tendered the rent before this date and it was on this point that the parties joined issue. Plaintiff never relied on an invalid tender. Defendant was, therefore, not in the position of a malicious trespasser and, consequently, this is not a case in which exemplary damages should be awarded.

The other ground of the cross-appeal is that the Native Commissioner should have granted judgment for damages calculated at the rate of £110 per annum up to the date on which the land is vacated and not only up to the date of judgment, viz. 2nd April, 1953.

In regard to this ground, the Native Commissioner says, in his reasons, that, upon judgment, plaintiff could have evicted defendant since the latter did not apply, in terms of rule 86, for the suspension of execution of the judgment pending the decision upon appeal. In this the Native Commissioner has clearly erred. At common law, the noting of an appeal automatically suspends execution. It follows, therefore, that if a successful party desires to issue execution, he should apply to the trial court for leave to do so. Plaintiff could have applied for leave but it is doubtful whether such application would have been granted, because as a rule, a court will not enforce an order of ejectment pending appeal, because it would be most difficult to restore the *status quo ante* if the appeal were successful [see Weber *v.* Spira 1912 T.P.D. 331 quoted with approval in Makhubedu & Ano. *v.* Ebrahim, 1947 (3) S.A. 155 (T) at p. 159].

The result is therefore that the appeal is dismissed with costs. The cross-appeal is allowed with costs and paragraph (2) of the judgment of the court below is amended by the substitution of the words "to the date on which the land is vacated" for the words "to the date of judgment."

Warner (Member): I concur.

Kelly (Member): I concur.

For Appellant: Mr. Elliot, Kokstad.

For Respondent: Mr. Zietsman, Kokstad.

NORTH-EASTERN NATIVE APPEAL COURT.

MTIMKULU *v.* **GASA.**

N.A.C. CASE No. 35 OF 1953.

PIETERMARITZBURG: 15th October, 1953. Before Steenkamp, President, Ashton and Balk, Members of the Court.

COMMON LAW.

Immovable property—Ejectment from—Notice to vacate required where tenant in lawful occupation—Claim for damages for rates and rental.

Summary: Plaintiff sued defendant for ejectment, damages in lieu of rental and for rates in respect of a property, Lot No. 4, which she alleged she bought. Defendant alleged that although plaintiff is the registered owner of the property, she took transfer of this property in error and that she bought and should have taken transfer of the adjoining property, Lot No. 7.

Held: That it is clear from the record that plaintiff purchased Lot No. 4, but owing to a mistake common to the Executor of the deceased's estate (the previous owner of the property) and to herself, she was given occupation of Lot No. 7 on which she made improvements and on which she has resided ever since.

Held further: That the defendant had resided on Lot No. 4 prior to the purchase of any land by plaintiff from the deceased and that he continued in occupation of that Lot up to the trial of the instant action.

Held further: That defendant had obtained his right of occupation of Lot No. 4 lawfully from the previous owner, i.e. the deceased, and that the deceased's successor in title, viz. the plaintiff, had at no time given him notice to remove from that Lot or otherwise questioned his right of occupation thereof.

Held further: That plaintiff's claim for damages fails on the same ground as the claim for defendant's ejectment.

Held further: That in the absence of any evidence that the defendant had agreed to pay rates on Lot No. 4 the plaintiff's claim therefore, also fails.

Cases referred to:

Meyer *v.* Merchant's Trust, Ltd., 1942, A.D., 244.
Le Riche *v.* Hamman, 1946, A.D., 648.
Amalgamated Engineering Union *v.* Minister of Labour, 1949 (3) S.A., 637 (A.D.)

Nene *v.* Nene, 1948, N.A.C. (T. & N), 14.

Appeal from the Court of the Native Commissioner, Pietermaritzburg.

Steenkamp (President):—

Good cause having been shown the late noting of the appeal and the cross-appeal was condoned.

The plaintiff, an exempted Native woman, sued the defendant for—

(i) an order for immediate ejectment from Lot No. 4, Block D, Georgetown, Edendale, Pietermaritzburg District;

(ii) £117 damages for being on the property based at 10s. a month from May, 1931, to the end of October, 1951;

(iii) £6. 6s. 11d. rates.

In her particulars of claim plaintiff avers that she is the owner of the property in question and that defendant is unlawfully residing thereon without right, title, or interest thereto and without permission from plaintiff.

Defendant, in his plea, admits plaintiff is the registered owner of the property but avers that she took transfer of this property in error and she should have taken transfer of the adjoining property Lot No. 7.

He further denies that he is residing on the property unlawfully and avers that the property belonged to the Estate of the late J. N. M. Mtimkulu (hereinafter referred to as "the deceased") and was pointed out and given to him for his use and occupation and he has occupied it ever since. It is also alleged that plaintiff has similarly had occupation of Lot No. 7 which is registered in the name of the deceased Estate.

Defendant further avers that for the reasons already stated he is not obliged to vacate the property nor to pay any damages or rates as claimed.

Defendant also filed a counterclaim, *as an alternative* claiming the ejectment of plaintiff from Lot No. 7 presently occupied by her but registered in the name of the deceased estate.

The counterclaim was not pressed and the attorney for defendant consented to judgment thereon in favour of plaintiff (i.e. defendant in reconvention).

The Native Commissioner granted an order of ejectment against defendant from Lot No. 4 with costs. On claim (ii) he gave an absolution judgment and on claim (iii) the judgment was for defendant.

Defendant noted an appeal against the order of ejectment with costs to this Court on the following grounds:—

"1. That the judgment was contrary to law and against the weight of evidence.

2. That the defendant was a bona fide possessor of the said Lot No. 4 at the time plaintiff obtained transfer of it and has remained such ever since and is therefore entitled to remain in undisturbed possession.

3. That plaintiff obtained transfer of Lot No. 4 by mistake common to both the previous owner and herself and in fact she intended to purchase and the previous owner intended to sell the adjoining Lot No. 7 and the learned Native Commissioner should have held accordingly and refused the ejectment order.

4. That owing to the lapse of time since plaintiff purchased a property in Georgetown during all of which period she took no action to claim defendant's ejectment she is now estopped from denying his assertion of bona fide possession alternatively by her actions she has waived any right to claim defendant's ejectment."

Plaintiff noted a cross-appeal on the following grounds:—

"1. That she has been the registered owner of the said property since the 11th February, 1937, since which date defendant (respondent) has been in continuous possession of the said property, without plaintiff's (appellant) permission and in defiance of her right as owner.

2. That defendant has refused to vacate the said property or to compensate plaintiff, notwithstanding demands made by her, calling upon him to do so, and has used the residence thereon continuously under colour of right and cultivated the land during the whole period to date, without compensation in defiance of plaintiff's rights as owner.

3. The Judicial Officer on the 3rd March, 1953, postponed the date of ejectment to the 1st June, 1953, to enable the legal representative to institute proceeding against plaintiff by the Estate of John Mtimkulu, the former owner of the property, if so advised, on an allegation that Lot No. 4 had been transferred to plaintiff in error instead of Lot No. 7, but no proceedings have been so taken.

4. The defendant in his reconvention at claim admitted that plaintiff was the registered owner of Lot No. 4 to which the plaintiff (defendant in reconvention) pleaded that the defendant (plaintiff in reconvention) had no *locus standi* to bring any action against her and the Judicial Officer should have given judgment in plaintiff's favour and dismissed the whole of defendant's claim against plaintiff in reconvention, with costs.

5. The Judicial Officer should have granted judgment in plaintiff's favour for her claim for compensation against defendant with costs."

The cross-appeal, while not being abandoned by Counsel for respondent, nevertheless was not supported or seriously argued.

There can be no doubt, and it is abundantly clear from the record, that plaintiff purchased from the Executor of the Estate of the deceased Lot No. 4 but owing to a mistake common to the Executor and to herself, she was given occupation of Lot No. 7 on which she has made improvements and on which she has resided ever since.

Here I wish to pause and am constrained to remark that when plaintiff instituted the instant action it was incumbent on defendant to apply for stay of proceedings to enable the legal representative of the deceased's estate to apply for rectification of the title deed by substituting "Lot No. 7" in the place of "Lot No. 4"—the former being the plot of ground plaintiff had intended to purchase and the plot the Executor had intended to transfer to her.

It is observed that the ejectment order on Claim (1) is as from 1st June, 1953. The Additional Native Commissioner gives no reasons for this implied suspension of the order but ground 3 of the notice of cross-appeal would appear to indicate that the Court *a quo* did this to enable the defendant or the legal representative of the deceased's estate to institute action for the rectification of the title deed. It would appear that this is contradictory to the Court's finding that no mistake had been made.

I fully realise that plaintiff is in this unenviable position that she has no title to the ground actually occupied by her but instead of the title she is permitted to occupy the ground as a bona fide occupier and she cannot be ejected therefrom; and any action for ejectment can be met with the defence that the title deed should be rectified and on the evidence before the Court no difficulty should be experienced to attain that object.

Defendant's right as a tenant at will cannot be impeached until such time as he has received reasonable notice to vacate the property.

I have had the opportunity of reading my brother Balk's judgment and I fully agree with his remarks and agree that a judgment as set out by him should be given by this Court.

Balk (Permanent Member):—

The issues involved emerge from the learned President's judgment.

The plaintiff stated in her evidence that she had called upon the defendant many times in the past to vacate Lot No. 4 but that he had persisted in remaining thereon. She also stated that the late J. N. M. Mtimkulu (hereinafter referred to as "the deceased"), from whom she had purchased and obtained transfer of Lot No. 4, had instructed the defendant to leave that property but that the latter had refused to do so.

The defendant, on the other hand, testified that he had been residing on Lot No. 4 for over forty years, that he had obtained that land from his bother, the deceased, in exchange for another piece of land, that the plaintiff had at no time told him to vacate Lot No. 4 and that no one had ever questioned his right of occupation thereof.

That the defendant resided on Lot No. 4 prior to the purchase of any land by the plaintiff from the deceased and that he continued in occupation of that Lot up to the trial of the instant action, is manifest from the plaintiff's admission accordingly under cross-examination; and whilst the defendant's version is borne out by the testimony of his three witnesses, the plaintiff adduced no evidence to corroborate her own testimony.

Moreover, the plaintiff's conduct, as disclosed by her evidence, supports the defendant's version that she at no time told him to vacate Lot No. 4. That this is so is apparent from her admission under cross-examination that she did not think of ejecting the defendant until recently, and from her obviously lame and contradictory, and thus unacceptable, explanations as to why she had delayed in instituting legal proceedings for the defendant's ejectment over a period of fourteen years, i.e. from the year 1937, when she obtained transfer of Lot No. 4, until

the year 1951, when she instituted the instant action; and this notwithstanding that the defendant had, according to her evidence, refused to pay her any rent for this land. Here it should be added that the first explanation given by the plaintiff for her protracted delay in bringing an action for the defendant's ejectment from Lot No. 4 was that she did not think of doing so until recently when the Local Health Commission intimated that that Lot would be forfeited for non-payment of rates thereon. Her other explanation was that she had left the question of the defendant's ejectment from Lot No. 4 in abeyance from the year 1931, when she purchased it, until she instituted the instant action as she hoped that the defendant would one day move from that property.

Again it is manifest from the evidence for the defendant, which appears to be straightforward and far more in keeping with the probabilities than the plaintiff's testimony in which there are serious inconsistencies, that the plaintiff was well aware that the only land which she had purchased from the deceased was that on which she had erected her dwelling and which she was occupying, viz., Lot No. 7. It is also manifest from the evidence as a whole that the plaintiff brought the instant action with a view to securing possession of Lot No. 4 in addition to retaining Lot No. 7.

It follows that, on a preponderance of the probabilities as were disclosed by the evidence to have been material, the defendant's version that he had derived his right of occupation of Lot No. 4 lawfully from the previous owner, i.e. from the deceased, and that the deceased's successor in title viz., the plaintiff, had at no time given him notice to remove from that Lot or otherwise questioned his right of occupation thereof, falls to be accepted.

As the defendant was in lawful occupation of Lot No. 4 when the plaintiff brought the instant action, her basis of claim was not substantiated and it was not competent for the Court *a quo* to have ordered the defendant's ejectment from that Lot, see Nene *v.* Nene, 1948, N.A.C. (T. & N), 14 at page 16.

The appeal accordingly succeeds on the second ground and it is thus unnecessary to consider the remaining ones.

I feel constrained to add that it seems to me to be regrettable that the question of the joinder of Attorney A. A. Smith, in his capacity as executor of the deceased's estate, as second defendant in the instant action, on the ground that as executor of that estate he was "directly and substantially interested" in the issues here involved in the sense in which this expression is used in Amalgamated Engineering Union *v.* Minister of Labour, 1949 (3) S.A., 637 (A.D.), at page 661, was not raised in the Court *a quo* with a view to Attorney Smith being so joined on the authority of that judgment and afforded an opportunity of bringing in issue in the instant action, by means of a counter-claim against the plaintiff, the question of the rectification of the deed relating to the sale of the land by the deceased to the plaintiff and the consequential transfers involved, i.e., the transfer by the plaintiff of Lot No. 4 to the deceased's estate against transfer to her from that estate of Lot No. 7 and so disposing of all the relevant issues in the only proper manner, i.e. simultaneously in the instant action. That relief by way of such rectification and transfers was competent is apparent from Meyer *v.* Merchants' Trust, Ltd., 1942, A.D., 244 and Le Riche *v.* Hamman, 1946, A.D., 648, at page 654.

Turning to the cross-appeal, the plaintiff's claim for damages obviously fails on the same ground as the claim for defendant's ejectment; and in the absence of any evidence that the defendant had agreed to pay the rates on Lot No. 4, the plaintiff's remaining claim also fails.

That being so, and as it seems to me to be clear that on a proper construction of the judgment of the Court *a quo* costs of the counterclaim were awarded to the defendant in reconvention, the whole of the cross-appeal, which in fact was not pressed by counsel for respondent, fails.

In the result I am of opinion that the appeal should be allowed with costs, that the cross-eppeal should be dismissed with costs and that the judgment of the Court *a quo* should be altered to read: "On the first and second claims in convention, absolution from the instance with costs. On the third claim in convention, for defendant with costs. On the counterclaim for defendant in reconvention with costs."

Ashton (Member): I concur.

For Appellant: S. M. Roberts of R. Tomlinson, Francis & Co.

For Respondent: Adv. J. A. Meachin instructed by D. L. McGillewie & Co.

NORTH-EASTERN NATIVE APPEAL COURT.

MAZIBUKO *v.* SHABALALA AND ANOTHER.

N.A.C. CASE No. 58 OF 1953.

PIETERMARITZBURG: 15th October, 1953. Before Steenkamp, President, Ashton and Balk, Members of the Court.

ZULU CUSTOM.

Native Chiefs—Recovery of fines imposed—Where attachment resisted, Chief must apply to Native Commissioner's Court for enforcement of judgment—Recovery of fines imposed where Chief had no jurisdiction to impose such fines—Not competent for Native Commissioner's Civil Court to consider whether fine properly imposed where Chief in the exercise of his criminal jurisdiction, has given accused a proper hearing and has acted within the limits of his jurisdiction—Value of cattle for customary purposes other than for lobolo.

Practice and Procedure—Absolution judgment not competent, where on the pleadings, onus rested on defendants.

Summary: Plaintiff sued defendants, jointly and severally, for the return of certain three head of cattle wrongfully, and unlawfully removed from plaintiff's premises. First defendant is a Native Chief, within whose area of jurisdiction plaintiff resides, and second defendant is the Chief's induna. The cattle were attached in respect of certain fines imposed on plaintiff by the Chief, the first defendant.

Held: That as defendants admitted in their plea that they had removed the three head of cattle in question from the plaintiff's premises, the onus of proving that they had done so lawfully, as alleged by them in their plea, rested on them and there was thus no room here for a decree of absolution from the instance to which the Native Commissioner's judgment dismissing the claim is tantamount.

Held further: That as plaintiff was accorded proper hearings by the first defendant before he was fined £1 and £5 or a beast, respectively, and as in imposing those fines the first defendant acted within the limits of the jurisdiction conferred on him, the Court *a quo* being, as it was, constituted for hearing the instant action as a court of civil causes, was not concerned with the hearing of any appeal against the imposition by the first defendant of a fine on plaintiff, which was the exclusive function of a Native Commissioner's Court constituted for that purpose under section *twenty* (6) of Act No. 38 of 1927.

Held further: That it was incumbent on the Court *a quo* to hold, as it did, that, in the absence of any evidence that those fines had been set aside on appeal by a Court of competent jurisdiction, they had been lawfully imposed, subject to this qualification that the alternative of a beast, imposed in the second fine, fell to be disregarded as punishment was in that instance limited to a fine of £5 in terms of section *twenty* (3) of Act No. 38 of 1927.

Held further: That the Court *a quo* was entitled to take cognizance of the facts that the remaining fine of a beast was imposed on plaintiff by first defendant for an assault with intent to do grievous bodily harm, that the first defendant had no jurisdiction to try and punish the plaintiff for that offence in view of the provisions of section *twenty* (1) (*a*) of Act No. 38 of 1927, read with Government Notice No. 1376 of 1943, and moreover, of the fact that the plaintiff was convicted and sentenced by him for that offence without a trial.

Held further: That a fine imposed by a Chief must be one sounding in money and must not exceed £5.

Held further: That as the Messenger of the Chief came to the conclusion that the seizure of plaintiff's cattle could not be effected without a breach of the peace, and reported accordingly to the first defendant, the latter should have applied to the Clerk of the Native Commissioner's Court concerned for the enforcement of the judgments as provided by Rule 8 (2) of the Regulations for Chiefs' and Headmen's Civil Courts, since, in terms of section 21 of the Code read with section *twenty* (4) of the Act and section 1 of the Regulations published under Government Notice No. 1099 of 1943, the fines in question fell, on the plaintiff's refusal to pay them, to be recovered as if they were civil judgments of a Chief.

Held further: That it follows that the attachment of the three head of cattle was unlawful and that the plaintiff is entitled to their return.

Held further: That it is open to a party to claim that a beast for customary purposes, other than for *lobolo*, is worth more than £5 if it can so be established by evidence.

Cases referred to:

Mkwanazi *v.* Mncube, 1933, N.A.C. (T. & N.), 8.
Mamitwa *v.* Mashabula, 1937, N.A.C. (T. & N.), 46.
Manyoni *v.* Zungu, 1937, N.A.C. (T. & N.), 99.
Zungu *v.* Butelezi, 1939, N.A.C. (T. & N.), 30.
Shange *v.* Mpofu, 1942, N.A.C., (T. & N.), 29.
Dhlamini *v.* Mate, 1952, N.A.C., 60 (N.E.).
Becker *v.* Wertheim, Becker and Leveson, 41, P.H.; F. 34 (A.D.).
Rex *v.* Kumalo and Others, 1952 (1), S.A., 381, A.D.

Statutes, etc., referred to:

Section *twenty* of Native Administration Act, 1927.
Sections 18, 21 and 86 of Natal Code of Native Law, 1932.
Section 1, Government Notice No. 1099 of 1943.
Government Notice No. 1376 of 1943.

Appeal from the Court of the Native Commissioner, Ladysmith.

Balk (Permanent Member):—

This is an appeal from the judgment of a Native Commissioner's Court dismissing the plaintiff's (present appellant's) claim with costs in an action in which he sued the two defendants (now respondents), jointly and severally, for the return of certain three head of cattle or payment of their value, £60, averring that these cattle had been wrongfully and unlawfully removed from his (plaintiff's) premises in January, 1953, by the second defendant acting as agent for and on the instructions of the first defendant.

The defendants pleaded as follows:—

"1. Defendants admit removing three head of cattle from plaintiff's premises, January, 1953. But deny plaintiff's right to take action against them, and defendants allege that:

2. The three head of cattle, was rightfully and lawfully removed from plaintiff's premises, and must not be absolved for the return of three head of cattle. (sic.)

3. Defendants deny plaintiff's right to claim the return of three head of cattle or the £60—their value, and deny that the value is £60—and allege that the value is not more than £15.

By reason of the aforesaid, defendants deny that the plaintiff is entitled to the order as prayed by him.

Wherefore, defendants pray that plaintiff's claim be dismissed and judgment be entered in their favour with costs."

The grounds of appeal are:—

"1. The learned Native Commissioner erred in finding that the first defendant was exercising his lawful judicial functions as the weight of evidence is against such finding.

2. The judgment was against the evidence and the probabilities in the matter."

As the defendants admitted in their plea that they had removed the three head of cattle in question from the plaintiff's premises, the onus of proving that they had done so lawfully, as alleged by them in their plea, rested on them and there was thus no room here for a decree of absolution from the instance to which the Native Commissioner's judgment dismissing the claim is tantamount, see Dhlamini *v.* Mate, 1952, N.A.C., 60 (N.E.) and Becker *v.* Wertheim, Becker & Leveson, 41, P.H., F. 34 (A.D.).

The Native Commissioner took judicial notice, and properly so, as was conceded by counsel for appellant, of the fact that at all material times, the first defendant was an appointed Chief authorised to exercise criminal jurisdiction in terms of section *twenty* of the Native Administration Act, 1927, as amended (hereinafter referred to as "the Act"); and from the evidence it is manifest that the second defendant was his Induna.

According to the evidence for the defendants, the second defendant attached three head of cattle at the plaintiff's kraal on the instructions of the first defendant, to recover the following fines imposed by the latter upon the plaintiff as well as costs amounting to £1. 5s. in respect of earlier attempted attachments to recover the fine of £1 specified below:—

1. £1 for the plaintiff's having failed to comply with the first defendant's order that he assist with the ploughing of the first defendant's land on a certain day.

2. £5 or a beast for an assault by the plaintiff on the first defendant's messenger, Samuel Zwane, whilst the latter was attempting to attach a beast to recover the above-mentioned fine of £1.

3. A beast for another assault by the plaintiff on the same messenger at a later date, this time with intent to do him grievous bodily harm.

It emerges from the Native Commissioner's reasons for judgment that he came to the conclusion that, as it appeared from the evidence that the first defendant in having the three head of cattle attached and exercised his lawful judicial functions, the claim for their return against him and the second defendant in their personal capacities could not be sustained and that the plaintiff's remedy lay by way of appeal against the convictions

and fines imposed upon him by the first defendant. The Native Commissioner quoted Shange *v.* Mpofu, 1942, N.A.C. (T. & N.), 29, in support of this conclusion. But it seems to me that the judgment in that case is not apposite and that in any event the Native Commissioner's conclusion was not justified, as will be apparent from what follows.

It is manifest from the plaintiff's evidence that he is resident within the first defendant's area of jurisdiction and that before being fined the £1 by the latter for failing to comply with his order to assist in ploughing his land on the day stipulated therefor, he was accorded a proper opportunity of explaining why he did not comply with this order.

That this is so is evident from the plaintiff's testimony as follows:—

> "The question of ploughing was mentioned to me personally by Chief (first defendant) after meeting was over. He asked me why I had not attended at ploughing. I told him that I was busy previous day inviting people as he had instructed me. On ploughing day—the Monday on which people had to come and plough for him I was doing my own ploughing. The Chief said that because I did not attend ploughing he was going to fine me £1. Then I said to Chief I could not see why I should pay £1 as I was not at fault."

And, as pointed out by the Native Commissioner in his reasons for judgment, it is a well-established Native Custom that a Chief is entitled to require the people under his jurisdiction to plough his fields. It follows that the plaintiff was accorded a proper hearing by the first defendant before he was fined the £1 and that in imposing this fine the first defendant acted within the limits of the jurisdiction conferred on him by section 18 of the Natal Code of Native Law, published under Proclamation No. 168 of 1932 (hereinafter referred to as "the Code"), see Zungu *v.* Butelezi, 1939, N.A.C. (T. & N.), 30.

The Court *a quo* being, as it was, constituted for hearing the instant action, i.e., as a Court of civil causes under section *ten* of the Act, was not concerned with the hearing of any appeal against the imposition by the first defendant of a fine in terms of section 18 of the Code, which, in terms of section 21 thereof, read with section *twenty* (6) of the Act, was the exclusive function of a Native Commissioner's Court constituted for that purpose under the lastmentioned section. That being so and as it is clear from the evidence that the plaintiff had been given a proper hearing and that the first defendant had acted within the limits of his jurisdiction, it was not, as conceded by counsel for appellant, competent for the Court *a quo* to determine whether or not the imposition of the fine was otherwise proper since this aspect is the exclusive function of a Native Commissioner's Court constituted under section *twenty* of the Act. Consequently it was incumbent on the Court *a quo* to hold, as it in fact did, that, in the absence of any evidence that this fine had been set aside on appeal by a Court of competent jurisdiction, it had been lawfully imposed. But this does not conclude the matter in so far as the fine of £1 is concerned as the question of whether the attachment of the beast to recover this fine was lawful, still remains to be considered. This aspect will be dealt with after the question of the validity of the imposition of the other two fines has been discussed.

Turning to the fine of £5 or a beast, it seems clear from the evidence as a whole that the plaintiff was given a proper trial before this fine was imposed on him by the first defendant and that, in doing so, the latter acted within the limits of the jurisdiction conferred on him under section *twenty* of the Act read with Government Notice No. 1376 of 1943. That being so and as in this instance it was for the reasons given above, also not competent for the Court *a quo* to determine whether or not the

imposition of the fine was otherwise proper, it was here also incumbent on that Court to hold, in the absence of any evidence that this fine had been set aside on appeal by a Court of competent jurisdiction, that it had been lawfully imposed, subject to this qualification that the alternative of a beast fell to be disregarded as punishment was in this instance limited to a fine of £5 in terms of section *twenty* (3) of the Act.

As regards the remaining fine of one beast for the assault to do grievous bodily harm, the first defendant had no jurisdiction to try and punish the plaintiff for this offence in view of the provisions of section *twenty* (1) (*a*) of the Act, read with Government Notice No. 1376 of 1943. Moreover, as is clear from the first defendant's evidence, the plaintiff was convicted and sentenced by him for this offence without a trial and the sentence of the fine of the beast was incompetent, as, in terms of section *twenty* (3) of the Act, the fine must be one sounding in money and must not exceed £5; and this position is not affected by the first defendant's statement in his evidence that the value of a beast for customary purposes is accepted as being £5; for it is only in the case of *lobolo* cattle that their value has been so fixed, see section 86 of the Code; and in the case of cattle for other customary purposes it is open to a party to claim that a beast is worth more than that sum if it can be so established by evidence, see Mkwanazi *v.* Mncube, 1933, N.A.C. (T. & N.), 8, at page 10.

The Court *a quo* was entitled to take cognizance of these factors in the light of the judgment in Mamitwa *v.* Mashabula, 1937, N.A.C. (T. & N.), 46, and it should, on the authority of that judgment, have held that the above-mentioned fine of a beast was a nullity and could thus not be lawfully recovered from the plaintiff.

Reverting to the question of the validity of the attachment of the three head of cattle, it is clear from the evidence for the defendants that the plaintiff resisted with force the initial attempt by the first defendant's messenger, Samuel Zwane, to attach a beast to recover the fine of £1 plus the £1. 5s. costs referred to above and that this messenger came to the conclusion that this seizure could not be affected without a breach of the peace and reported accordingly to the first defendant. The latter should then have applied to the Clerk of the Native Commissioner's Court concerned for the enforcement of the judgment as provided by section 8 (2) of the Regulations for Chiefs' and Headmen's Civil Courts, published under Government Notice No. 2885 of 1951, since, in terms of section 21 of the Code, read with section 20 (4) of the Act and section 1 of the Regulations published under Government Notice No. 1099 of 1943, the fine in question fell, on the plaintiff's refusal to pay it, to be recovered as if it were a Chief's civil judgment. As is also clear from the evidence for the defendants, the first defendant, instead of so applying to the Clerk of the Native Commissioner's Court, again sent his messenger to attach the beast in respect of the fine of £1 and £1. 5s. costs, plus another beast in respect of the fine of £5 or a beast for the assault; and again the plaintiff resisted the attachment with force and the Messenger came to the conclusion that he could not affect this attachment without a breach of the peace and reported accordingly to the first defendant who again failed to apply to the Clerk of the Court for the enforcement of these judgments. Instead, he sent the second defendant with ten men to attach these two head of cattle plus a third beast in respect of the fine for the assault with intent to do grievous bodily harm.

According to the plaintiff's testimony, the three head of cattle were attached by the second defendant by force. The only evidence to the contrary was that of the second defendant as follows:—

"I was sent by Chief Ayliff Shabalala (first defendant) to go to plaintiff's kraal to try and separate plaintiff from the Chief's messengers whom plaintiff had been attacking and to take possession of any assegais I found in his kraal. I then proceeded with 10 other men to the plaintiff's kraal and when we got there one man came in with plaintiff's mother. Then Samuel Zwane saw an assegai which he had seen plaintiff holding. There was another assegai which we could not find. We then told plaintiff that we were now going away, that we wanted from him £15 or three head of cattle and we told him those were instructions from Chief to us. Plaintiff said he would not bring the £15. We then proceeded to his cattle kraal—plaintiff led us there. At the cattle kraal he said one Induna should get into his cattle kraal and drive out cattle that we wanted. I then went into cattle kraal. After I had gone into cattle kraal I said Samuel Zwane should also get in to come and point out two beasts over which there had been a struggle, as In understood, the previous day. Then Zwane came into kraal and pointed out the two head of cattle and I should drive them out of kraal. Then I told plaintiff that in addition to these two head of cattle Chief said we should attach one further beast for Assaulting Messengers. I then pointed out one small black beast and it was driven out while plaintiff stood and looked on."

It seems unlikely that the plaintiff, would, after refusing to pay the £15, have led the second defendant and his party to his cattle kraal and have said that one Induna should go into it and drive out the cattle that were required. The plaintiff's version in this respect that the three head of cattle were attached by force in the circumstances related by him is the more probable, particularly in view of his attitude throughout as disclosed by the first defendant's evidence and that of this witness, Samuel Zwane, who was his Messenger. It therefore seems to me that it falls to be accepted that the three head of cattle were attached by force. It should be added that the Native Commissioner gave no finding in this respect.

That the legislation referred to above in connection with this aspect postulates that a Chief may not use force in the attachment of property to recover any fine imposed by him, is clear from the judgments in Manyoni *v.* Zungu, 1937, N.A.C. (T. & N.), 99 and Rex *v.* Kumalo and Others, 1952 (1) S.A., 381 (A.D.), at pages 394 and 395.

It follows that the attachment of the three head of cattle was unlawful and that the plaintiff is entitled to their return.

As regards their value, the plaintiff stated in his evidence that they were worth £20 each and that this was the sum it would cost him to replace each of them. The only other evidence in this connection was that of the first defendant to the effect that the value of cattle for customary purposes is £5 each. But this evidence cannot be regarded as controverting the plaintiff's, for, as pointed out above, it is only in the case of *lobolo* cattle that the value has been fixed at £5 each, see section 86 of the Code, and it is open to a party to claim that a beast for other customary purposes is worth more than that amount if it can be so established by evidence.

In the course of his argument before this Court, the first respondent contended that he should have been sued in his official capacity as Chief instead of in his personal capacity, since the fines imposed by him accrued to his tribe and not to him personally.

But, apart from the fact that this aspect was not put directly in issue by the defendants' plea, there appears to be no substance in the contention in question in that, in the absence of any regulations under section *twenty* (4) of the Act regarding the appropriation of fines, they accrue, in accordance with Native

Law and Custom as provided by that sub-section, to the Chief concerned in his personal capacity and consequently it is competent for the plaintiff to maintain the instant vindicatory action against the first defendant in the latter's personal capacity.

The second respondent's submission that he cannot be held liable to the plaintiff for the return of the cattle as he had attached them on the first defendant's instructions, is not well founded, see Manyoni's case (*supra*).

In the result I am of opinion that the appeal should be allowed with costs and that the Native Commissioner's judgment should be altered to read: "For plaintiff with costs for the return to him by the defendants, jointly and severally, of the three specific cattle claimed, failing which, payment by the defendants, jointly and severally, to the plaintiff of the value of these three cattle at the rate of £20 per head, the one defendant returning any of the cattle or making any payment in respect of their value, the other to be *pro tanto* absolved therefrom."

Lest the appellant regard the success of this appeal as approval of his conduct, I feel constrained to point out that his attitude towards his Chief, as disclosed by the evidence in this case, is to be deprecated. Furthermore, it is still open to the Chief to recover the first and second fines imposed upon the appellant by following the proper procedure referred to above.

Steenkamp (President): I concur.
Ashton (Member): I concur.

For Appellant: Adv. J. A. Meachin instructed by Macaulay and Riddell.
Respondents in person.

NORTH-EASTERN NATIVE APPEAL COURT.

KHANYILE *v.* KHANYILE.

N.A.C. CASE No. 66 OF 1953.

PIETERMARITZBURG: 15th October, 1953. Before Steenkamp, President, Ashton and Balk, Members of the Court.

LAW OF PROCEDURE.

Practice and Procedure—Judgment for dissolution of customary union containing an order for refund of lobolo *cattle where father not cited as party:* Locus standi *of woman plaintiff to appeal against such order for return of* lobolo *cattle: Proper procedure is for father to apply for rescission of order.*

Summary: A Native Commissioner's Court granted a judgment for the dissolution of a Native customary union in an action in which the woman plaintiff's father was not cited as a party and embodied in that judgment an order for the return by plaintiff's father of certain *lobolo* cattle. Plaintiff noted an appeal against such order for return of *lobolo* cattle.

Held: That plaintiff has no *locus standi in judicio* in the instant appeal as the order appealed against was not made against her but solely against her father.

Held futher: That it is undesireable to embody any indication as regards the number of *lobolo* cattle refundable in any case in which the dissolution of a customary union is sought under the provisions of the Natal Code of Native Law and in which the wife's father or "protector" is not cited as a party.

Held further: That the order for return of *lobolo* cattle in this case is void *ab origine* and that it is therefore open to plaintiff's father to apply to the Court *a quo* for the rescission of the order in question.

Cases referred to:

Nkambula *v.* Linda, 1951 (1), S.A., 377 (A.D.).
Mkize *v.* Mkize, 1941, N.A.C. (T. & N), 125.
Masoka *v.* Mcunu, 1, N.A.C. (N.E.), 327.
Mbuyazi *v.* Mthethwa, 1952, N.A.C., 54 (N.E.).

Statutes, etc., referred to:

Section 80 of the Natal Code of Native Law of 1932.
Rules 73 (*b*) and 74 (9) of the Rules for Native Commissioners' Courts.

Appeal from the Court of the Native Commissioner, Estcourt.

Balk (Permanent Member):—

This is an appeal from the order of a Native Commissioner's Court that the plaintiff's father is to return ten head of *lobolo* cattle to the defendant, this order being embodied in that Court's judgment granting the dissolution of the customary union between the plaintiff and the defendant in an action in which the plaintiff's father was not a party but merely appeared for the purpose of assisting his daughter, the plaintiff, to bring her claim for the dissolution of that union.

The grounds of appeal are:—

"1. That the Native Commissioner erred in making an order against Plaintiff's guardian for the return of any cattle since he was not a party to the action in his personal capacity.

2. That in any event the number ordered to be returned is excessive."

The appeal fails for the simple reason that it is brought by the plaintiff who has no *locus standi in judicio* in this matter as the order appealed from was not made against her but solely against her father.

Accordingly the appeal falls to be dismissed with costs.

Certain other aspects of this case call for comment. The first arises out of the following statement by the Assistant Native Commissioner in his reasons for judgment:—

"This Court was well aware of the fact that no order for the return of *lobolo* cattle could be made in divorce actions where the father or protector of the wife is not cited as a party to the action in view of section 80 of Proclamation No. 168 of 1932. Item 4 of the Court's judgment was merely intended as an indication what cattle are refundable and was not made with the intention that execution can be levied on it."

The language in which the order in question is couched obviously does not give effect to this intention of the Assistant Native Commissioner in that this order is embodied in the judgment and it requires, in express and unqualified terms, the plaintiff's father to return ten head of *lobolo* cattle to the defendant. There is thus no proper basis for the Assistant Native Commissioner's statement which therefore does not commend itself to me.

The order was thus void *ab origine*, see Mbuyazi *v.* Mthethwa, 1952, N.A.C., 54 (N.E.) at page 55.

It is open to the plaintiff's father, consonant with the judgment in that case, to apply to the Court *a quo* to have the order in question rescinded in terms of Rule 73 (*b*) of the Rules for Native Commissioners' Courts, published under Government Notice No. 2886 of 1951. Such application should, in terms of Rule 74 (9) of those Rules, be made not later than one year after the applicant first had knowledge of the invalidity concerned.

It should be added that it appears to be undesirable to embody any indication as regards the number of *lobolo* cattle refundable in any case in which the dissolution of a customary union is sought under the provisions of the Natal Code of Native Law, published under Proclamation No. 168 of 1932, as amended, and in which the wife's father or "protector" is not cited as a party; for such an indication is open to misconstruction and moreover serves no useful purpose, since, should the husband and the wife's father fail to reach agreement in regard to the number of *lobolo* cattle refundable, that issue has to be decided in a further action wherein none of the findings in the former action, i.e. the action for the dissolution of the customary union, other than the fact of the dissolution itself, can be relied upon except by agreement of the parties, see Masoka *v.* Mcunu, 1, N.A.C. (N.E.), 327, at page 330.

The remaining aspect concerns the considerations governing the number of *lobolo* cattle refundable to the husband on the dissolution of the customary union.

Had the plaintiff's father been cited as co-plaintiff in the instant case and the question of the *lobolo* cattle refundable thus been put in issue, it would appear that not ten but no *lobolo* cattle were refundable to the defendant as the customary union here was dissolved on account of his misdeeds and his having contracted a civil marriage with another woman, see Mkize *v.* Mkize, 1941, N.A.C. (T. & N.), 125, at page 126 and Nkambula *v.* Linda, 1951 (1), S.A., 377 (A.D.), at page 384.

Steenkamp (President): I concur.

Ashton (Member): I concur.

For Appellant: Adv. J. H. Niehaus instructed by Hellet & De Waal.

Respondent in Person.

NORTH-EASTERN NATIVE APPEAL COURT.

MABUYAKHULU *v.* **MABUYAKHULU.**

N.A.C. CASE No. 59 OF 1953.

ESHOWE: 20th October, 1953. Before Steenkamp, President, Balk and Oftebro, Members of the Court.

LAW OF SUCCESSION.

Estate Inquiry—Conducting of—Duty of Native Commissioner.

Summary: In an estate inquiry held in terms of section *three* of Government Notice No. 1664 of 1929, as amended, certain essential available evidence was omitted.

Held: That these inquiries need not be conducted with such strict compliance with the rules of procedure and relevancy and admissibility of the law of evidence as is necessary in the conduct of ordinary civil and criminal matters.

Held further: That to arrive at a just solution of a very important matter the Court is entitled to make use of all available information especially as the subject of this appeal is an administrative inquiry.

Held further: That it was the duty of the presiding Native Commissioner to call all available evidence and to have seen to it that the record of the civil case, including the evidence contained therein was put in and taken into consideration at the inquiry as that course was essential for the proper determination of the dispute in question.

Cases referred to:

Mpungose *v.* Mpungose 1946 N.A.C. (T. & N.) 37.
Poswayo *v.* Tshatshu 1947 N.A.C. (C. & O.) 109.

Statutes, etc. referred to:

Section 3 of Government Notice No. 1664 of 1929. (Native Estate Regulations.)

Appeal from the Court of the Native Commissioner, Ingwavuma.

Steenkamp (President):—

This is an appeal from an Acting Assistant Native Commissioner's finding in an inquiry held in terms of section 3 of the Regualtions for the Administration and Distribution of Native Estates, published under Government Notice No. 1664 of 1929, as amended (hereinafter referred to as " the Regulations ").

At this stage it is desirable to give a brief résumé of the events which led up to this inquiry.

On the 18th of November, 1952, the Native Commissioner, Ingwavuma, on appeal, altered the judgment of a Chief's Court from one for Defendant to one of absolution from the instance in a case (hereinafter referred to as " the civil case ") in which Moti Mabuyakhulu had sued Makati Mabuyakhulu for cattle, sheep, goats, wagons and donkeys which belonged to their late grandfather, Zambule. For the sake of convenience Moti will hereinafter be referred to as the plaintiff and Makati as the defendant.

The plaintiff noted an appeal to this Court against the Native Commissioner's judgment in the civil case. That appeal was, however, noted late. This Court refused the application for condonation of that late noting and in its judgment intimated that it seemed that the matter could only properly be disposed of by the Native Commissioner holding an inquiry in terms of section 3 of the Regulations.

Thereafter, on the 18th May, 1953, the Clerk of the Court concerned, issued notices to both the plaintiff and the defendant reouesting their attendance, with their witnesses, at the office of the Native Commissioner on the 16th June, 1953, so that an inquiry could be held to determine the person or persons entitled to the property in the estate of the late Madakwa Mabuyakhulu.

That inquiry was duly held by the Acting Assistant Native Commissioner, who found that the defendant was the late Madakwa's heir.

The instant appeal is brought by the plaintiff against that finding, the grounds of appeal, inclusive of an additional ground approved by this Court in terms of Rule 16 read with Rule 14 of the Rules for Native Appeal Courts, published under Government Notices No. 2887 of 1951, being—

" 1. That the learned Native Commissioner erred in accepting the evidence adduced for the Respondent and in rejecting that adduced for the Appellant.

2. That the learned Native Commissioner erred in holding, if he has so held, that the mother of the Respondent was married to the said Madakwa Mabuyakhulu before the appellant's mother was married to him or otherwise if the learned Native Commissioner held that the the Appellant's mother was married first he erred in holding that the Respondent's mother was lawfully declared to be the first or Indhlunkulu wife or that she was in fact the first or Indhlunkulu wife.

3. That the judgment is against the evidence and the weight of the evidence.

4. That the learned Native Commissioner erred in taking cognizance of the records relating to a case purporting to have been heard by Chief Mbabane Nyawe and of an appeal purporting to have been heard by the Native Commissioner, Ingwavuma, and of an appeal purporting to have been heard by the Native Appeal Court notwithstanding the fact that the records of such alleged proceedings were not properly before the learned Native Commissioner or otherwise the learned Native Comerred when taking cognizance of such records in failing to take cognizance in full of the contents thereof and correctly to interpret their application to the matter being heard by him."

The civil case concerned only the estate of the late Zambule whereas the inquiry was held solely in connection with the estate of the late Madakwa; and, as will be seen later on in this judgment, it is very important to determine with certainty whose estate is in dispute and, while the civil case does not form an exhibit in the proceedings in the inquiry, I am nevertheless of opinion that to enable this Court to arrive at a just solution of a very important matter in which anything from fifty to one hundred and forty head of cattle, apart from other property, are involved, it is entitled to make use of all available information especially as the subject of this appeal is an administrative inquiry. The remarks in the judgment in Poswayo *v.* Tshatshu 1947 N.A.C. (C. & O.) 109 at page 110, indicate that proceedings under section 3 of the Regulations, such as those with which we are here concerned, are of an administrative nature and are not subject to the rules of procedure applicable in ordinary civil cases. The following passage which occurs at page 177 of Blaine's "Native Courts Practice", and is supported by the authorities there cited, is also apposite—

> "These inquiries need not be conducted with such strict compliance with the rules of procedure and relevancy and admissibility of the law of evidence as is necessary in the conduct of ordinary civil and criminal trials."

The Acting Assistant Native Comissioner also referred to the civil case. In his reasons for judgment he mentions that the inquiry was held on the suggestion of the Native Appeal Court made in the course of its judgment refusing the application for condonation of the late noting of the appeal in the civil case (N.A.C. No. 117 of 1952).

Although it was the duty of the Acting Assistant Native Commissioner to call all available evidence in accordance with the onus cast on him in this respect by the provisions of section 3 (3) of the Regulations, he does not appear to have seen to it that the record of the civil case, including the evidence contained therein, was put in and taken into consideration at the inquiry as he should have done since this course was essential for the proper determination of the dispute in question.

It would appear from the civil case and the proceedings in the inquiry that the estate of the late Zambule is concerned in the dispute in question and that the estate of the late Madakwa may also be concerned therein.

In so far as the late Zambule's estate is concerned, there may be some substance in the plaintiff's claim that he is the heir, as will be apparent from what follows.

The late Zambule had several sons of whom Mpoli appears to have been the eldest and Madakwa the second eldest. Certain of the evidence given at the inquiry is to the effect that a girl, Sibebe, was *lobolaed* by Mpoli but she bore no children before Mpoli died; thereafter she was *ngenaed* by Madakwa, the plaintiff being the issue of this *ukungena* union. This aspect, which is of importance, see Mpungose *v.* Mpungose 1946 N.A.C. (T. & N.) 37, was not pursued with a view to determining whether or not the truth lay in that direction. It is quite possible that when

the late Zambule died, his son, Madakwa, took charge of the estate on behalf of the plaintiff who was then still a minor. In fact, according to the evidence adduced at the inquiry, Madakwa died in about the year 1949 and Zambule's death took place prior thereto but after the birth of the plaintiff and whilst the defendant, who is older than the plaintiff, was still a young boy.

Apart from the fact that, as pointed out above, essential available evidence was omitted at the inquiry, it seems to me that the evidence as a whole therein is far too inconclusive to justify a finding for either of the two claimants concerned, i.e. the plaintiff or the defendant.

I am thereofer of opinion that the appeal should be allowed with costs, that the Acting Assistant Native Commissioner's finding and all the other proceedings in the inquiry should be set aside and that a fresh inquiry should be held to determine the heir or heirs in the estates of the late Zambule and the late Madakwa.

It is advisable that the fresh inquiry should be held by a judicial officer with considerable experience to ensure the proper determination of the issues involved, particularly in view of the magnitude of the assets concerned and the numerous abortive efforts hitherto to finalise this matter.

Balk (Permanent Member): I concur.
Oftebro (Member): I concur.
For Appellant: Mr. W. E. White of Eshowe.
Respondent in person.

NORTH-EASTERN NATIVE APPEAL COURT.

NTOMBELA *v.* NTOMBELA d.a. AND ANOTHER.

N.A.C. CASE No. 63 OF 1953.

ESHOWE: 20th October, 1953. Before Steenkamp, President, Balk and Oftebro, Members of the Court.

LAW OF PROCEDURE.

Practice and Procedure— Dissolution of customary union— Default judgment by Clerk of the Court not competent—Proof of customary union, where such union not registered.

Summary: Plaintiff sued defendants for the dissilution of the customary union subsisting between plaintiff and first defendant. Defendants did not defend the action and plaintifl applied for judgment by default. The Clerk of the Court referred the matter to the Court for hearing. At the hearing plaintiff did not prove the existence of the customary union which had not been registered, and the Native Commissioner decreed absolution from the instance.

Held: That it is clearly implicit in sections 57 (1) and 76 to 83, inclusive, of the Natal Code of Native Law that a Clerk of the Court cannot properly enter a judgment by default or consent in an action for the dissolution of a customary union.

Held further: That the procedure followed in the instant case, viz., the Clerk of the Court referring to the Court the request for default judgment in terms of Rule 41 (9) of the Rules for Native Commissioners' Courts and the Court thereupon dealing with the matter on the basis that the plaintiff had to establish his case by evidence, was correct.

Held further: That while the failure to register a customary union at the office of the Native Commissioner concerned, does not invalidate such union, the existence of such a union has to be proved by satisfactory evidence, and that such evidence was lacking in the instant case.

Held further: That the existence of a customary union has to be proved before it is competent for a court to decree its dissolution.

Cases referred to:

Ndhlovu *v.* Shongwe, 1940, N.A.C. (T. & N.), 66.
Ndhlovu *v.* Mbata, 1952, N.A.C. 13 (N.E.).

Statutes, etc., referred to:

Rules 32 and 41 of the Rules for Native Commissioners' Courts.

Sections 57 (1), 59 (1) (*c*), 65, and 76 to 83 of the Natal Code of Native Law of 1932.

Appeal from the Court of the Native Commissioner, Eshowe.

Balk (Permanent Member):—

This is an appeal from the judgment of a Native Commissioner's Court decreeing absolution from the instance with costs after the close of the plaintiff's (present appellant's) case in an undefended action in which he sought the dissolution of his customary union with the first defendant and custody of the minor children of that union.

The first defendant's "protector" was cited both as assisting her in the action and as second defendant.

The grounds upon which the dissolution of the customary union was sought are that the first defendant had wilfully deserted the plaintiff and that conditions were such that the continued living together of the parties had become insupportable or dangerous.

The summons commencing this action, which complied with the provisions of Rule 32 of the Rules for Native Commissioners' Courts, published under Government Notice No. 2886 of 1951, as amended, was, according to the return endorsed thereon by the Messenger of the Court, served on the defendants personally. They failed to enter appearance to defend and the plaintiff's attorney thereafter made a written request for default judgment under Rule 41 (2) of these Rules. Subsequently the plaintiff gave evidence before the Native Commissioner whereafter the plaintiff's attorney closed his case and the Native Commissioner gave the judgment referred to above. The defendants were then shown as being in default.

The grounds of appeal are:—

"1. That in terms of section 41 of Government Notice 2886 of the 9th November, 1951, a judgment of absolution from the instance with costs is not a competent or otherwise was not the appropriate judgment.

2. That there was no good or sufficient reason for the matter to be referred to the Court in terms if section 41 (9) of the said Government Notice and that judgment should have been entered as requested without evidence.

3. That in any event sufficient evidence was adduced to prove all the relevant facts and to justify the entry of judgment in favour of the plaintiff as prayed with costs.

4. That the learned Native Commissioner erred especially in holding that the uncontradicted statement of the plaintiff on oath to the effect that a customary union has been entered into was insufficient to prove the existence of such a customary union and that his evidence required corroboration."

At the outset of his argument before this Court, Counsel for the appellant intimated that he abandoned the first and second grounds of appeal and, to my mind, properly so; for although there is nothing in Rule 41 of the Rules referred to above precluding the Clerk of the Court from entering a default judgment in an action such as the instant one in which the dissolution of a customary union is sought under the provisions of the Natal Code of Native Law published under Proclamation No. 168 of 1932, as amended, it appears to be clearly implicit in the relevant provisions of that Code i.e. sections 57 (1) and 76 to 83, inclusive, thereof, that judgment in such an action cannot properly be entered by the Clerk of the Court by default or consent but must be given by the Court of Native Commissioner itself after it has heard evidence as in the case of undefended divorce actions in respect of civil marriages in superior Courts; and consequently the procedure which it seems was adopted in the instant case, namely, the Clerk of the Court referring to the Court the request for default judgment in terms of Rule 41 (9) of the above-mentioned Rules and the Court thereupon dealing with the matter on the basis that the plaintiff had to establish his case by evidence, was correct.

Turning to the remaining two grounds of appeal, the plaintiff stated in his evidence that he had entered into a customary union in the year 1942. He did not mention with which woman he had contracted this union but it is implicit in his evidence as a whole that it was with the first defendant. He stated further that this union had not been registered at the office of the Native Commissioner concerned as required by section 65 of the Code referred to above but he did not explain why this had not been done; nor did he mention that there had been the declaration by the first defendant that the union was with her own free will and consent which, in terms of section 59 (1) (*c*) of the said Code, was required to be made in public by her to the official witness at the celebration of the union and without which the union was invalid, see Ndhlovu *v.* Mbata, 1952, N.A.C. 13 (N.E.) and the authorities there cited. The plaintiff also stated that the second defendant had refunded ten of the *lobolo* cattle concerned to him. Then he went on to say that the second defendant had refunded £40 to him in lieu of eight head of the *lobolo* cattle and that he still claimed £10 to make up the full value of £50 of these eight head. Finally he stated that he did not wish to claim any further refund of *lobolo* from the second defendant, which accorded with paragraph 6 of the particulars of claim embodied in the summons.

It is therefore not surprising that the Native Commissioner stated in his reasons for judgment that he found that the plaintiff was not such a reliable type of witness that his evidence could be accepted without question as being entirely truthful.

It seems to me that in the circumstances it was essential for further evidence to be adduced, preferably that of the official witness concerned, if available, to prove the existence of the customary union contended for by the plaintiff.

Here it should be mentioned that it appears from the Native Commissioner's notes in the relative record of the proceedings that he pointed out to the plaintiff's attorney, after the plaintiff had given evidence and his case had been closed, that proof of the existence of the customary union was still wanting. The attorney thereupon argued that the registration of the customary union was not an essential and submitted that there was no need for him to prove anything more. It was thereafter that the Native Commissioner entered the absolution judgment.

It is true that failure to register a customary union at the office of the Native Commissioner concerned does not invalidate such union, see Ndhlovu *v.* Shongwe, 1940, N.A.C. (T & N), 66, but in that event the existence of such a union has to be proved by satisfactory evidence which, as indicated above, was lacking in the instant case. It seems hardly necessary to add that as in the

case of civil marriages so in the case of customary unions in Natal, the union has to be proved before it is competent for the Court to decree its dissolution.

It follows that the Native Commissioner's decree of absolution from the instance cannot be said to be wrong and that the appeal therefore falls to be dismissed with costs.

Steenkamp (President): I concur.

Oftebro (Member): I concur.

For Appellant: Mr. W. E. White.

For Respondents: Mr. H. H. Kent.

NORTH-EASTERN NATIVE APPEAL COURT.

NGOBESE *v.* SITOLE.

N.A.C. CASE No. 61 OF 1953.

DURBAN: 26th October, 1953. Before Steenkamp, President, Balk and Rossler, Members of the Court.

PRACTICE AND PROCEDURE.

Practice and Procedure—Application for written judgment in terms of Native Appeal Courts Rule 2 (1)*—Application which forms part of record, to be filed of record—written judgment to reflect date on which handed to Clerk of the Court by the Native Commissioner.*

Summary: The facts of the case not material to this report have been omitted.

At the hearing of an appeal, which, on the face of the documents before the Court, had been noted late, Counsel for appellant produced documentary proof that appellant had applied for a written judgment within the prescribed period of seven days and that the appeal had been noted within the prescribed period of fourteen days after delivery to the Clerk of the Court of the written judgment by the Native Commissioner.

Held: That the application by the attorney for a written judgment should have been filed with the record.

Held further: That the Native Commissioner must date every document that bears his signature.

Held further: That although the written judgment was not dated by the Native Commissioner, it has been ascertained telephonically by the Registrar that it had been delivered to the Clerk of the Court on the 3rd of July, 1953, and the Court accepts that that was the day on which the Native Commissioner delivered the written judgment to the Clerk of the Court.

Statutes, etc., referred to:

Rules 2 (1) and 4 of the Rules for Native Appeal Courts.

Appeal from the Court of the Native Commissioner, Mapumulo.

Steenkamp (President):—

Before dealing with the appeal as such, I wish to point out that on the face of the documents before the Court, the appeal had been noted late.

The attention of Counsel for Appellant was drawn to this whereupon he informed this Court that appellant's attorney had applied for a written judgment in terms of Rule 2 (1) of the Native Appeal Court Rules, published under Government Notice No. 2887 of 1951, within the period of seven days as prescribed. He produced a receipt for 10s. being the fee payable. The date of the receipt is within the prescribed period of seven days.

Counsel did not receive the written judgment until 4th July, 1953, and although the Native Commissioner did not date his written judgment, it has been ascertained by telephone that it had been delivered to the Clerk of the Court on the 3rd July, 1953. The letter from the Clerk of the Court to appellant's attorney is dated 3rd July, 1953, and therefore this Court accepts that this was the day on which the Native Commissioner delivered the judgment to the Clerk of the Court.

The appeal was noted on 16th July, 1953, and received by the Clerk of the Court the next day. According to Rule 4 of the Native Appeal Court Rules already referred to, an appeal may be noted within 14 days after the filing of the written judgment. This period had not yet expired when the Clerk of the Court received the notice of appeal and therefore this Court is satisfied that the appeal was noted timeously.

I am constrained to remark that in the first place the application by the attorney for a written judgment should have been filed with the record and secondly the Native Commissioner must date every document that bears his signature.

If these requirements had been complied with there would have been no need for the Registrar of this Court to have contacted the Native Commissioner by telephone which caused unnecessary delay in the hearing of the appeal.

Balk (Permanent Member): I concur.

Rossler (Member): I concur.

For Appellant: Mr. W. T. Clark.

Respondent in Person.

SOUTHERN NATIVE APPEAL COURT.

MKUMATELA *v.* **FIGLAN.**

N.A.C. CASE No. 25 OF 1953.

UMTATA: 26th October, 1953. Before Sleigh, President, Warner and Cornell, Members of the Court.

LAW OF PROCEDURE.

Notice of appeal—Failure to stamp—Clerk of Court should decline to accept.

Summary: The Notice of appeal against the judgment given by the Assistant Native Commissioner was dated 12th June, 1953. It was apparently received by the Clerk of the Court on the following day. It was not stamped in terms of the rules.

Held: (1) That the Clerk of the Court should have declined to accept the Notice of Appeal until it was properly stamped as in view of the provisions of Section 22 of Act No. 30 of 1911, the Notice must be regarded as being null and void unless properly stamped.

Statutes referred to: Act No. 30 of 1911—Section 22.

Cases referred to: Memel Municipality *v.* Schafer [1933 (1) P.H.—F. 64].

Appeal from the Court of the Native Commissioner, Cala.

Sleigh (President):—

In this case plaintiff (now respondent) sues appellant for delivery of certain ten acres of land and all the crops growing thereon and in his particulars of claim alleges that on 14th August, 1952, he hired the said piece of land, being portion of

the farm Figlan, for the purpose of cultivation during the season 1952/53, and that on 29th September, 1952, while he was in quiet, peaceful and lawful occupation of the said land through his agent, Reginald Figlan, appellant wrongfully, unlawfully and forcibly dispossessed him.

In his plea, appellant denies that respondent hired the land and that on 29th September, 1952, he (respondent) had any right to the said land. He further denies that on this date he (appellant) unlawfully and forcibly ejected the respondent from any land to which the latter had any lawful rights.

It is not disputed that appellant cultivated the land and incurred certain expenses in connection therewith. The Assistant Native Commissioner entered judgment in favour of respondent but ordered the latter to compensate appellant in the amount of £13. 7s. for expenses incurred and work performed in connection with the cultivation of the land. From this judgment appellant has appealed on various grounds.

Before dealing with the merits of the case there is one matter which I must mention. The notice of appeal is dated 12th June, 1953, and was apparently received by the Clerk of the Court the following day but it was not stamped in terms of the rules. In view of the provisions of section *twenty-two* of Act No. 30 of 1911, the Clerk of the Court should have declined to accept it until it was properly stamped. It was held in Memel Municipality *v.* Schafer [1933 (1) P.H.—F. 64], that an unstamped notice of appeal is void.

His Honour then proceeded to deal with the merits of the action.

SOUTHERN NATIVE APPEAL COURT.

KETANE *v.* **MSUNDULO AND ANOTHER.**

N.A.C. CASE No. 26 OF 1953.

UMTATA: 26th October, 1953. Before Sleigh, President, Warner and Cornell, Members of the Court.

LAW OF PROCEDURE.

Appeal from the Native Commissioner's Court—Late noting of—Copy of Notice of Appeal must be served on opposite party—Written acknowledgement of receipt of copy of Notice of Appeal must be obtained from respondent's attorney.

Summary: Judgment was delivered on 12th February, 1953. Application for written judgment was made on behalf of appellant and this was delivered to the Clerk of the Court on 2nd March, 1953. The Notice of Appeal is dated 23rd March, 1953, and was received by the Clerk of the Court on 30th March, 1953.

Objection was taken to the hearing of the appeal on two grounds, viz.—(i) that the appeal was *not* noted within the statutory period allowed and (ii) that a copy of the Notice was not served on respondent or delivered to his attorney. Respondent's attorney supported the second ground by an affidavit. Appellant's attorney filed a replying affidavit in which he declared that the delay in noting the appeal was occasioned by the fact that the written judgment was not received by him till the 21st March, 1953, and contended that there was no late noting. He further declared that a copy of the Notice of Appeal was posted to respondent's attorney on the 23rd March, 1953.

Held:

(i) That in view of the definition of "deliver" there is no obligation on the Clerk of the Court to serve a copy of the written judgment upon appellant or his attorney, and that it is the duty of the latter to obtain a copy when the written judgment is available.

(ii) That as a written acknowledgement of the receipt of a copy of the Notice of Appeal was not obtained from respondent's attorney in terms of the rules of the Native appeal Court, the service of the Notice of Appeal was fatally defective.

Objection upheld.

Legislation referred to: Government Notice No. 2887 of 1951, Section 6.

Cases referred to:

Phomodi *v.* Mosithela, 1937 [N.A.C. (C. & O.), 236].

Nunlal *v.* Pillay, 1948 (4), S.A., 720 (N).

Appeal from the Court of the Native Commissioner, Cofimvaba.

Sleigh (President):—

Judgment in this case was delivered on the 12th February, 1953. Application was made on behalf of appellant for written judgment which was delivered to the Clerk of the Court on 2nd March, 1953.

Notice of appeal is dated 23rd March, 1953, but it was not received by the Clerk of the Court until 30th March. There was thus a late noting and objection is now taken to the hearing of the appeal on two grounds, viz. (1) That the appeal was not timeously noted and (2) that a copy of the notice was not served on respondent. The second ground is supported by an affidavit by respondents' attorney.

Appellant's attorney filed a replying affidavit in which he declares that the delay in noting the appeal was occasioned by the fact that the written judgment was not received by him until the 21st March, 1953, and it is contended that there was thus no late noting.

In view of the definition of "deliver" in the rules there is no obligation on the Clerk of the Court to serve a copy of the written judgment upon the appellant or his attorney. It is the duty of the latter to obtain a copy when the written judgment is available [see Phomodi *v.* Mosithela, 1937, N.A.C. (C. & O.), 236].

In regard to the second ground of objection appellant's attorney declares that a copy of the Notice of Appeal was posted to respondents' attorney on the 23rd March, 1953. The rule (No. 6) provides that service of a copy of the appeal on respondent may be made, in person, in the presence of two witnesses, or by the Messenger of the Court, and, when the Respondent was legally represented, service may be effected on such representative either in person or by registered post (sub-rule 4). But service under the sub-rule shall be of no force and effect unless appellant has obtained from respondent's attorney a written acknowledgement of the receipt of such copy (sub-rule 6).

Since the written acknowledgement was not obtained, the service is fatally defective—[see Nunlal *v.* Pillay, 1948 (4), S.A., 720 (N)].

The objection is consequently upheld and the appeal is struck off the roll with costs.

Warner (Member): I concur.

Cornell (Member): I concur.

For Appellant: Mr. Matanzima, Engcobo.

For Respondent: Mr. Muggleston, Umtata.

SOUTHERN NATIVE APPEAL COURT.

GOVA *v.* GUSHU.

N.A.C. CASE No. 27 OF 1953.

UMTATA: 26th October, 1953. Before Sleigh, President, Warner and Cornell, Members of the Court.

TEMBU CUSTOM.

Dowry—Liability of person other than parent or guardian for restoration of dowry—Return of wife—Action for, Premature without " Putuma ".

Summary: Plaintiff before attempting to *putuma* his wife, sued defendant for the return of his customary wife or restoration of the dowry and alleged that his wife was defendant's ward. Defendant admitted receipt of the dowry and the desertion but denied that the woman was his (defendant's) ward. It was clear from the evidence that the woman was the daughter of one Fezane who was away at work. It is common cause that the cattle were removed under permit in Fezane's name from Engcobo to Cala, were registered in Fezane's name and are still so registered.

Judgment in the Court below was in favour of defendant.

Held:

(1) That as defendant, to whom the cattle were paid, has accounted to Fezane (the person entitled to the cattle) for the stock, he cannot be held liable for the restoration of the dowry on the desertion of plaintiff's wife.

(2) That as plaintiff admits that he has not gone to putuma his wife his action for the recovery of his dowry is premature.

The appeal fails.

Cases referred to:

Dlumti *v.* Sikade [1947 N.A.C. (C. & O.) 47].
Sibovana *v.* Dlokova [1 N.A.C. (S) 281].

Appeal from the Native Commissioner's Court, Cala.

Sleigh (President):—

This is an appeal against a judgment for defendant with costs in an action in which plaintiff sued him for the return of his customary wife, Nowelile, or restoration of the dowry paid for her, and in the particulars of claim it is alleged that Nowelile is the ward of defendant to whom the dowry was paid. Defendant admits the desertion and that he received the dowry, but it is clear from the evidence that plaintiff's father (the dowry messenger) was told that Nowelile was not defendant's ward but the daughter of Fezane who was away at work. The crisp point for decision is whether defendant is liable for the restoration of the dowry.

The custom is that dowry is paid to the head of the kraal at which the girl is found and the husband has no right to challenge the authority of such head to give her in marriage. If the head is not the guardian, it is his duty to report the proposal of the marriage to her guardian. The husband is, however, entitled to claim restoration of the dowry from the person to whom it was paid but the latter can escape liability if he can show that he has accounted for the dowry to the person entitled to it. [See Dlumti *v.* Sikade, 1947, N.A.C. (C. & O.), 47.]

In the present case it is not quite clear whether Nowelile was living at defendant's kraal at the time the dowry was paid. Assuming that she did, defendant maintains that he was acting all along as the agent of Fezane and the evidence supports him. Plaintiff's father admits that defendant told him that he was not the father of the girl and plaintiff would naturally have enquired into her ancestry to ascertain whether marriage to her was permissible. Moreover, the cattle were removed from Engcobo to Xalanga district under permit in the name of Fezane and were registered in his name and are still so registered. Defendant had thus accounted for the cattle to Fezane and in the circumstances, plaintiff's evidence that defendant told him that he was the father of the girl must be rejected.

Ownership in the cattle passed directly to Fezane upon payment. It is true that he has never seen the cattle which are still in the physical control of defendant but the latter is also in control of other property belonging to Fezane. He has no authority to dispose of the cattle and any judgment against him would not be executable against the property of Fezane. It is surprising that the latter was not sued or joined in the action. The summons could have been served upon him by edictal citation if necessary.

There is another reason why the appeal must fail: although the point was not pleaded. It appears from the evidence that Nowelile went to her uncle's kraal when she deserted and plaintiff admits that he had not gone to that kraal *to putuma* her. His action is therefore premature [see Sibovana *v.* Dlokova. 1. N.A.C. (S) 281].

The appeal is dismissed with costs.

Warner (Member): I concur.

Cornell (Member): I concur.

For Appellant: Mr. Muggleston, Umtata.

For Respondent: Mr. White, Umtata.

SOUTHERN NATIVE APPEAL COURT

MAYILE *v.* MAKAWULA.

N.A.C. CASE No. 28 OF 1953.

UMTATA: 27th October, 1953. Before Sleigh, President, Warner and Cornell, Members of the Court.

NATIVE CUSTOM.

Adultery—Damages for—whether recoverable after dissolution of customary union but before adultery action disposed of.

Summary: Plaintiff was deserted by his wife and in April, 1951, he instructed his attorney to recover her. The woman's guardian, Mfutyu, advised that, before complying, he required four head of cattle as additional dowry. In May, 1951, plaintiff issued summons for the return of his wife or restoration of the dowry.

Mfutyu then raised the defence of *teleka* and claimed a further beast. A cheque for £8 representing one beast was sent to his attorney. The woman then left her brother's kraal while the case was pending and on 9th October, 1951, was found sleeping with the defendant. On 12th November, 1951, Mfutyu's attorney advised plaintiff's attorney that his client would not accept the £8 and intended to return the

dowry to plaintiff. A cheque for £10 was enclosed as part refund of the dowry. Plaintiff refused to accept the amount as also a further cheque for £11 dated 28th July, 1952. On 29th December, 1951, the summons in the present case was issued.

Judgment in the Court below was in favour of plaintiff.

Held:

(1) That as the tender of part of the dowry (with consequent dissolution of the customary union) was made only after action for damages had been taken, defendant was liable for the customary fine for adultery.

(2) That on the part of the wife a repudiation of the union can become effective only by restoration of the lobolo or part thereof.

The appeal fails.

Cases referred to:

(1) Ndlamya *v.* Mhashe (1 N.A.C. 112).
(2) Rolobile *v.* Matandela (2 N.A.C. 126).
(3) Sobijase *v.* Bheba (5 N.A.C. 13).
(4) Mendziwe *v.* Lubalule (3 N.A.C. 170).
(5) Mapekulu *v.* Zeka (3 N.A.C. 6).
(6) Bobotyane *v.* Jack [1944, N.A.C. (C. & O.), 9].

Appeal from the Court of the Native Commissioner, Elliotdale.

Sleigh (President):—

This is an appeal against a judgment for plaintiff as prayed with costs in an action in which he sued defendant for three head of cattle or their value £15 as damages for adultery with his customary wife, Noinglan.

The facts of the case are as follows:—Noinglan deserted the plaintiff and returned to her brother, Mfutya. In April, 1951, the plaintiff instructed his attorney to recover her. The attorney sent a messenger to Mfutyu and received a reply that the latter wanted four cattle as additional dowry. In May, 1951, plaintiff issued summons against Mfutyu for the return of his wife or restoration of the dowry, namely seven cattle. Appearance was entered and a plea filed in which Mfutyu raised the defence of *teleka* and claimed one beast. Thereafter a cheque for £8, representing one beast, was sent to Mfutyu's attorney. While the case was pending, Noinglan left her brother's kraal and on 9th October, 1951, she was found sleeping with defendant. On 12th November, Mfutyu's attorney advised plaintiff's attorney that Mfutyu would not accept the £8 and intended to return the dowry to Plaintiff. A cheque for £10 was enclosed as part refund of the dowry. Plaintiff refused to accept the amount as also a further cheque for £11 dated 28th July, 1952. On 29th December, 1951, the summons in the present case was issued.

It is established native law that the right of action for adultery is contingent upon there being in existence a valid customary union between the plaintiff and his wife at the time when action is taken against the adulterer. In Native Law action is taken when the adultery is reported at the adulterer's kraal and damages are demanded. It thus follows that where the union has been dissolved without such action having been taken the husband cannot recover damages for adultery committed with the woman prior to the dissolution.

The question for decision in the present case is whether damages are recoverable when the union is dissolved before the adultery action is disposed of. On this point the authorities are conflicting. In Ndlanya *v.* Mhashe (1 N.A.C. 112), the wife had returned to her people and her husband had obtained judgment against her father for her return or restoration of the dowry paid for her. Before such judgment, however, she committed adultery. This Court accepted the opinion of the Native assessors that the husband had lost his right of action by dissolution of the union. In that case, however, there is nothing in the report to indicate that the husband had taken action against the adulterer before obtaining judgment for the return of the wife.

In Rolobile *v.* Matandela (2 N.A.C. 126), the husband sued the adulterer for damages for adultery, but before this action was disposed of he sued her brother for her return or restoration of the dowry and obtained judgment. The wife did not return. This Court accepted the opinion of the Native assessors that the action against the brother resulted in the dissolution of the union before the claim for damages was disposed of and the husband consequently lost all further right to claim damages for adultery. It should be noted that in that case action was taken against the adulterer before the dissolution of the union whereas in Ndlanya's case the action for damages was apparently instituted after the dissolution. In Sobijase *v.* Bheba (5 N.A.C., 13) the wife left her husband's kraal while he was at the mines and went to live with the adulterer. Thereafter the father tendered the return of the dowry to the husband. It was held that the tender of the dowry did not absolve the adulterer from liability to pay the legal damages. Since a tender of the dowry dissolves the union, this case is in conflict with *Rolobile's* case, and is not opposed to *Ndlanya's* case provided we assume that in that case damages were demanded from the adulterer after the tender. In view of these conflicting decisions the point of law was referred to the Native assessors. As will be seen from their replies, a record of which is annexed, the law as stated by them is substantially in accord with the statement of the law set out above, namely, that the dissolution of the union does not cancel the right of action for adultery, provided that such action was taken against the adulterer before the dissolution of the union. In my opinion, therefore, *Rolobile's* case was wrongly decided.

Now in Mendziwe *v.* Lubalule (3 N.A.C. 170), where the wife refused to return to her husband and the dowry paid for her was tendered, this Court held that the husband was bound to accept the tender which had the effect of dissolving the union. In that case, apparently, the full dowry was tendered, and the Native assessors in the present case state that the union is not dissolved by tendering part of the dowry only. They say that the full dowry less the customary deductions must be tendered. I do not agree with this statement. It is in conflict with the decisions in Mapekulu *v.* Zeka (3 N.A.C. 6) and Bobotyane *v.* Jack [1944 N.A.C. (C. & O.), 9], in which it was stated that "on the part of the wife, a repudiation (of the union) can become effective only by restoration of the *lobolo* or part thereof". The position may be that the father is unable to restore the dowry in full, and if the Native assessors are correct the husband would have a sort of lien on the wife until the full dowry is restored. Such a situation would be immoral and opposed to public policy. The tender of part of the dowry is a clear indication that the wife is rejecting her husband and, in my opinion, it dissolves the union.

In the present case the adultery was committed while the action against Mfutyu for the return of Noinglan or restoration of the dowry paid for her was pending, and before the restoration of any portion of the dowry was tendered. It is thus clear that at the time of the adultery she was still plaintiff's wife. The tender of portion of her dowry made on 12th November had the effect of dissolving the union. Thereafter the claim against Mfutyu for the return of the wife fell away; but when the tender was made damages had been demanded from defendant. In Native Law action had been taken against defendant prior to the dissolution of the union and, consequently, he is liable for the customary fine for adultery.

The appeal must therefore be dismissed with costs.

Warner (Member): I concur.

Cornell (Member): I concur.

OPINIONS OF NATIVE ASSESSORS.

Names of Assessors: E. C. Bam (Tsolo), Charles Mananga (Qumbu), John Ngcwabe (St. Mark's), Ntose Sakele (Umtata), and Dumalisile Mbekeni (Engcobo).

The facts of the case are put to the assessors and the position is explained that the action for the return of wife was held in abeyance pending the hearing of the claim for damages for adultery.

1. *Question:* Can the father of the girl defeat the husband's claim for damages for adultery by tendering the return of the dowry?

Answer (per John Ngcwabe): The woman's father would have no right to dissolve the marriage by returning the dowry and thus defeat the husband's claim for damages for adultery before the latter action has been settled.

All agree.

2. *Question:* Must the father tender the return of the full dowry paid in order to dissolve the union or will it suffice if he tenders return of a portion of it.

Answer (per John Ngcwabe): If a man offers return of one beast of the dowry that is not *keta.* To dissolve the union he must return the full dowry paid less customary deductions. If the father of the woman has only one beast and pays it to the husband the union is not dissolved, even if the woman is married to another man. In such a case, the husband can sue the second man for damages for adultery.

All agree.

3. *Question:* If the husband obtained judgment for the return of his wife or restoration of dowry and the wife does not return can he proceed thereafter with his action for damages for adultery which was instituted prior to judgment being given in the case claiming return of wife or refund of dowry?

Answer (per John Ngcwabe): The woman remains the man's wife even if judgment has been obtained for her return or refund of dowry. If the wife refuses to return and the dowry is then recovered, her husband can still proceed with his action for damages for adultery since he claimed these damages before the dowry was returned. A husband cannot recover damages for adultery if he has not made his claim thereto before the union was dissolved.

All agree.

4. *Question:* If the father tenders return of dowry, can the husband decline to accept is?

Answer (per John Ngcwabe): If the father tenders return of dowry, the husband must accept it because this shows that the woman is rejecting her husband.

All agree.

5. *Question:* If a man drives his wife away, must a beast be returned to him in order that the union may be dissolved?

Answer (per John Ngcwabe): This is not our custom. If a man rejects his wife he is not entitled to return of any portion of the dowry.

All agree.

For Appellant: Mr. Knopf, Umtata.

For Respondent: Mr. Muggleston, Umtata.

NORTH-EASTERN NATIVE DIVORCE COURT.

DHLAMINI *v.* DHLAMINI.

N.D.C. Case No. 94 of 1953.

Pietermaritzburg: 30th October, 1953. Before Balk, President.

LAW OF PERSONS.

Husband and wife—Action to declare marriage null and void—Banns not published—Coercion of wife to enter into marriage.

Summary: Plaintiff, the female spouse of a marriage by Christian Rites, sued for a declaration that her marriage to defendant be declared null and void; on the grounds that no banns were published in regard to the marriage and alternatively on the ground that she was wrongfully and unlawfully coerced and forced against her will to marry defendant.

Held: That it falls to be accepted that the intention of the legislature (in Natal) was that licences under Law No. 46 of 1887 were to be regarded as licences within the meaning of Ordinance No. 17 of 1846, i.e. as licences authorising the solemnation of marriages without the prior publication of banns.

Held: That it is manifest that plaintiff went through the marriage ceremony solely because she was actuated by fear engendered by her father's threats of further violence.

Held further: That it must be borne in mind that plaintiff remained in the defendant's power until the second day after her marriage to him and that it would have been idle for her to have protested against the consummation of the marriage on her wedding night in the light of the violent treatment she had already received at the defendant's and her father's hands when she objected to the marriage.

Held: That plaintiff is entitled to the relief sought in her alternative claim.

Cases referred to:

Gingxa *v.* Kula, 1911, E.D.L., 344.
Smith *v.* Smith, 1948 (4) S.A., 61 (N.P.D.).

Statutes etc. referred to:

Ord. 17 of 1846 (Natal).
Law 46 of 1887 (Natal).
Law 7 of 1889 (Natal).

Action for an order declaring a marriage null and void.

Facts not material to this report have been omitted.

Balk (President):—

In the instant action the relief sought by the plaintiff is an order declaring her marriage to the defendant to be null and void *ab initio* for want of publication of their banns as required by Ordinance No. 17 of 1846 of Natal or alternatively for want of her consent to this marriage.

Certain of the facts are common cause, viz.—

(*a*) That the parties are Natives;
(*b*) that they are domiciled in the Province of Natal;
(*c*) that the marriage was solemnised in that Province on the 28th October, 1952, after they had obtained the licence required by them in terms of Law No. 46 of 1887 of Natal but without their having obtained a special licence under Law No. 7 of 1889 of Natal;
(*d*) that the marriage still subsists; and
(*e*) that there are no children thereof.

The marriage was proved by the plaintiff's uncontroverted evidence thereanent, including the production of the relative marriage certificate and its identification and that of the parties mentioned therein.

That no banns were published in respect of the marriage, as averred by the plaintiff in her particulars of claim, is manifest from the uncontroverted evidence given for her by the Assistant Magistrate, Richmond, and Isaiah Shezi and from the defendant's testimony.

Here it should be mentioned that section *eighteen* of Ordinance No. 17 of 1846 of Natal does not preclude the admission of evidence regarding want of publication of banns and that such evidence is admissible in the instant case as no mention is made in the relative marriage certificate that banns were published, see Gingxa *v.* Kula, 1911, E.D.L., 344.

This leads to a consideration of the question whether the failure here to publish the banns invalidated the marriage.

The provisions of Law No. 46 of 1887 of Natal fall, in terms of section *one* thereof, to be read with those of Ordinance No. 17 of 1846 of Natal in so far as the latter have not been varied by the former. And whilst Law No. 46 of 1887 does not specifically dispense with the publication of banns required by Ordinance No. 17 of 1846, it seems to me that on a proper construction of the provisions of Law No. 46 of 1887, they necessarily do so by implication in the case of a marriage, such as the one here under consideration, for the solemnisation of which a licence under the lastmentioned enactment is required; for the declarations required to be completed by the parties in terms of section *two* of Law No. 46 of 1887 to obtain such a licence, are similar in all material respects to those required in the case of a special licence under Natal Law No. 7 of 1889, which permits of a marriage without prior publication of banns, and in the same way appear to have been designed to provide the safeguard necessitated by dispensing with banns. In addition, both these laws contain a penal clause for making false declarations thereunder. In other words, the publication of banns in the case of a marriage for the solemnisation of which a licence under Law No. 46 of 1887 is required, appears clearly to be redundant as the necessary safeguard is provided by the declarations which the parties are required to make before they can obtain such a licence and by the penalty clause for any false statement in such declarations, in the same way as a safeguard is afforded by the declarations required in the case of a special licence under Law No. 7 of 1889 and the corresponding penalty clause in that Law. To hold in these circumstances that the publication of banns is required in the case of a marriage of the nature in question leads to absurdity. It, therefore, falls to be accepted that the intention of the legislature was that licences under Law No. 46 of 1887 were to be regarded as licences within the meaning of section *eleven* of Ordinance No. 17 of 1846, i.e. as licences authorising the solemnisation of marriages without the prior publication of banns. Having reached this conclusion, it follows that the plaintiff's main claim fails and that it is unnecessary to consider wether the provisions of Act No. 20 of 1913 have any bearing thereon.

Turning to the plaintiff's alternative claim, the defendant in his plea denied the plaintiff's averment in her particulars of claim that she had been wrongfully and unlawfully coerced and forced against her will to marry him. The defendant further stated in his plea that the plaintiff had voluntarily and of her own free will and whilst in her sound and sober senses consented to contract the marriage and that she did so contract it.

It is manifest from the plaintiff's version that from September, 1952, onwards, she was at all times opposed to marrying the defendant, that although the latter knew thereof, he insisted on their obtaining the marriage licence and on going through the marriage ceremony and that she did so on the 28th October,

1952, solely because she was actuated by fear engendered by her father's threats of further violence and of taking her back to the kraal of the defendant at whose hands she had also suffered violence and confinement owing to her opposition to her marriage to him. It is true that the plaintiff could have intimated that she was not a consenting party to this marriage both at the Native Commissioner's office when the marriage licence was obtained and at the church when the marriage was solemnised. But, as explained by her in her evidence, her father was with her all the time then and he had already given her a thrashing in the presence of a European (Mrs Odendaal) at the latter's house and had threatened her with further violence and with sending her back to the defendant's kraal if she continued to refuse to marry the latter at whose hands she had already suffered violence and confinement because she had not been willing to do so.

It is also true that the plaintiff admitted in the course of her testimony that she had shared a hut with the defendant on their wedding night and that the latter stated in his evidence that their marriage had been consummated with her consent. Unfortunately the plaintiff was not questioned as to whether or not she had protested against the consummation of the marriage and, if not, the reason therefor. But even assuming that she did not protest, it seems to me that this still does not militate against the success of her case; for it must be borne in mind that she remained in the defendant's power until the second day after her marriage to him and that it would have been idle for her to have protested against the consummation of the marriage on her wedding night in the light of the violent treatment she had already received at the denfendant's and her father's hands when she objected to the marriage. The cogency of this reasoning becomes more apparent from the plaintiff's subsequent conduct, as disclosed by her evidence, viz., that on the second day after her marriage to the defendant, she returned to her father's kraal after having obtained leave from the defendant to do so, that four days later she fled from that kraal and took refuge with her lover, Lakeni Nxele, and that she brought the instant action soon afterwards.

I, therefore, come to the conclusion that the plaintiff was not a consenting party to her marriage to the defendant and that she did not thereafter either affirm or acquiesce in this marriage so as to overcome the effect of original want of consent.

It follows that on the authority of Smith *v.* Smith, 1948 (4), S.A. 61 (N.P.D.), the plaintiff is entitled on her alternative claim to the relief sought.

In the result the judgment of this Court is:—

On the main claim: For defendant.

On the alternative claim: It is ordered that the marriage between Evelina Mtolo (plaintiff) and Dumezweni Dhlamini (defendant), the ceremony wherein was performed at Indalen in the District of Richmond, Province of Natal, on the 28th October, 1952, be and it is hereby declared null and void *ab initio*.

The plaintiff is awarded costs of suit with the costs of hearing, i.e. the costs of her attorney's attendance at Court for trial, limited to one half of the maximum amount allowed by the Rules of this Court, this apportionment, dictated by the Plaintiff's failure in her main claim, being agreed to by both parties.

For Plaintiff: Mr. J. R. N. Swain.
For Defendant: Adv. J. H. Niehaus, instructed by C. C. C. Raulstone & Co.

NORTH-EASTERN NATIVE DIVORCE COURT.

MATJILA *v.* MATJILA.

N.D.C. CASE No. 330 OF 1953.

PRETORIA: 25th November, 1953. Before Steenkamp, President.

LAW OF PROCEDURE.

Native Divorce Court—Rule 18 (1)—*Short service of summons—Court cannot condone short service unless consented to by defendant or where proper application in writing has been made.*

Summary: A divorce summons was served 29 days prior to the date on which defendant was called upon to appear. On the day of hearing defendant was in default and plaintiff applied verbally for condonation of short service.

Held: That in the absence of a waiver of any right to object to short service by defendant, the Court may only condone such short service after a written application, duly served on the opposite side, had been made.

Cases referred to:

Bischoff *v.* Bischoff, 1933, T.P.D., 33.
Pohlman *v.* Pohlman, 1948, (3), S.A. 13, (W.L.D.).

Statutes, etc., referred to:

Native Divorce Court Rules 18 (1) and 31.

Trial Case for Divorce on grounds of adultery.
Steenkamp (President):—
According to Rule 18 (1) of the Native Divorce Court rules published under Government Notice No. 2888 of 1951 as amended by section 5 (*a*) of Government Notice No. 628/1953, the process of the Court for commencing action shall be served on the defendant calling on him to appear before the Court on a day which shall not be less than thirty days after the date of the service of the summons.

In the instant action the summons was served 29 days prior to the date on which defendant was called upon to appear, i.e. it should have been served a day earlier.

On the date set down for hearing defendant was in default and the Court drew Counsel's attention to the fact that the summons had been served a day late.

Counsel thereupon verbally applied to the Court to condone the late service and in support of his application he quoted Rule 31 (3) of this Court's Rules.

Rule 31 deals with non-compliance of Rules including time limits and errors and while this Court may in accordance with this rule come to the assistance of a party who has not strictly complied with any rule in so far as time limits are concerned a proper construction of sub-rules (1) (2) and (3) would seem to indicate that written application should be made after notice of such application had been served on the opposite party.

The Courts are very loth to put a party to unnecessary costs but there can be no doubt that unless a defendant expressly waives his right to object to short service, the Court may only condone such defect after a written application, duly served on the opposite side, had been made. To obviate costs in the preparation of an application, I think that justice will be met if leave is granted to the plaintiff to have the summons re-served.

Only if defendant had appeared and waived any rights to object to the late service may the Court entertain a verbal application that might be made in this connection. That this is permissible would appear to be indicated in the case of Bischoff *v.* Bischoff, 1933, T.P.D. 33.

I have read the case of Pohlman *v.* Pohlman, 1948, (3), S.A. 13, (W.L.D.) in which it is indicated that the Court will not allow an amendment of a summons altering the *dies induciae* without notice to the defendant and on the same principles I hold that in the instant action the hearing should be postponed to the next session of this Court during February, 1954, and it is ordered accordingly. It is also ordered that the summons be re-served on the defendant after a fresh date of hearing had been obtained from the registrar of this Court.

For Plaintiff: Adv. Cooper, instructed by M. Silber.

Defendant in default.

SOUTHERN NATIVE APPEAL COURT.

NTETA *v.* MALILWANA.

N.A.C. CASE No. 29 OF 1953.

KING WILLIAM'S TOWN: 1st December, 1953. Before Israel, President, Warner and Gold, Members of the Court.

LAW OF PROCEDURE.

Native Appeal Case—Procedure—Appeal against Order granting application by defendant for rescission of default Judgment—Order not appealable.

Summary: An appeal was noted against the following order: "Application for rescission of default judgment granted. Applicant ordered to pay costs of default judgment and costs of application". The Court *mero motu* raised the question as to whether the first part of the order was appealable.

Held: That as the order appealed against was neither a judgment of the nature described in rule 54 of the Native Commissioners' Courts Rules nor an order having the effect of a final judgment, it was not appealable.

The appeal was accordingly struck off the roll.

Cases referred to:

Ranchod *v.* Lalloo 1942 T.P.D. 211.
Gatebe *v.* Gatebe 1928 O.P.D. 145.
Bubi *v.* Gebenga 1 N.A.C. 133 (S).

Statutes referred to:

Government Notice No. 2886 of 1951, sections 81 (2) and 54.

Appeal from the Court of the Native Commissioner, Lady Frere.

Warner (Member):—

This is an appeal against the following order made by the Additional Assistant Native Commissioner, Lady Frere, on 11th June, 1953: "Application for rescission of default judgment granted. Applicant ordered to pay costs of default judgment and costs of application."

The Notice of Appeal states that the appeal is noted on behalf of defendant and is signed "W. M. Tsotsi, applicant's attorney". Defendant however, applied for rescission of the default judgment and his application was granted. Mr. Tsotsi is plaintiff's attorney and appears to have intended to note the appeal on behalf of plaintiff.

The Notice also states that the whole judgment is appealed against. Defendant, however, was ordered to pay the costs of the default judgment and the costs of the application so that it seems unlikely that plaintiff would appeal against such an order.

This is regarded, therefore, as an appeal by plaintiff against that portion of the order which granted the application by defendant for the rescission of a default judgment given against him.

This Court has *mero motu* raised the question as to whether the order is appealable.

Section 81 (2) of the Rules of Native Commissioners' Courts promulgated under Government Notice No. 2886 of 1951 reads as follows:—

> "A party to any civil suit or proceeding may appeal to a Native Appeal Court constituted under section *thirteen* of Act No. 38 of 1927 and to no other Court against (*a*) any judgment of the nature described in rule 54; (*b*) any rule or order made in such suit or proceeding and having the effect of a final judgment including any order as to costs."

The order is not a judgment of the nature described in rule 54 nor is it an order having the effect of a final judgment. It is, therefore, not appealable [see cases of Ranchod *v.* Lalloo 1942 T.P.D. 211; Gatebe v. Gatebe 1928 O.P.D. 145 and Bubi *v.* Gebenga 1 N.A.C. 133 (S)].

The appeal should be struck off the roll with costs.

Israel (President): I concur.

Gold (Member): I concur.

For Appellant: Mr. Tsotsi, Lady Frere.

For Respondent: Mr. Kelly, Lady Frere.

SOUTHERN NATIVE APPEAL COURT.

MDUNANA *v.* **NTSUNTSWANA.**

N.A.C. CASE No. 30 OF 1953.

KING WILLIAM'S TOWN: 1st December, 1953. Before Israel, President, Warner and Gold, Members of the Court.

TEMBU CUSTOM.

Native Appeal Case—Husband and wife—claim for return of deserting wife or refund of dowry—Duty of husband to search for wife—Sufficient if wife traced to guardian's kraal—Judgment creditor must be given option of satisfying judgment in cash if no evidence as to existence of original dowry paid.

Summary: Judgment was given for plaintiff for the return of his customary wife on or before 4th September, 1953, failing which for return of certain dowry paid. In 1948 in a previous action judgment for plaintiff was entered by consent. This judgment was satisfied by handing the wife and children to plaintiff. On their return home in 1948 the wife disappeared at Sterkstroom station and plaintiff has not seen

her since. Sufficient evidence was led to convince the judicial officer that she had returned to her guardian's kraal and was actually seen there in 1951. The appeal against the judgment on the grounds that it was against the weight of evidence therefore failed.

The second ground of appeal was that there was no obligation on defendant to return his ward to plaintiff, or restore the dowry, as plaintiff had failed to look for his wife and produce her to defendant. Plaintiff admits that until April, 1953, he did not visit defendant's kraal in order to *putuma* his wife nor did he send messengers to do so.

Held:

(1) That the obligation on the husband to search for and take his erring wife to her people ceases when he has traced her to her guardian's kraal.

(2) That it was incumbent on the wife's guardian to notify Plaintiff of the presence of his ward at his kraal.

The appeal fails.

Cases referred to:

Mampeyi *v.* Rarai 1937 N.A.C. (C. & O.) 148.
Talindaba *v.* Mpilana 1942 N.A.C. (C. & O.) 93.
Willie *v.* Skyman 1943 N.A.C. (C. & O.) 61.
Sibovana *v.* Dlokova 1 N.A.C. (S) 281.

Appeal from the Court of the Native Commissioner, Lady Frere.

Warner (Member):—

This is an appeal against a judgment for plaintiff for return of his customary wife Nonotise on or before 4th August, 1953, failing which for return of balance of dowry (4 head of cattle) and costs.

Plaintiff is domiciled in the district of Glen Grey but for some years has been residing on a farm in the district of Potchefstroom where he is employed.

It is common cause that in 1948 plaintiff instituted legal proceedings against defendant for return of his wife and custody of three minor children; that judgment was entered by consent for plaintiff as prayed and that this judgment was satisfied by the handing of his wife and children over to him.

Plaintiff states that when returning to Potchefstroom in April, 1948, Nonotise left the train at Sterkstroom and he has not seen her since then. He alleges, however, that she returned to defendant's kraal during the year 1951 and then again disappeared.

Defendant denies that plaintiff's wife returned to his (defendant's) kraal. According to him he has not seen her since

The Assistant Native Commissioner accepted the evidence for plaintiff that his wife was at defendant's kraal in 1951, and held that as plaintiff had traced her to defendant's kraal after she had deserted from him there was no onus on him to make further search for her but he was entitled to judgment for her return.

Defendant has appealed against this judgment on the grounds that (1) it is against the weight of evidence and (2) in any event, as plaintiff's wife's alleged return to defendant occurred long before plaintiff "putumaed" or reported to defendant and as plaintiff failed to look for his wife and produce her to defendant, there was no obligation on the defendant to return her to plaintiff or restore the dowry.

Nkwenkwana Mbaba states that he is a Board Member residing about two miles from defendant's kraal and that he saw plaintiff's wife there. Subsequently he visited the office of the Native Commissioner in connection with land matters and travelled to Lady Frere with the woman Nonotise and another woman named Ntilashe. When he was in the Land Office he saw these two women obtaining passes. This evidence is supported by the fact

that the records show that, on 8th November, 1951, passes were issued to women named Nofinitshi Goboda and Sana Ntilashe to enable them to travel to Cape Town. Nosajini Ntsuntswana states that in 1951 she saw Nonotisi at the shop which is next to Mhlanga railway siding and Teyisi Sam says that in the same year he saw her at defendant's kraal when he went there to borrow a plough.

Defendant, his wife, Maggie Liniwana and Nozelile Mdunana declare that Nonotise has not returned to defendant's kraal since she left in 1948.

I am of opinion, however, that there is ample evidence to justify the finding of the Assistant Native Commissioner that Nonotise returned to defendant's kraal in 1951.

Except for the bare statement that he and Nkwenkwana are enemies, defendant does not suggest any reason why the latter should give false evidence. It seems to me that, if Nkwenkwana's evidence was concocted, he would have said that he heard the women giving false names when applying for passes. Instead of that, he has merely said that he saw them obtaining passes and the records show that passes were issued to the women, one of them in a name similar to that given by Nkenkwana.

For these reasons, the appeal on the first ground must fail.

Plaintiff admits that, until April, 1953, he did not visit defendant's kraal in order to *putuma* his wife nor did he send messengers to do so.

In the case of Mampeyi *v.* Rarai 1937 N.A.C. (C. & O.) 148 it was held that where the husband had made no effort to trace his wife and had not reported the desertion to her father to enable him to institute a search, the husband was not entitled to recover the *lobolo*.

In the case of Talindaba *v.* Mpilana 1942 N.A.C. (C. & O.) 93 it was held, however that the obligation on the husband to search for and take his erring wife to her people ceases when he has traced her to her father's kraal.

It was also held in the case of Willie *v.* Skyman, 1943 N.A.C. (C. & O.) 61, that if the father can be shown to be in collusion with his daughter he will be liable to restore her or the dowry.

In the case of Sibovana *v.* Dlokova 1 N.A.C. 281 (S), Sleigh (President) stated: "It sometimes happens that the wife deserts to the kraal of her father or some other close relative and then disappears. In such cases the father will have to refund the dowry if she cannot be found, because the father should have notified the husband that the woman was at his kraal so that the husband could *putuma* her."

In the present case, defendant not only failed to notify plaintiff that his wife was at his (defendant's) kraal but he has falsely denied that she came there. Plaintiff is, therefore, entiled to a judgment for return of his wife or restoration of the dowry and the appeal on the second ground must also fail.

The appeal should be dismissed with costs but the judgment requires to be amended. In his summons plaintiff claimed return of his wife or refund of six head of cattle or payment of £48. When giving evidence, stated that he was claiming cattle only and abandoned his alternative claim for cash value. There is no evidence however, that the original cattle paid are still in existence. This being the case, defendant should be given the option of satisfying the judgment in respect of the *lobolo* either by handing over cattle or by paying cash.

In his summons plaintiff placed a value of £8 per head on the cattle claimed. Mr. Tsotsi, in this Court, has admitted that the average value of cattle usually paid as dowry in the Glen Grey district is £8 per head. The judgment should therefore, be amended by the insertion of the words " or their value £32 " after the word " cattle ".

Israel (President): I concur.

Gold (Member): I concur.

For Appellant: Mr. Tsotsi, Lady Frere.

For Respondent: Mr. Kelly, Lady Frere.

SOUTHERN NATIVE APPEAL COURT.

NGESI *v.* MGCULE AND ANOTHER.

N.A.C. CASE No. 31 OF 1953.

KING WILLIAM'S TOWN: 1st December, 1953. Before Israel, President, Warner and Gold, Members of the Court.

COMMON LAW.

Native Appeal Case—Abolution judgment—Civil case to be decided on balance of probabilities—damages for assault.

Summary: Appellant, plaintiff in the Court below, sued the two respondents jointly and severally for £300 as damages for assault. Respondents are appellant's brothers-in-law. The Native Commissioner in giving a judgment of absolution from the instance stated that plaintiff gave his evidence in a straight-forward manner and he had no cause for disbelieving him but he could not with conviction say that the defendants were being untruthful in denying that they assaulted plaintiff as a result of which he lost his eye. Having come to the conclusion that the Native Commissioner had misdirected himself in that the case was not a criminal one which had to be proved beyond reasonable doubt but decided on a balance of probabilities, the Court proceeded to consider the evidence before it and awarded damages in the sum of £150 to the plaintiff.

Held:

(1) That as the issue was a civil one it must be decided on a balance of probabilities and need not be proved beyond all reasonable doubt.

(2) That as the judicial officer in the Court below had misdirected himself, the Court was in as good a position as he was to consider the evidence before it.

The appeal succeeds.

Cases referred to:

Sandler *v.* Wholesale Coal Suppliers, Ltd., 1941, A.D., 199.
Radebe *v.* Hough, 1949 (1), S.A., 380 (A.D.).
Quongqa *v.* Dyan and Ano., 1 N.A.C. (S), 352.

Works of Reference: Laws of Delict (3rd Edition) McKerron.

Appeal from the Court of the Native Commissioner, Middledrift.

Warner (Member):—

This is an appeal against an absolution judgment given in a case in which plaintiff claimed from the two defendants, jointly and severally, £300 as damages for assault.

Defendants are both brothers of plaintiff's wife. It appears that plaintiff, who was employed on the railways at Alice, came home in the evening on 8th August, 1952, and found that his wife was not at home. He then went to look for her at the kraal where defendants reside and where a beerdrink was in progress. According to the evidence given by plaintiff and his wife, plaintiff entered a hut, asked the people in the hut to stop dancing and called his wife to come home, whereupon the two defendants attacked him, drove him out of the hut and continued the assault outside, in the course of which first defendant hit him on his right eye with a stick, thus causing him to lose the sight of that eye.

The version given by defendants is that plaintiff took his wife away twice but she came back each time, that he came a third time in a very angry mood, kicked the door open and struck second defendant with a stick, whereupon the two defendants pushed him out and closed the door. They state that they then heard a scream and, on going outside, they found that plaintiff had received the injury to his eye.

The Native Commissioner states that plaintiff gave his evidence in a straight-forward manner and he had no cause for disbelieving him but he cannot with conviction say that the defendants were being untruthful in denying that they assaulted plaintiff as a result of which he lost his eye. He has pointed out various discrepancies in the evidence of plaintiff and his wife but these discrepancies do not seem to me to be of such a serious nature that a reasonable person would come to the conclusion that the story that defendants followed plaintiff outside the hut and continued the assault there, is a fabrication. In any case, there are also discrepancies in the evidence of defendants. For instance, second defendant states that when plaintiff came into the hut he did not call upon the dancers to stop whereas first defendant says that he did.

The Native Commissioner has misdirected himself as he has failed to give proper consideration to the probabilities of the case so that this Court is in as good a position as he was to consider the evidence. This is not a criminal case which must be proved beyond reasonable doubt but a civil case which must be decided on the balance of evidence and probabilities.

It is common cause that blows were exchanged in the hut and, thereafter, plaintiff received his injury outside the hut. Defendants state that plaintiff was in an angry mood, that he kicked open the door and struck second defendant with a stick. They admit that they had been drinking beer that night and it seems to me that the story that they followed plaintiff outside the hut and struck blows at him there, is more probable than the story that they merely pushed him out of the hut and closed the door while they remained inside.
he handed her to plaintiff in 1948.

Defendants seem to suggest that, after they had pushed plaintiff out of the hut, someone else assaulted him and inflicted the injury. They do not suggest, however, who this person could have been or what reason he would have had for assaulting plaintiff; nor do they suggest why plaintiff should conceal the identity of the person who assaulted him and falsely implicate defendants who are his brothers-in-law and are on friendly terms with him. Defendants admit that plaintiff made a report to the headman that same night, as a result of which they were prosecuted on a criminal charge. It seems to me to be unlikely that plaintiff and his wife could have concocted a false story in that short space of time while plaintiff was still suffering from his injuries. Plaintiff received the injuries at the kraal at which defendants reside and it seems to me that, if these injuries were inflicted by someone else, defendants should not have experienced any difficulty in ascertainig who that person was.

I come to the conclusion, therefore, that, on the balance of probabilities, plaintiff's story that he received his injuries while being assaulted by the two defendants should be accepted. Even if as alleged by defendants plaintiff kicked open the door and struck second defendant, while this would justify their action in pushing him out of the hut, in following him outside they became aggressors and are thus responsible for the injuries inflicted on him there.

Plaintiff has claimed £300 as general damages. He states that, in addition to the injury to his eye, he received several blows on the body. He has not called medical evidence but the following statements by him have not been challenged or contradicted:—

1. He paid 15s. for medical attention.
2. He spent a month in the Lovedale hospital.
3. As a result of the assault he was unable to work for three months.
4. His right eye is of no further use to him.
5. He has been working for the Railways for 14 years and before he received his injury he was receiving £14 per month but since then he has been put off heavy work and given lighter work with a salary of £8 per month.
6. He is 47 years of age.

Plaintiff is entitled to compensation for: (1) actual expenditure and pecuniary loss; (2) disfigurement, pain and suffering, and loss of general health and the amenities of life; and (3) future expenses and loss of earning capacity [see *Law of Delict by McKerron* (third edition) page 151].

In assessing the amount which should be awarded to plaintiff as damages, this Court must be guided by the principles laid down in the following cases:—

Sandler *v.* Wholesale Coal Suppliers, Ltd., 1941, A.D., 199.
Radebe *v.* Hough, 1949 (1), S.A. 380 (A.D.).
Quongqa *v.* Dyan and Ano., 1, N.A.C. 352 (S).

Considerable difficulty is caused, however, by the paucity of evidence in regard to this matter. Plaintiff states that he spent a month in the Loveday hospital but does not say for how long he suffered pain. No medical evidence has been called and plaintiff does not say whether his general health has been impaired as a result of the injury. He states that he is now in receipt of less wages than he was receiving before the assault took place but has not called evidence to show that he was unable to undertake the work on which he was engaged previously. On the other hand, plaintiff must have suffered considerable pain and it is not denied that he was out of employment for three months. Taking all these factors into consideration, I am of opinion that an award of £150 would be fair in all the circumstances of the case.

The appeal should be allowed with costs and the judgment of the Court below altered to read:—

"For plaintiff for £150 and costs."

Israel (President): I concur.

Gold (Member): I concur.

For Appellant: Mr. T. Stewart and Mr. Gillett, King William's Town.

For Respondents: Mr. Randell, King William's Town.

SOUTHERN NATIVE APPEAL COURT.

MABUTO *v.* NINGIZA AND ANOTHER.

CASE No. 32 OF 1953.

KING WILLIAM'S TOWN: 1st December, 1953. Before Israel, President, Warner and Gold, Members of the Court.

LAW OF DELICT.

Native appeal case—Defamation—Damages for—Loss of salary—Privilege—Malice, proof of—Amendment of summons—Grounds for refusing.

Summary: Plaintiff a Native female teacher sued defendants—a senior Methodist Evangelist and a Government appointed headman respectively—for £200 damages for defamation, and £57. 1s. 4d. being loss of salary. (Plaintiff lost her post as a result of the alleged defamatory statement made to the minister in charge of the school by the defendants, after the minister has requested first defendant to keep a watch on the doings and behaviour of the plantiff). The defamatory statement is indicated in the particulars of claim as "we saw Mr. Mtshabe in the room of Miss E. Mabuto—during the hours of darkness on the 18th May in bed with her." The Native Commisisoner gave judgment for defendants with costs and against this the plaintiff appealed on the grounds—

(*a*) that the judgment is against the weight of evidence and is not supported thereby;

(*b*) that the Native Commissioner erred in finding that the defendants had discharged the onus of proving that the defamatory statements were privileged; and

(*c*) that even if the defamatory statements were privileged the defendants acted maliciously and the privilege was abused.

In regard to the evidence the Native Commissioner accepted the defendants version.

Held:

(*a*) That as the conduct and character of any teacher in a school is a matter of interest and concern to his official Superior and as second defendant (as headman of the location in which the children plaintiff teaches reside) has an interest in plaintiff's conduct the occasion must be regarded as privileged.

(*b*) That the statement complained of must be regarded as being "relevant or pertinent to the discharge of the duty" placed on defendants.

(*c*) That as the motives of the defendants for making the report (statement) had nowhere been attacked, by privilege which they claimed had not been destroyed by malicious action.

(*d*) That in granting or refusing an application, during the course of a trial, to amend the summons, the guiding principle is the prejudice which may be occasioned to the opposite party: Once prejudice is imminent amendment should not be allowed.

The appeal fails.

Cases referred to:

De Waal *v.* Ziervogel, 1938, A.D., 121.
Basner *v.* Trigger, A.D., 1946, 93.
Molepo *v.* Achterberg, 1943, A.D., 97.

Works of reference: Law of Defamation—Nathan.

Appeal from the Court of the Native Commissioner, Whittlesea.

Israel (President):—

In the Native Commissioner's Court plaintiff, a Native female teacher, sued the defendants in the following terms:—

"1. The parties are Natives as defined by Act No. 38 of 1927.

2. Plaintiff was at all relevent times teacher at the Lower Didima School, Queenstown district.

3. During or about May, 1952, and at or near Kamastone, the defendants wrongfully, unlawfully and maliciously made to Rev. J. W. Minty, Manager of Schools, of and concerning plaintiff the following false, malicious and defamatory statements or words to that effect: 'We saw Mr. Mtshabe in the room of Miss E. Mabuto during the hours of darkness on the 18th May, in bed with her.'

4. The said allegation was to defendants' knowledge false or made recklessly with utter disregard to its truth or otherwise and was made with intent to injure plaintiff in her good name, character and reputation.

5. As a result plaintiff has suffered damages in the sum of £200, for which defendants are liable and payment of which plaintiff claims from the defendants.

6. In consequence of the said statement referred to in paragraph 3 hereof plaintiff lost her post and has therefore suffered damages in the sum of £57. 1s. 4d. being loss of salary for the period 1st June, 1952, to 30th September, 1952, at the rate of £14. 5s. 4d. per month, for which defendants are in law liable and which plaintiff hereby claims from defendants."

To this the defendants pleaded:—

"1. Defendants, jointly and severally admit paragraphs 1 and 2 of plaintiff's summons.

2. Defendants admit that they made separate statements to Rev. J. W. Minty, Manager of Schools, on the 30th May, 1952, of and concerning the plaintiff. Such statements were not identical, but were to the effect that the defendants at about 9 p.m. on the 18th May, 1952, found the plaintiff and the said Mtshabe alone in the former's hut at or near Mdatyulwa's kraal, in compromising circumstances and, in the case of the second defendant, that he actually saw them lying together in bed.

Defendants deny that the statement they made were false or malicious or, by reason of the facts hereinafter set out, that they were defamatory in law.

3. Paragraph 4 of the summons is denied, and defendants put the plaintiff to the proof of the allegations therein contained.

4. Defendants plead that, in making the statement they did to Rev. J. W. Minty, they were acting under a duty and having an interest to do so, and that the Rev. J. W. Minty (to whom they made the statement) had a duty and interest to receive such statements, and that the occasion was in law a privileged one and that the statements were in law privileged communications by reason of the following facts:—

(*a*) The plaintiff was a teacher at the Methodist Mission School at Lower Didimana location, and was also a member of the Methodist Church.

(*b*) First defendant occupied (and still occupies) the position of Evangelist of the Methodist church in the Kamastone Circuit, and had as such been requested by the Rev. J. W. Minty to keep a watch on the doings and behaviour of the plaintiff. Second

defendant was (and still is) the headman of the Lower Didimana location and is a member of the Methodist Church, and on the night in question was requested by first defendant to accompany him to the plaintiff's hut, in his capacity aforesaid.

(c) The Rev. J. W. Minty was (and still is) the manager of the aforesaid school, and as such was the proper person to investigate any matter concerning the behaviour and morals of a teacher of the school.

5. Paragraphs 5 and 6 of the summons are denied, and plaintiff is put to the proof of the allegations therein contained. In any case, defendants plead that they are not in law liable for any damages that the plaintiff may have sustained in the premises."

Alternative Plea:

"Alternatively, and only should the Court hold that the above plea of privilege has not been sustained, the defendants plead:—

That the respective statements made by them to Rev. J. W. Minty were true in substance and in fact, and that by reason of the position of teacher held by the plaintiff and the facts contained in the main plea above they were made for the public benefit."

The Native Commissioner gave judgment for defendants with costs and against this plaintiff has appealed on the grounds—

"1. that the judgment is against the weight of evidence and is not supported thereby;

2. that the Native Commissioner erred in finding that the defendants had discharged the onus of proving that the defamatory statements were privileged;

3. that even if the defamatory statements were privileged the defendants acted maliciously and the privilege was abused."

As to the evidence, the testimonies of all witnesses on both sides agree that plaintiff and Mtshabe were together in the former's hut after dark on the night in question; that defendants saw them there and made a report to the Rev. Minty accordingly. But there is disagreement as to the circumstances in which plaintiff and Mtshabe were found, plaintiff claiming that it was comparatively early in the evening and that nothing compromising had occurred, while defendants maintained it was much later and that plaintiff and Mtshabe at the time were actually in bed together or had been. The Native Commissioner has accepted the defendants' version, and with this finding this Court is in full agreement.

But the statement complained of is defamatory *per se* and there are, therefore, more important lines of enquiry, suggested by the pleadings, than the substantive truth of the published report. Privilege has been pleaded and proof of the privilege by the defendants is perhaps, from the nature of the case, the most important avenue of investigation. It is pure common sense to say, as *Nathan* does in his *Law of Defamation*, that the conduct and character of any teacher in a school is a matter of interest and concern to his official superiors. The Rev. Minty then would have done less than his duty, as manager of the school in which plaintiff worked, had he not instituted enquiries into her conduct after receiving complaints of misbehaviour on Mtshabe's and her part. First defendant is senior assistant to the Rev. Minty and an evangelist in his church and as such would not only be the natural choice to conduct the investigation but would *ex officio* be charged with the duty of doing so. Second defendant is headman of the location in which the plaintiff teaches and in which the children whom she teaches reside and, as such, he too would have an interest in her conduct and a duty to report any lapse in her behaviour.

All the elements to make the occasion a privileged one are, therefore, present (see De Waal *v.* Ziervogel, 1938, A.D., 121). The next line of enquiry then is to determine whether the communication itself was within the privilege so established, that is to say, whether it was relevant to the occasion (see Basner *v.* Trigger, A.D., 1946, at page 97). In this respect the defendants were charged with the duty of enquiring into plaintiff's behaviour and for that purpose visited the hut of plaintiff and there discovered circumstances which to their minds pointed to misbehaviour on her part. The facts revealed were thus patently relevant to the enquiry they were conducting, and their report to Mr. Minty, in that it spoke of what they had seen on that occasion, cannot but be considered as being "relevant or pertiment to the discharge of the duty" placed on them (see Molepo *v.* Achterberg, 1943, A.D., at page 97) and thus protected.

This brings us to the third and final line of judicial enquiry, namely, whether the privilege which has been proved has been destroyed by proof of *mala fides* on the part of defendants. "Once a privileged occasion is proved the plaintiff in order to destroy or defeat the privilege must prove malice, in the technical sense, that is, that defendants published the words from some improper or indirect motive" (Basner *v.* Trigger *supra* at page 93). Can it be said that plaintiff has thus discharged this onus placed on her? I do not think so. Nowhere in the evidence for plaintiff are the motives of the defendants attacked or the propriety of their making the report to Mr. Minty questioned. Almost the whole of plaintiff's case was confined to a denial of the defendants' evidence of the events forming the basis of the communication in question, but as was pointed out at the outset, their story is acceptable in preference to that of plaintiff. Basing their communication to Mr. Minty on their observations at plaintiff's hut on the night in question as they did, they must be regarded as having had an honest belief in the truth of what they reported to him. In short, their bona fides have not been challenged and the privilege which they claimed has not been destroyed.

Coming to the fourth ground of appeal, the record discloses that after defendants, who were required to commence proceedings, had closed their case and an adjournment had been ordered, plaintiff in a written application dated two days before the adjourned date of hearing sought to amend his summons by adding the names of two further persons "and others" to that of the Rev. Minty to whom the alleged defamatory statements had been made. Defendants' attorney in a written document objected to this application on the grounds, *inter alia* that "it sought to introduce fresh and new allegations unrelated to time and place after evidence of defendenats had been fully led and defendants' case closed" and that granting the application would necessitate a complete recasting of the pleadings and a re-commencement of the evidence. At the resumption of the hearing after the adjournment the Native Commissioner refused the application to amend "as being far too prejudicial to the case of the defendants and introduced at far too late a stage of the proceeding and such application (amendment?) would in effect be a fresh case." Further in his reasons for judgment he states that the application "sought to bring in the case an entirely fresh allegation requiring a totally different lines of defence. The Court considered this would be highly prejudicial to defendants' case and the application could not be allowed." The criterion for granting or refusing an application to amend a summons is the prejudice which the other party may be occasioned by the amendment. In arriving at its decision the Court has a wide discretion but once prejudice is imminent it appears from the authorities that amendment should not be allowed. In the instant case it is clear that the consequences to which both the Native Commissioner and attorney for the defendants refer would inevitably have ensued and defendants would undoubtedly have been prejudiced in their defence by the amendment even if adjournment were granted. The Native Commissioner was therefore right in refusing that application.

A second application was made at an even later stage in the trial to increase the amount of damages claimed. This was also refused by the Native Commissioner, but as it has had no effect on the course of the trial or the result it need not be considered here.

The appeal is dismissed with costs.

Warner (Member): I concur.

Gold (Member): I concur.

For Appellant: Mr. Tsotsi, Lady Frere.

For Respondent: Mr. T. Stewart, King William's Town.

NORTH-EASTERN NATIVE APPEAL COURT.

MATSANE *v.* MAHAULE.

N.A.C. CASE No. 71 OF 1953.

PRETORIA: 3rd December, 1953. Before Steenkamp, President, Ramsay and Rein, Members of the Court.

COMMON LAW.

Damages—Adultery—Corroboration of wife's evidence required.

Practice and Procedure—Where defendant is legally represented in Native Commissioner's Court, a plea as required by Rule 45 should be delivered—Handing in by consent, of previous record as evidence not always advisable. Appeals to Native Appeal Court—Ground of appeal stating that judgment is against the law, should state in what respect it is bad in law.

Summary: Plaintiff sued defendant for damages for adultery committed by defendant with plaintiff's wife.

Held: That in an action for damages for adultery committed with plaintiff's wife, there must be corroborative evidence *aliunde* of such wife's evidence unless defendant's evidence is such that he cannot be believed.

Held further: That as both plaintiff and defendant were legally represented in the Native Commissioner's Court, a plea as required by Rule 45 of the Rules for Native Commissioner's Courts should have been delivered as prescribed.

Held further: That although it is competent for the record in a previous case to be handed in by consent as evidence, such a course is not always advisable as the presiding officer is not in a position to study the demeanour of the witnesses who gave evidence in the previous case and who are not recalled when the action subsequently comes before him.

Held further: That if one of the grounds of appeal is that the judgment is against the law, it should be stated in what respect it is bad in law, and consequently the first ground of appeal in the instant case will be disregarded.

Cases referred to:

Zulu *v.* Qwabe, 1943, N.A.C. (T. & N), 89.
Dhlamini *v.* Sibesi, 1947, N.A.C. (T & N), 13.
Nduba *v.* Nkosi, 1 N.A.C. (N.E.), 7.
Ntusi *v.* Mqadi, 1 N.A.C. (N.E.), 385.

Statutes, etc. referred to:

Rule 45 of the Rules for Native Commissioners' Courts.

Appeal from the Court of the Native Commissioner, Bushbuckridge.

Steenkamp (President):—

In the Native Commissioner's Court the plaintiff sued the defendant for 5 head of cattle, being damages for adultery committed with plaintiff's wife, Sammie. In his prayer attached to his claim the plaintiff claims for judgment for the payment by the defendant for 5 head of cattle or their value at £5 each plus costs of suit. The Native Commissioner entered judgment in favour of plaintiff, as prayed, with costs. Against that judgment an appeal has been noted to this Court on the following grounds:—

"1. Such judgment is bad in law.

2. Such judgment is not substantiated by the facts and is contrary to the weight of evidence in particular and *inter alia*, on the following grounds:—

(i) The Native Commissioner erred in finding the allegation of adultery to have been proved.

(ii) The Native Commissioner erred in finding or assuming that the defendant was identified, and the inference as drawn by the Native Commissioner is not a reasonable inference from the evidence.

(iii) The Native Commissioner erred in concluding that the necessary quantum of evidence sufficient to justify the claim of the Plaintiff in the Court below had been adduced."

It is observed that on the first day of the hearing of the case by the Native Commissioner, no plea had been filed but the record of the previous case in which an absolution judgment had been granted was put in as evidence by agreement between the parties. Both plaintiff and defendant were legally represented and I am constrained to remark that a plea as required by Rule 45 of the Native Commissioners' Courts Rules, should have been delivered as prescribed.

The first ground of appeal is being disregarded by this Court as it had been held in the case of Nduba *v.* Nkosi, 1 N.A.C. (N.E.), 7, that if an appeal is against the law, it should be stated in what respect it is bad in law. In any case, Counsel for Appellant has not advanced any argument on legal issues. Although it is competent for the record in the previous case to be handed in by consent as evidence, such a course is not always advisable as the presiding officer is not in a position to study the demeanour of the witnesses who gave evidence in the previous case and who are not recalled when the action subsequently comes before the Court.

The proceedings in the previous case relate to the hearing of an appeal from the judgment of the Chief awarding plaintiff the damages he claims in the instant action. That appeal was allowed by the Native Commissioner and the Chief's judgment was altered to one of absolution from the instance with costs. At the trial in the present case, the only *viva voce* evidence is that given by the Induna, for the plaintiff, and that of Jacobus, for the defendant. The Induna, as is apparent from his evidence, held the preliminary inquiry in a prior action before it was tried by the Chief. His evidence is to the effect that when he asked defendant whether he had committed adultery with plaintiff's wife, he denied the allegation. According to the evidence of this witness, the defendant persisted in his denial and even went so far as to state that he did not want the case to be tried by the Induna but he wanted to pay damages at the Court of the Chief.

There is also evidence by the Induna that defendant, at the Chief's Court, refused to take off his clothes to permit of his being examined for an alleged injury he sustained against a fence when he ran away. From the previous case it seems clear that at the Chief's Court there was no question of the defendant having sustained wounds on his body from the fence but he had a mark on his face as a result of a fall. Plaintiff in the previous case stated: "I struck him (defendant) on his back three times. He was then running away. He ran into a fence nearby. I also ran into the fence and it cut me on my left hand. I did not see that the defendant was cut by the fence. In the Chief's Court

I said that when he fell, defendant received a mark on his face and I identified the mark the next morning."

There is therefore, no proper basis for the Assistant Native Commissioner's findings that defendant, when challenged in the Chief's Court that he had not received the alleged injuries refused to take his shirt off and that defendant at every opportunity tried to postpone the investigation of the case, presumably to allow his alleged wounds to heal.

The Induna's evidence, regarding the defendant's admissions of the alleged adultery is also unacceptable as it is manifest from the defendant's plea in the Chief's Court that the defendant in that Court denied the adultery in question.

The only evidence for the plaintiff, other than his own, is that of his wife, and this falls to be treated with reserve. Against her evidence is that of the defendant which is borne out by two of his witnesses in the previous action as well as by his witness, Jacobus, who was a member of the " Khoro " when the case was tried by the Chief. Jacobus states that defendant denied the alleged adultery.

According to plaintiff, at the time he chased the man he found committing adultery with his wife, it was dark and it must have been so as, according to plaintiff he ran into the fenee. He further states he could not recognise the defendant and therefore we only have the evidence of the plaintiff's wife as to the name of the person with whom she had committed adultery. Her evidence is not worthy of credence as there are certain inconsistencies between her evidence and that of the plaintiff as to the spot where the alleged adultery had occurred. First she stated it had taken place in the bush and later that it had occurred in open country, not under a tree. Plaintiff states that it had taken place in the shadow of a tree.

Plaintiff's ease boils down to this that there is no satisfactory corroboration of the woman's evidence and it is trite law that there must be corroborative evidence *aliunde* of the woman's evidence unless the defendant's evidence is such that he cannot be believed. As already mentioned the evidence of the Induna on the alleged admission made by the defendant in the Chief's Court must be treated with reserve especially as Jacobus, who was a member of the Khoro contradicted him.

Counsel for respondent has advanced the arguments that the woman's evidence is corroborated by her husband, the plaintiff, but I am not prepared to hold that in sexual cases of this nature the evidence of one spouse may be accepted as corroboration of the other's testimony.

It was suggested by Counsel for plaintiff (respondent) that defendant's refusal to take off his shirt before the Chief is a presumption of a guilty conscience and therefore corroborative of the evidence adduced on behalf of plaintiff. I have already dealt with this aspect and in the absence of any suggestion to the defendant when he was being cross-examined in the Chief's Court that he received any injuries to his body, he can hardly be blamed for refusing to expose his body for which he might have had good reasons.

The Native Commissioner, who tried the previous action referred to the parties as appellant and respondent and in this connection it will be found that on the reference in the case of Zulu *v.* Qwabe, 1943, N.A.C. (T. & N.), 89 and the case of Dhlamini *v.* Sibesi, 1947, N.A.C. (T. & N.), 13 and Ntusi *v.* Mqadi, 1, N.A.C. (N.E.), 385, that the terms " plaintiff " and " defendant " must be used.

In my opinion the appeal should be allowed with costs and the Native Commissioner's judgment altered to one of " absolution from the instance with costs ".

Ramsay (Acting Permanent Member): I concur.
Rein (Member): I concur.
For Appellant: Mr. Schweizer i/b Aling & Streak.
For Respondent: Adv. Kirk-Cohen i/b Roux & Kuit.

NOORDOOSTELIKE NATURELLE-APPÈLHOF.

MBENYANE v. HLATSHWAYO.

N.A.H. SAAK No. 75 van 1953.

PRETORIA: 3 Desember 1953. Voor Steenkamp, President, Ramsay en Rein, Lede van die Hof.

TRANSVAALSE NATURELLEGEWOONTE.

Naturelle-gebruiklike verbindings—Eis vir ontbinding en teruggawe van bruidskat—Prosedure in Transvaal.

Opsomming: Eiser beweer dat hy 'n gebruiklike verbinding met die dogter van verweerder aangegaan het en dat die dogter wederregtelik en kwaadwilliglik eiser se kraal verlaat het. Hy eis teruggawe van bruidskat en ook die sorg en bewaring van die minderjarige kinders uit die verbinding gebore.

Gehou: Dat die regte prosedure in die Transvaal in sake soos die onderhawige is dat die man die terugbesorging van sy vrou moet eis en in die dagvaarding moet meld dat as die voog van die vrou verbeur om dit te doen, dat hy dan die teruggawe van die bruidskat eis.

Verder gehou: Dat waar die kinders in die bewaring van hulle moeder is, sy ook as 'n verweerderes moet siteer word in 'n aksie om hulle sorg en toesig.

Besliste sake aangehaal:

Mutandaba *v.* Morenwa 1 N.A.H. (N.O.) 326.
Matlala *v.* Tompa 1 N.A.H. (N.O.) 404.

Appèl van die Hof van Naturellekommissaris, Barberton.

Steenkamp (President):—

In sy besonderhede van eis beweer die eiser dat omtrent sewe jaar gelede hy met verweerder se dogter, Manasan, volgens Naturellegewoonte in die huwelik getree en vier beeste as bruidskat betaal het. Daar is twee kinders uit die gebruiklike verbintenis gebore. Omtrent sewe maande gelede het Manasan wederregtelik en kwaadwilliglik eiser se kraal verlaat en genoemde twee kinders met haar saamgeneem. Sy het geweier om na die eiser se kraal terug te keer

Hy eis (1) terugbesorging van twee stuks beeste of betaling van hulle waarde £10 synde vier beeste betaal as bruidskat min twee beeste wat afgetrek is ten opsigte van die twee kinders en (2) terugbesorging aan hom en die sorg en bewaring van die twee kinders wat uit die huwelik gebore is.

Verweerder het eers in sy pleidooi ontken dat hy die voog van Manasan is, maar later toe die verhoor van die saak begin het, het hy erken dat hy die voog is en het verder gepleit dat hy alleenlik £5 ontvang het en nie vier beeste of hulle waarde as bruidskat nie.

Die uitspraak van die Naturellekommissaris lui as volg:—

„For Plaintiff for payment of two head of cattle or their value £10. Custody of the two minor children and costs of suit. The youngest child to remain with his mother until he has reached the age of seven years."

Nòg eiser nòg verweerder het regsbystand geniet in die hof *a quo* maar na die uitspraak het verweerder deur 'n regsgeleerde verteenwoordiger appèl aangeteken na die Hof op die volgende gronde:—

„1. That the Summons discloses no cause of action in that it contains—

(*a*) No allegation that defendant has been called upon to return plaintiff's wife.

(*b*) No allegation that the customary union has been terminated.

(*c*) No allegation of sufficient grounds for the termination of the customary union.

2. That the evidence fails to show any grounds for judgment in the respects set out in paragraph 1 (*a*), (*b*) and (*c*) above."

Die appèl was laat aangeteken en aansoek om kondonasie daarvan is nou voor die Hof.

Die redes vir die vertraagde aantekening van die appèl is nie sulks dat die hof dit gewoonlik sal toestaan nie, maar daar Verweerder 'n redelike kans het om in die appèl te slaag is die versoening toegestaan. Volgens die uitspraak in verskillende sake alreeds beslis deur die Hof, en waarvan dit net nodig is om die saak van Matlala *v.* Tompa 1 N.A.H. (N.O.) 404 aan te haal om te beklemtoon dat die regte prosedure in die Transvaal is om te eis dat die vrou terug besorg moet word en as die voog van die vrou verbeur om dit te doen moet dit in die eis gemeld word dat die man die terugbetaling van die bruidskat eis.

In die huidige appèl is daar getuienis dat eiser by die voog van die vrou aangeklop het vir haar terugkeer en dat die voog geweiers het om dit te doen. Die voog het ook beweer dat hy dit geweier het. Alhoewel die dagvaarding dit nie meld dat die eiser sy vrou terug eis nie en dat as haar vader versuim om dit te doen die *lobolo* terug betaal moet word, kan die hof volgens die mag deur artikel *vyftien* van Wet No. 38 van 1927 toegeken, die ontbreekte bepalings soos vasgelê in die vorige sake, by dié stadium die vonnis so verander dat dit aanpas by die vereiste van die Hof.

Wat betref die toekenning van die sorg en toesig van die kinders is dit nodig om daarop te wys dat die hof in die saak van Mutandaba *v.* Morenwa 1 N.A.H. (N.O.) 326 beslis het dat waar die kinders in die bewaring van die moeder is, sy ook as verweerderes siteer moet word.

In die huidige saak is daar geen getuienis dat die kinders in verweerder se bewaring is nie en daarom moet aangeneem word dat hulle wel by die moeder is en in sulke gevalle moet sy ook siteer word.

In die omstandighede is ek van mening dat sover die kinders aangaande, die vonnis ook verander moet word.

In die omstandighede is dit my mening dat die appèl gedeeltelik gehandhaaf moet word met koste en dat die Naturellekommissaris se uitspraak verander moet word soos volg:—

„The defendant is ordered to return to plaintiff his wife Manasan, on or before 3.1.54. Failing her return, the defendant is ordered to return to plaintiff two head of cattle or their value £10 to mark the dissolution of the customary union. On the question of the custody of the children, absolution from the instance.

Defendant to pay costs."

Ramsay (Permanente Lid): Ek stem saam.

Rein (Lid): Ek stem saam.

Vir Appellant: Adv. M. J. Mentz i.o.v. Webb & Ross.

Respondent in verstek.

NORTH-EASTERN NATIVE APPEAL COURT.

MDHLULI *v.* **MBUYANE.**

N.A.C. CASE No. 83 OF 1953.

PRETORIA: 3rd December, 1953. Before Steenkamp, President, Ramsay and Rein, Members of the Court.

(1) LAW OF PROCEDURE. (2) TRANSVAAL NATIVE CUSTOM.

Practice and Procedure—Appeals from Chiefs' Courts—Designation of parties to appeal in Native Commissioner's Court—Native Commissioner to record whether condonation for late noting of appeal granted—Native Commissioner to re-hear and re-try case as if it were one of first instance in his Court—Plaintiff in Chief's Court becomes plaintiff in the Native Commissioner's Court and should give evidence first—Increase of judgment of Chief to an amount in excess of claim in Chief's Court, where no amplification of claim is made on appeal, is not competent.

Customary Union: Dissolution in Transvaal marked by refund of lobolo: *Proper procedure to sue for return of wife and, failing that, the refund of the* lobolo.

Summary: Mbuyane sued Mdhluli for refund of *lobolo* and obtained judgment in the Chief's Court for refund of 10 head of cattle. On appeal to the Native Commissioner's Court the Chief's judgment was altered to one for refund of £55 and 2 head of cattle. Plaintiff did not amplify his claim on appeal to the Native Commissioner.

Held: That it is not understood why the Chief's judgment for 10 head of cattle should have been increased to £55 and two head of cattle in the absence of any amplification of plaintiff's claim.

Held further: That the parties to an appeal from a Chief's Court should, in the Native Commissioner's Court, not be referred to as "appellant" and "respondent" but as "plaintiff" and "defendant" respectively.

Held further: That as Rule 12 (4) of the Chiefs' Courts Rules requires the Native Commissioner to proceed to rehear and re-try the case as if it were one of the first instance in his Court, the plaintiff should have adduced evidence first.

Held further: That as the appeal was noted late and application made for condonation of the late noting, the Native Commissioner should have recorded whether or not he condoned the late noting.

Held further: That in Transvaal the proper procedure in actions for dissolution of customary unions is that the dowry holder must be sued for the return of the woman, and failing her return, for the repayment of *lobolo*.

Cases referred to:

Zulu *v.* Qwabe, 1943, N.A.C. (T & N), 89.
Dhlamini *v.* Sibisi, 1947, N.A.C. (T & N), 13.
Manana *v.* Lusuku, 1947, N.A.C. (T & N), 116.
Ntusi *v.* Mqadi, 1, N.A.C. (N.E.), 385.
Matlala *v.* Tompa, 1, N.A.C. (N.E.), 404.

Statutes, etc, referred to:

Section 15 of Act 38 of 1927.
Rules 4, 12 (1) and 12 (4) of the Rules for Chiefs' Courts.

Appeal from the Court of the Native Commissioner, Bushbuckridge.

Steenkamp (President):—

This is an appeal from the judgment of the Acting Native Commissioner who upheld a judgment from the Chief's Court in which Simon Mbuyane described on form N.A. 503 as the plaintiff, obtained judgment which reads "Alfred Mdhluli (described on form N.A. 503 as the defendant) should pay back 10 head of cattle."

The Acting Native Commissioner's judgment reads:

> "Judgment of Chief George Kumalo upheld and altered to read: Plaintiff to restore the £55 and 2 head of cattle to defendant as his daughter deserted him. Judgment for defendant with costs."

This judgment is meaningless. Assuming that the Acting Native Commissioner had made a mistake and had intended that where the word "plaintiff" is used the word "defendant" was intended and where the word "defendant" was used the word "plaintiff" was intended, it is still not understood why the Chief's judgment for 10 head of cattle should have been increased to £55 and two head of cattle in the absence of any amplification of plaintiff's claim before the Chief as permitted by Rule 12 (1) of the Chiefs' and Headmen's Civil Courts Rules published under Government Notice No. 2885 of 1951 as amended by Section 4 (*a*) of Government Notice No. 1180 of 1953.

Here I wish to pause with a view to stressing the unsatisfactory manner in which the proceedings before the acting Native Commissioner were conducted. It is observed that in the Native Commissioner's Court the parties are described as "appellant" or "respondent". This has led to confusion as will be seen from what follows: on page 6 of the original record it is recorded by the Acting Native Commissioner that the plaintiff is Alfred Mdhluli and that defendant is Simon Mbuyane. The Presiding Officer could not have applied his mind to the case and it is obvious from the notice of appeal from the Chief's Court that Simon Mbuyane, who is described as the respondent in the appeal, was the plaintiff in the Chief's Court, and he is therefore still the plaintiff when the appeal was being heard by the Acting Native Commissioner. In this connection, if the directions contained in the following cases had been observed, the mistake, which I am satisfied is due to the Presiding Officer being somewhat confused, would not have occurred.

See Zulu *v.* Qwabe, 1943, N.A.C. (T & N), 89.
Dhlamini *v.* Sibisi, 1947, N.A.C. (T & N), 13.
Ntusi *v.* Mqadi, 1, N.A.C. (N.E.), 385.

In those cases it was laid down that the parties in the Native Commissioner's Court should be referred to as "plaintiff and defendant" and not as "appellant and respondent".

There is also this aspect that Simon Mbuyane who was the plaintiff in the Chief's Court and also plaintiff in the Native Commissioner's Court should have adduced evidence first, but we find that defendant was called upon to lead evidence first. According to Rule 12 (4) of the Chiefs' Courts Rules the Native Commissioner shall proceed to re-hear and re-try the case as if it were one of the first instance in his Court.

Another fact needs comment and that is that an appeal had been noted by the defendant but as it was noted late, he applied for condonation of the late noting which he was permitted to do by virtue of Rule 4 of the Chiefs' Courts Rules. There is no record whether or not the Acting Native Commissioner condoned the late noting.

The defendant noted an appeal to this Court on the grounds that the Acting Native Commissioner's judgment is bad in law and against the weight of evidence. It is not mentioned in what respect the judgment is bad in law but it is so obvious from what has already been mentioned and from what is to follow in which respect the Acting Native Commissioner has erred in law that this Court must deal with that aspect.

It is necessary to quote the case of Manana *v.* Lusuku, 1947, N.A.C. (T & N), 116 in which it was held that in dissolution of Native Customary unions the dowry holder must be sued for the return of the woman and failing her return, then the repayment of the *lobolo* paid by the husband becomes due. It is the refund of the *lobolo* that marks the dissolution of the union.

In the case of Matlala *v.* Tompa, 1 N.A.C. (N.E.), 404 it was held that the proper procedure in the Transvaal in actions of the nature in question is to claim the return of the wife failing which the restoration of the *lobolo*.

The plaintiff's proper procedure in the instant action should have been to sue her guardian for her return and only on her failure to do so may an order for the return of the *lobolo* be made.

The case as a whole contains so many irregularities that this Court cannot countenance them as by doing so, we will lend support to matters which have already been held not to be in accordance with well-established procedure and principles.

In the circumstances and by virtue of the powers vested in this Court by section *fifteen* of Act No. 38 of 1927, I am of opinion that the appeal should be allowed with costs and the proceedings in the Chief's Court and in the Court of the Native Commissioner be set aside with costs.

Ramsay (Acting Permanent Member):—

I concur and would add that it is impossible to ascertain from the Reasons for Judgment whether the Acting Native Commissioner found that the Chief had jurisdiction over the defendant or not.

Rein (Member): I concur.

For Appellant: Mr. H. A. Jensen.

For Respondent: Adv. D. G. van der Byl (i/b Solomon & Nicholson).

CENTRAL NATIVE APPEAL COURT.

MAUNGA *v.* NGCOBO.

N.A.C. CASE No. 41 OF 1953.

JOHANNESBURG: 17th December, 1953. Before Marsberg, President, Menge and Thorpe, Members of the Court.

MUNICIPAL LOCATION STAND.

Sub-lease in contravention of location regulations—Relief where parties are in pari delictu—*Evidence—Onus to begin.*

The facts appear from the judgment.

Held (dismissing the appeal):

1. That a sub-lease of a shop in a municipal location without the consent of the municipality under the regulations contained in Administrator's Notices Nos. 94 of 1925 and 890 of 1952 confers no lawful occupation on the sub-lessee as against the sub-lessor.

2. That where neither party is guilty of intentionally flouting the law, a sub-lessee who, in terms of an illegal lease, has been given due notice, cannot rely on the maxim *in pari delictu potior est conditio defendentis.*
3. That a defendant in an ejectment suit who sets up a special defence of lawful occupation, is *quoad* the claimant and bears the onus to begin.

Cases referred to:

Pillay *v.* Krishna and Another, 1946, A.D. at page 952.
Hatch *v.* Koopomal, 1936, A.D., 190.
Jajbhay *v.* Cassim, 1939, A.D., 545.
Kelly *v.* Wright and Kelly *v.* Kok, 1948 (3), S.A., 522.

Regulations referred to:

Administrator's Notice No. 94 of 1925.
Administrator's Notice No. 890 of 15th October, 1952.

Appeal from the Court of the Native Commissioner, Johannesburg.

Menge (Permanent Member), delivering judgment of the Court:—

In this matter plaintiff sued defendant for ejectment from a certain shop described as shop No. 3, Orlando West Market, Johannesburg. He claims to be the registered lessee of the shop; that defendant is in unlawful occupation and that she refuses to leave notwithstanding notice of one month having been given and demand made.

Defendant admits that plaintiff is the registered lessee of the shop, but pleads that she is lawfully in occupation and has paid rent therefor. In three alternative pleas she alleges, firstly: That she is the tenant in fact and entitled to occupation; secondly: That plaintiff abandoned the shop in her favour, and thirdly: That if there is a lease insufficient notice was given.

At the outset the Additional Native Commissioner ruled that the onus to begin with is on defendant. This decision forms one of the grounds of appeal. In our opinion the Additional Native Commissioner's ruling was correct. Defendant set up a special defence in that, whilst admitting the registered tenancy of plaintiff, she alleged his abandonment of the lease and the lawfulness of her occupation. She is *quoad* that defence the claimant, and must satisfy the Court that she is entitled to succeed on it. (See Pillay and Krishna and Another, 1946, A.D. at page 952.) But even if that were not correct, the defendant could not have been prejudiced as evidence was fully led for both sides.

The facts are that plaintiff sublet the shop to defendant in terms of a written agreement of lease to trade on her own account as from the 3rd April, 1951, to 31st December, 1951, at £3 per month including Municipal rent. Notice of one month is to be given in the event of termination of the lease.

Plaintiff thereupon left for Natal on an extended visit. He only returned on the 1st November, 1952. Meanwhile the defendant continued to pay the rent. On the 3rd November, 1952, plaintiff gave defendant notice to leave. She asked him for an extension to enable her to dispose of her stock and plaintiff agreed to let her remain until the 31st January, 1953. This conversation regarding an extension to the 31st January, 1953, is denied by plaintiff, but on the preponderance of evidence there can be no doubt that this arrangement was made.

Defendant's case is that plaintiff promised to transfer the shop to her on his return, but apart from her own words there is nothing to establish such an undertaking nor is there any reason why it should have been given, having regard to the terms of the lease.

On these facts the plaintiff has established a clear right to the order he seeks; but it remains to be considered whether his position is affected by the regulations governing the occupation of shops in Orlando, and how far these regulations support the defendant in her plea of lawful occupation. It is common cause that the shop is situated within a Municipal location. Consequently at that time (on the 3rd April, 1951), the tenure of the shop was governed by Regulation No. 30 of the Native Location Regulations promulgated under Administrator's Notice No. 94 of 1925. This reads as follows:—

> "30. No person or persons shall carry on any business within a location or Native village in any other place than a site rented by the Council to such person or persons for trading or business purposes."

In view of this provision a sub-lease could not have been entered into lawfully (cf. Hatch *v.* Koopomal, 1936, A.D., 190, where the circumstances were similar).

Further regulations have been promulgated under Administrator's Notice No. 890 of 15th October, 1952, of which Chapter VI is in point. These regulations took effect whilst plaintiff was still in Natal, and whilst the expired lease was kept alive under circumstances which the Additional Native Commissioner rightly held to be a tacit renewal. In terms of these regulations a trader may not dispose of his trading site to any person other than a person approved by the City Council; nor may he sublet or abandon his site without the Council's approval. The Council is in certain circumstances entitled to cancel the right to trade. A "trader" is defined as including "any Native who is carrying on any lawful trade or business in a location with the approval of the Council, at the date of coming into force of these regulations" (i.e. 15th October, 1952). There is nothing in these regulations on which defendant can rely to establish lawful occupation as against plaintiff. Plaintiff has remained throughout the registered tenant of the shop and the evidence discloses that the licence too remained in his name. Vis-a-vis the location authorities defendant had no status at all except as a person who paid the plaintiff's rent. Her plea of lawful possession consequently fails.

The sub-lease entered into between the parties was unlawful, and they can be said to be in *pari delictu* in that regard. In such circumstances a defendant may be protected by the maxim *in pari delictu potior est conditio defendentis*. If that maxim is applied to this case the plaintiff's case would fail and defendant would be left to make whatever arrangements she can to secure lawful occupation of the shop from the Municipality. But there seems to be no adequate reason for applying this maxim in the instant case. Neither party is guilty of any intentional flouting of the law. It seems therefore that this is a case where the plaintiff was entitled to relief, having regard to the dictum of Stratford, C.J., in Jajbhay *v.* Cassim, 1939, A.D., 545, and to the case of Kelly *v.* Wright and Kelly *v.* Kok, 1948 (3), S.A. 522, where it was held by the Appellate Division that in the case of an illegal lease, subject to a month's notice, if the lessor has given a month's notice the lessee who was in *pari delicto* cannot successfully rely on the maxim *in pari delictu potior est conditio defendentis*.

The appeal is dismissed with costs.

Marsberg (President) and Thorpe (Member) concurred.

For Appellant: Adv. Mr. I. Lubinsky instructed by Mr. S. Goss.

For Respondent: Mr. H. Helman of Messrs. Helman & Michel.

CENTRAL NATIVE APPEAL COURT.

MPANZA *v.* NTULI.

N.A.C. CASE No. 14 OF 1953.

JOHANNESBURG: 24th April, 1953. Before Marsberg, President, Wronsky and Towne, Members of the Court.

LAW OF PERSONS.

Ordinance No. 44 *of* 1903 (*Transvaal*)—*Evidence of respondent's ability to pay maintenance.*

Summary: Respondent, who had been ordered to pay £3 per month maintenance in respect of a child alleged to be his, appealed unsuccessfully on the facts. Counsel, however, raised the question of proof of respondent's ability to pay maintenance.

Held: That evidence should have been taken to establish whether respondent can pay maintenance and, if so, how much.

Appeal from the Court of the Native Commissioner, Brakpan.

Marsberg, President (delivering judgment of the Court):—

Respondent, Joseph Mpanza, has appealed against the order made by the Native Commissioner of Brakpan in an inquiry held in terms of Section 3 (1) of Ordinance No. 44 of 1903 (Transvaal) on the complaint of Martha Ntuli. Joseph was ordered to pay £3 a month towards the maintenance of a child Petros, alleged to be his.

The appeal is based on the ground that the judgment is against the evidence and the weight of evidence.

The notice of appeal also claims that the order is "bad in law". We have not permitted argument on this ground, as it does not comply with the rules.

The only evidence before the Native Commissioner was that of the complainant Martha Ntuli, which was supported by Hilda Yanda a friend, and the father and brother of Martha, Kleinbooi and William Ntuli. On this evidence the Native Commissioner was fully justified in making an order against respondent.

Against this evidence respondent, Joseph Mpanza merely stated—

> "I do not wish to make my statement under oath. I deny the whole case. I never made love to Martha Ntuli. I never promised to marry her. The child belongs to some other man. That is all I have to say. I have no witnesses to call."

This statement of respondent was not under oath and is of little evidential value.

Before us Mr. O'Dowd, for respondent, has drawn attention to the fact that there was no evidence before the Native Commissioner on which he could make an assessment of the amount of maintenance to be contributed. We agree that there is no evidence on record to this effect. The case is therefore remitted to the Native Commissioner to call the parties before him again to furnish information of respondent's ability to pay maintenance and if so the amount. We do not necessarily state that the amount of £3 per mensem is not justified.

The appeal, otherwise, is dismissed with costs.

Wronsky and Towne (Members) concurred.

For Appellant: Adv. Mr. O'Dowd, A., instructed by Messrs. Mandela & Tambo.

For Respondent: No representation.

NORTH-EASTERN NATIVE DIVORCE COURT.

PHATLANE *v.* PHATLANE.

N.D.C. CASE No. 413 OF 1952.

PRETORIA: 21st May, 1953. Before Steenkamp, President.

LAW OF PROCEDURE

Recusal of judicial officer—Application for.

Summary: At the trial of an action for divorce application was made for the presiding judicial officer to recuse himself on the ground that in a previous action between the same parties based on the same facts he had granted absolution from the instance.

Held: That there was no justification in the instant action for the presiding judicial officer to recuse himself.

Cases referred to:

R. *v.* T., 1953, (2), S.A. 479 (A.D.).

Cases distinguished:

Rose *v.* Johannesburg Local Road Transportation Board, 1947 (4), S.A. 272, (W.L.D.).

Trial of action for divorce on grounds of adultery.

Steenkamp (President):—

When this case was called on the 3rd March, 1953, Counsel for plaintiff applied *in limine* for the Presiding Officer to recuse himself for the reason that he had granted an absolution judgment on a previous occasion.

It was submitted that the facts in the present case are similar to those placed before the Court at the previous trial.

Counsel quoted the case of Rose *v.* Johannesburg Local Road Transportation Board, 1947 (4), S.A. 272, (W.L.D.) in which application was made for a member of the Road Transportation Board to recuse himself. In my opinion a distinction should be drawn between a judicial officer and a member of a Board and therefore the remarks by Lucas, A.J., have no application in a matter in which a judicial officer is called upon to try a civil case.

If there is any doubt then that doubt has been removed in no uncertain manner in the case of R. *v.* T., 1953 (2), S.A. 479, (A.D.) in which, on page 482, Centlivres, C.J., is reported to have stated—

> " Nor is there anything to prevent a Judge who has granted absolution from the instance from sitting in a further case between the same parties where the facts alleged are the same as those alleged in the previous case."

His Lordship further on in his judgment elaborates on this dictum and there can therefore be no doubt that in the present case I am not justified in recusing myself from sitting in the case now pending.

In the circumstances the application is refused.

For Applicant: Adv. Pudney, instructed by Metelerkamp, Ritson & Keet.

For Respondent: Adv. Spitz, instructed by E. Beder.

CENTRAL NATIVE APPEAL COURT.

MORE *v.* MABUNYA.

N.A.C. CASE No. 19 OF 1953.

JOHANNESBURG: 12th June, 1953. Before Marsberg, President, Warner and De Beer, Members of the Court.

COMMON LAW.

Damages for assault—Reasons for judgment not confined to matters appearing on record.

Summary: Appellant unsuccessfully appealed against a judgment for respondent with costs given by the Native Commissioner on a claim by appellant of £50 damages for assault. In his reasons for judgment the Native Commissioner had gone beyond matters contained in the record.

Held: That in his reasons for judgment the Native Commissioner should confine himself to matters which are pertinent to the case.

Appeal from the Court of the Native Commissioner, Alexandra Township.

Marsberg, President (delivering judgment of the Court):—

In the Native Commissioner's Court at Alexandra Township, Johannesburg, plaintiff, Joslina More sued defendant, Sarah Mabunya for £50 damages for assault. She alleged that on or about 1st August, 1951, the defendant wrongfully, unlawfully and maliciously assaulted her by throwing stones at Plaintiff and further that defendant threatened plaintiff with an iron poker and instigated a general attack on plaintiff by three persons.

We have searched the record diligently to find any evidence to support these allegations but have been quite unable to do so. According to plaintiff's own evidence she was not touched by defendant, Sarah, but was involved in a clash with three other women. If plaintiff is to be believed Sarah only approached her with a poker after the clash with the three women but did not get near enough to use it because other persons warned plaintiff and she made off. There is no evidence to suggest that defendant instigated the attack by the three women.

On this *evidence* alone the Native Commissioner was justified in giving judgment in favour of defendant. The onus rested on plaintiff and she was bound to discharge it.

Plaintiff has noted an appeal against the judgment on the following grounds:—

(*a*) Judgment is against the evidence and the weight of evidence.

(*b*) The judgment is bad in law for the following reasons:—

(i) The Court erred in giving a judgment for defendant when the Court was unable to determine whether or not the plaintiff or defendant was to be believed.

As we read the evidence the Native Commissioner's judgment was correct and we see no good reason to order its alteration. Argument before us has not been helpful.

In framing reasons for judgment the Native Commissioner should confine himself to matters which are pertinent to the case. For instance he remarks:

"It appeared to the Court as if trouble arose over something which was illegal or secret and which cannot be mentioned in Court."

We are unable to find any reference on the record to this effect. Again, it is no part of his judicial duty to offer advice to the parties. The following remarks of his do not meet with our approbation:—

"If an appeal is noted in this case I advise the defendant to be on the safe side and to abandon her judgment for one of absolution from the instance with costs, in terms of Rule 17 (3) of the N.A.C., in view of the principles laid down in the case of Oliver's Transport *v.* Divisional Council, Worcester, S.A. 1950 (4) 537, which I looked up in the 'Noter up' today."

The appeal is dismissed with costs.

Warner and de Beer (Members) concurred.

For Appellant: Mr. R. I. Michel, of Messrs. Helman & Michel.

For Respondent: Adv. Mr. I. Lubinsky instructed by Mr. H W. Chain.

CENTRAL NATIVE APPEAL COURT.

MOGOAI *v.* TSHABALALA.

N.A.C. CASE No. 16 OF 1953.

JOHANNESBURG: 29th June, 1953. Before Marsberg, President, Warner and De Beer, Members of the Court.

COMMON LAW.

Damages for breach of promise.—Quantum meruit—*When the Court will set aside findings of fact—Costs, where conduct of both parties merits disapproval.*

Respondent (plaintiff in the Court below) claimed £20 damages and £200 being the extent to which appellant (defendant in the Court below) had been enriched by respondent's services and employment for the parties' mutual and joint benefit. The Assistant Native Commissioner found for plaintiff in the sum of £15 damages for breach of promise and £200 for *quantum meruit* and costs.

Held: (Allowing the appeal and reversing the judgments to read "for defendant"):

1. That the Court will set aside findings on questions of fact where proper consideration has not been given to the probabilities of the case.
2. That there will be no order as to costs where the conduct of both parties merits strong disapproval.

Cases referred to:

Carelse *v.* De Vries, 23, S.C. 532.
Middleton *v.* Carr, 1949 (2), S.A. 374 A.D.

Appeal from the Court of the Native Commissioner, Alexandra Township.

Marsberg, President (delivering judgment of the Court.—

Plaintiff, a Native woman, who states that she contracted a customary union which was dissolved by mutual consent in 1934 although *lobolo* was not returned, sues defendant for (*a*) £200 as damages for breach of promise, (*b*) £200 for *quantum meruit*, (*c*) alternative relief and (*d*) costs of suit.

She has furnished the following particulars of claim:—

2. During 1947 defendant promised to marry plaintiff by civil rights in community of property.
3. In consequence of the said promise of marriage plaintiff agreed to go and live with the defendant at his farm at Klipgaat, Pretoria.
4. The plaintiff engaged herself in full activity and service for the defendant and for their mutual and joint benefit.
5. The defendant has breached his promise of marriage and has rejected the plaintiff.
6. By reason of the premises plaintiff has suffered damages in the sum of £200 by virtue of breach of promise.
7. Defendant has also been enriched at the expense of the plaintiff by reason of her service and employment as hereinbefore mentioned, and which enriches plaintiff estates and values in the sum of £200.

Defendant filed the following plea:—

2. *Ad Paragraph* 2.

   Defendant denies each and every allegation contained therein as if specifically traversed.

3. *Ad Paragraph* 3.

   Defendant states that plaintiff was employed for domestic work at plaintiff's farm, for which she received due remuneration. Save as above the allegations contained in this paragraph are denied.

4. *Ad Paragraph* 4.

   Defendant says that plaintiff engaged herself in the ordinary course of employed, but specifically denies that she worked for the mutual and joint benefit of herself and defendant as alleged.

5. *Ad Paragraph* 5.

   Defendant repeats paragraph 2 hereof.

6. *Ad Paragraph* 6.

   Defendant denies that plaintiff has suffered damages in the sum of £200 or at all and further denies that he is liable to pay this amount as alleged, or at all.

7. *Ad Paragraph* 7.

   Defendant denies each and every allegation contained therein as if specifically traversed, and in particular denies that he has been enriched to the extent of £200 as alleged or at all.

Subsequently he furnished the following alternative plea:—

> " Alternatively, and in the event of this Honourable Court finding that a promise of marriage was made by defendant to plaintiff, which is denied, then defendant states that such promise was made at the time when, to the knowledge of the plaintiff, defendant was a married man.
>
> Further alternatively, and in the event of this Honourable Court finding that a promise of marriage was made by defendant to plaintiff, which is denied, then defendant states that plaintiff was married at the time when the said promise was made.
>
> In the premises the promise referred to in the aforegoing alternative paragraphs was illegal and/or unenforceable, and plaintiff is therefore not entitled to claim damages for the alleged breach thereof."

After hearing evidence the Native Commissioner granted judgment for plaintiff for (*a*) £15 damages for breach of promise, (*b*) £200 for *quantum meruit* and (*c*) costs of suit.

Defendant has appealed against this judgment on the following grounds:—

1. The judgment is bad in law and against the evidence and weight of evidence.

2. The Assistant Native Commissioner erred in finding that defendant promised to marry plaintiff. Alternatively the Assistant Native Commissioner erred in failing to find that if defendant promised marriage to plaintiff, such promise was made at a time when, to plaintiff's knowledge, defendant was still a married man; and in the premises, erred in failing to find that the said promise, if made, was void as against public policy and good morals, and that plaintiff's claims were unenforceable in law.

3. The Assistant Native Commissioner erred in law:

   (*a*) In finding that plaintiff was entitled to rely on a *quantum meruit* in the circumstances of this particular case.

   (*b*) In failing to hold that, even if plaintiff's evidence should be accepted, plaintiff's evidence showed the existence of a contract of service in terms of which plaintiff should have sued, and that, in the premises, plaintiff was not entitled to claim on a *quantum meruit*.

   (*c*) In admitting and/or attaching any significance to the statement of one of defendant's witnesses to the effect that he gave his wife food and clothing, and that if he were to give her £6 per month she would have a lot of money after four years.

4. The Assistant Native Commissioner erred:

   (*a*) In finding that defendant had been enriched as alleged or at all and/or at plaintiff's expense;

   (*b*) In finding that the defendant had not remunerated plaintiff at the agreed rate of £1. 10s. per week plus food and quarters.

   (*c*) In any event, in failing to deduct from or set off against plaintiff's claim on a *quantum meruit*, if such claim were competent, the benefits derived by plaintiff from defendant, of which benefits the Assistant Native Commissioner took no or insufficient account.

   (*d*) In having regard to an amount of £288 when assessing plaintiff's claim and *quantum meruit* where plaintiff's claim was merely for £200 and the claim for the balance over and above the said sum of £200 had, in any event been prescribed by lapse of time by virtue of the provisions of the Prescription Act, No. 18 of 1943;

   (*e*) In finding that the money that plaintiff did receive from defendant was used by plaintiff mainly or at all for the benefit of the "joint" household, and in finding that there was a "joint" household at all.

5. The Assistant Native Commissioner erred in rejecting the evidence of the defendant and his witnesses and/or in accepting the evidence of the plaintiff and her witnesses.

6. The Assistant Native Commissioner erred in overlooking the probabilities in favour of the defendant's version, and in failing to have regard to the improbability of plaintiff's version.

7. The Assistant Native Commissioner erred, in the premises, in giving judgment for the plaintiff in the sums awarded or at all.

The reasons furnished by the Native Commissioner for giving judgment in favour of plaintiff are not of any assistance to this Court. He has not commented on the demeanour of the witnesses or stated why he accepted the evidence for plaintiff in preference to that for the defence.

Plaintiff appears to be an unreliable witness. In her particulars of claim she stated that it was in consequence of a promise of marriage by defendant that she agreed to go and live with him at his farm. When she was confronted with the plea that, at that time, defendant was a married man, she gave evidence to the effect that she had been living with defendant in adultery and that it was only after defendant's wife had obtained a decree of divorce against him that defendant promised to marry her. Plaintiff also admits that she committed perjury in the action for divorce brought against defendant by his wife.

A striking feature of the case is the absence of any motive which might induce defendant to promise to marry plaintiff. The latter states that she went to defendant's place in February, 1947. She states: "I am sure it was in February." She states that she went there as a domestic servant at a wage of £1. 10s. per week but defendant paid her this wage for two weeks only and then she lived with him as his wife. It is common cause that defendant's wife obtained a decree of divorce against him in August, 1947, so the parties must then have been living together as man and wife for about six months prior to this.

Plaintiff says that on their way home after the action for divorce defendant said that he would marry her. Defendant had opposed the divorce action which involved him in considerable financial loss in the division of the joint estate and it seems unlikely that he would be ready to enter into a fresh marriage immediately with plaintiff who had been granting him privileges as if she were his wife without marriage.

It has been suggested in argument that defendant wanted to marry plaintiff because his immoral relationship with her was viewed with disfavour by the church and the community. If this was the case, we are left without any explanation as to why defendant did not marry plaintiff as soon as his marriage had been dissolved. It has been said that he did not do so because he had to bear certain expenses. But a marriage to plaintiff would not have involved defendant in any expense. He did not have to incur expenses of providing a home because they were already living together in a home. Evidence was also given to the effect that defendant visited plaintiff's people and told them that he was going to marry plaintiff but there is no suggestion that they told him that he would have to pay *lobolo* before he did so.

Gaur Radebe states that he was friendly with the parties and visited them on the farm and heard them discussing the question of marriage. He states, however: "It was not concluded. It was just a discussion about getting married. The date of the marriage was not fixed". It appears that in 1950 the parties desired to adopt a child and were advised by the Adoption Secretary that it was necessary for them to be married according to European law before their application could be considered. The witness states: "I remember finally there was a discussion that they should get married civilly so that they could get the child. I also confirmed what they were saying that it was not right for people like them to stay together like children without being married. Finally defendant said that if he was not held up by the fact that he was responsible for a marriage that was to take place (either defendant's son's marriage or his daughter's marriage)

he would arrange to get married at that time." If, as alleged by plaintiff, defendant had promised to marry her three years previously, it is unlikely that she would not have taken advantage of this opportunity to remind him of his promise and to enlist the support of the witness in prevailing upon defendant to marry her.

Plaintiff's nephew, Shadrach Tshabalala, states that defendant visited him and his father and told them that he would marry plaintiff. They did not however, as one would expect them to do, ask him when or where the marriage would take place or what *lobolo* he would pay. The conversation is alleged to have taken place in 1947 but the witness took no steps in order to ascertain whether defendant had carried out his promise and, if not, the reason for his failure to do so.

Cecilia Mbele, daughter of plaintiff, states that, while at school in Magaliesberg in 1947 she received a letter from defendant saying that he was going to marry her mother. She is, however, unable to produce the letter.

Defendant admits that plaintiff was his concubine but denies that he ever promised to marry her. He states that, after the divorce had been granted against him, he tried to persuade his wife to return to him and, in March, 1948, he sent plaintiff away from the farm because he had been told that his wife would not go to it while plaintiff was there. His evidence is supported by that of Martin Ramogodi who states that in March, 1948, defendant brought plaintiff's goods to his place in Alexandra Township and asked him to keep them and that he did so for some time until plaintiff informed him that she was returning to defendant's farm as she was out of employment and had no means of existence.

Defendant also admits that in 1950 he wanted to adopt a child but was told that he could not do so unless he and plaintiff were married. If he had promised to marry plaintiff, it seems unlikely that he would not have done so then so that he could complete his arrangements for the adoption of the child.

This Court is always reluctant to set aside a finding of a Native Commissioner on questions of fact. The Native Commissioner has the witnesses before him and is in the best position to weigh their evidence. In this case, however, we are satisfied that the Native Commissioner has not given proper consideration to the probabilities of the case, otherwise he would not have found that plaintiff had proved that defendant had promised to marry her.

But, even if there was a promise of marriage, it seems to us that plaintiff would not be entitled to damages in view of the fact that, after it is alleged to have been made, she lived with defendant as his mistress, for a period of four years. In the case of Carelse *v.* De Vries 23 S.C. 532, the learned judge stated on page 538: "In regard to plaintiff's claim for damages for seduction and breach of promise of marriage, the seduction took place twenty-one years before the death of De Vries, and during the interval he made ample provision for supporting her in comfort. After consenting to be kept by him as his mistress for that long period, she is not, in my opinion, entitled to damages for his alleged breach of promise to marry her, whatever the legal period of prescription for that form of action might be." In the present case, plaintiff was supported by defendant and consented to be kept by him as his mistress for a long period, namely, four years.

In regard to the claim for *quantum meruit,* there is justification for the rejection by the Native Commissioner of the statement by defendant that he paid plaintiff wages of £6 per month while she lived with him. The Native Commissioner states that if plaintiff had been paid £6 per month for four years she would have received a sum of £288 and he has therefore awarded her the sum of £200 claimed. The claim, however, is not for wages due but for *quantum meruit.*

To succeed in an action for *quantum meruit* it would be necessary for plaintiff to prove that there was an implied agreement that she should be paid for her services and that defendant has been enriched to the extent of the amount claimed [see case of Middleton *v.* Carr [1949 (2) S.A. 374 (A.D.)]. This she has failed to do.

Mr. Helman, who appeared for plaintiff, has conceded that if the claim for damages for breach of promise fails, the claim for *quantum meruit* cannot be sustained. Although this claim is described in the summons as *quantum meruit,* he has argued that it is in fact a claim for special damages flowing from the breach of promise of marriage.

In any case, the claim cannot be divorced from the immoral relationship which existed between plaintiff and defendant. Plaintiff lived with defendant as his wife and enjoyed all the privileges of a wife but is claiming remuneration for services rendered by her while this relationship existed. In Carelse's case (*supra*) the learned judge, after allowing an award for the maintenance of the illegitimate children, stated (on page 538): "To do more would be against the policy of the law, which discourages all illicit relations between the sexes."

For these reasons the Native Commissioner's judgment cannot be sustained.

We feel that we should record our displeasure with certain unsatisfactory features in this case. Plaintiff's claims are extravagant. Though she herself originally contracted a customary union, she has brought this case under the Common Law for £400, the equivalent of 133 head of cattle. Under Native law she would, as a dikazi, not have been entitled to a single beast on the particulars of her claim. On the other hand, defendant's action in inducing plaintiff to live with him as his wife when he had no intention of marrying her and then, after four years, casting her aside, merits strong disapproval.

We are of opinion, therefore, that this Court should order each party to pay his own costs, both in this Court and the Native Commissioner's Court.

The appeal is allowed and the judgment of the Native Commissioner's Court altered to read: "Claim (*a*) Breach of promise: For defendant. Claim (*b*) *Quantum meruit:* For defendant." There will be no order as to costs, either in the Native Commissioner's Court or in the Appeal Court.

Warner and De Beer (Members) concurred.

For Appellant: Mr. R. Tuch of Messrs. Kovalsky & Tuch.

For Respondent: Mr. H. Helman of Messrs. Helman & Michel.

CENTRAL NATIVE APPEAL COURT.

MOLEFE *v.* **MOLEFE.**

N.A.C. CASE No. 29 OF 1953.

JOHANNESBURG: 25th August, 1953. Before Marsberg, President Wronsky and Bowen, Members of the Court.

COMMON LAW.

Matrimonial matters—Native Commissioner's jurisdiction in regard to property and other incidental matters.

Summary: Appellant had been divorced from his wife and in the decree had been ordered to pay her £50 representing her share of the assets in the joint estate. His wife was in possession of certain furniture of the former joint home. These appellant claimed in the Native Commissioner's Court where he tendered the £50 due to his wife in terms of the decree. The Acting Additional Native Commissioner dismissed the application, holding that he had no jurisdiction.

Held: That the Native Commissioner's Court has jurisdiction in all matrimonial matters not specifically excluded from its jurisdiction by the legislature.

Statutes referred to: Section *ten* (1) (*e*) of Act No. 38 of 1927.

Appeal from the Court of the Native Commissioner, Johannesburg.

Marsberg, President (delivering judgment of the Court):—

We have before us a Notice of Appeal of David Tiro Molefe, who was applicant in a matter before the Native Commissioner, Johannesburg. We have pointed out to Mr. Julian Phillips who appears for appellant that the Notice of Appeal does not comply with the rules of the Native Appeal Court: Rule No. 7. In that the Notice merely states that the Native Commissioner's judgment is "bad in law". We have, however, allowed argument on the point raised in the Native Commissioner's Reasons for judgment: viz., whether or not he had jurisdiction to deal with the application.

A Native Commissioner's Court has concurrent jurisdiction with the Native Divorce Court to deal with all matters not specifically excluded from its jurisdiction, *vide* section *ten* (1) (*e*) of Act No. 38 of 1927. In the divorce matters the Native Commissioner has no jurisdiction when a decree of nullity, divorce or separation in respect of a marriage is sought. In respect of property and other incidental matters the Native Commissioner has concurrent jurisdiction.

In the matter before him he dismissed the application on the ground that he regarded himself as having no jurisdiction to decide the issue. We are of the opinion that he did have jurisdiction. His judgment, "Application dismissed with costs", is set aside and the matter is returned to him to be dealt with on the basis that he did have jurisdiction to entertain the application.

As the notice of appeal is defective and does not comply with the Rules of Court, appellant is ordered to pay the costs of appeal.

Wronsky and Bowen concurred.

For Appellant: Adv. Mr. J. Phillips instructed by Messrs. Louis Sacks & Baskin.

For Respondent: Mr. Helman, of Messrs. Helman & Michel

AMPTENARE VAN DIE NATURELLE-APPÈLHOWE.
OFFICERS OF THE NATIVE APPEAL COURTS.

1953

NOORDOOSTELIKE NATURELLE-APPÈLHOF
NORTH-EASTERN NATIVE APPEAL COURT.

President: Ed./Hon. J. H. Steenkamp.

Permanente Lid / Permanent Member: H. Balk 1.1.53—30.10.53.
T. D. Ramsay 24.11.53—31.12.1953.

Griffier / Registrar: R. Welman.

SENTRALE NATURELLE-APPÈLHOF.
CENTRAL NATIVE APPEAL COURT.

President: Ed/Hon. H. F. Marsberg.

Permanente Lid / Permanent Member: R. Wrongsky 7.1.1953—31.8.1953
W. O. H. Menge 1.9.53—31.12.53.

Griffier / Registrar: H. P. Kloppers.

SUIDELIKE NATURELLE-APPÈLHOF.
SOUTHERN NATIVE APPEAL COURT.

President: Ed./Hon. J. W. Sleigh 1.1.1953—31.10.1953.
Ed./Hon. M. Israel 1.11.1953—31.12.1953.

Permanente Lid / Permanent Member: H. W. Warner.

Griffier / Registrar: E. B. Keaton 1.1.1953—30.11.1953.
E. J. Brigg 1.12.1953—31.12.1953.

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