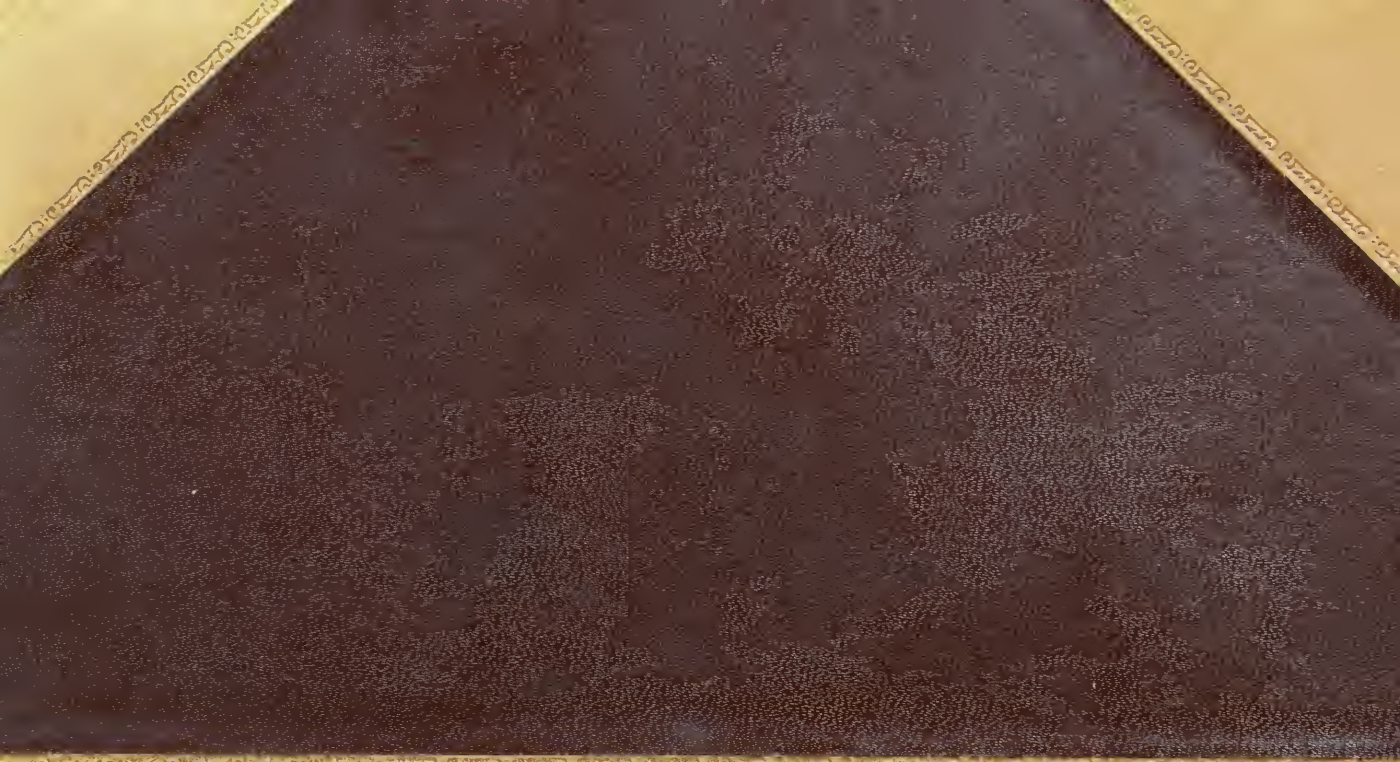

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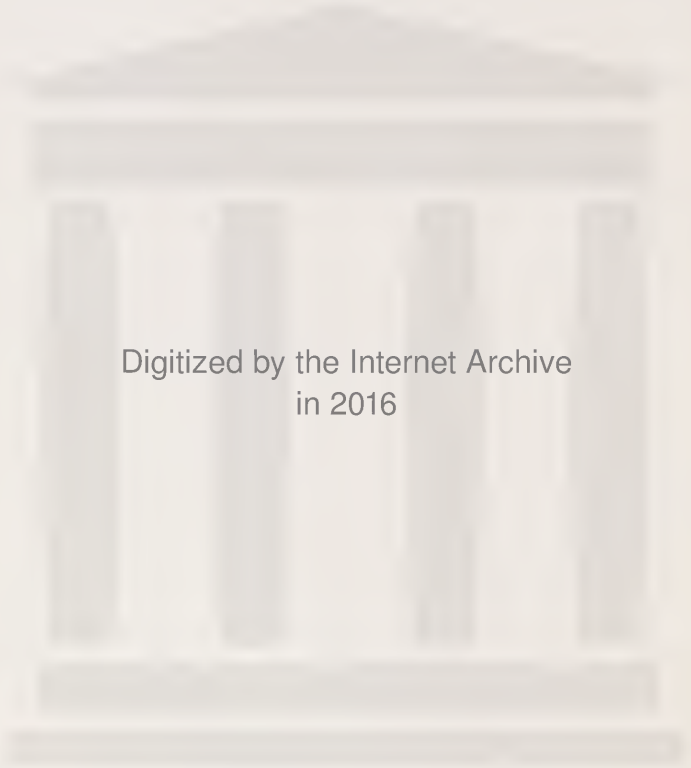

VERSLAE

VAN DIE

BANTOE-APPÈLHOWE

1970

REPORTS

OF THE

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AMPTENARE VAN DIE BANTOE-APPÈLHOWE, 1970
OFFICERS OF THE BANTU APPEAL COURTS, 1970

SENTRALE BANTOE-APPÈLHOF
CENTRAL BANTU APPEAL COURT

VOORSITTER/PRESIDENT: H. J. POTGIETER
PERMANENTE LEDE/PERMANENT MEMBERS:
J. P. THORPE, D. O. BOWEN

NOORD-OOSTELIKE BANTOE-APPÈLHOF
NORTH-EASTERN BANTU APPEAL COURT

VOORSITTER/PRESIDENT: C. J. CRONJE
PERMANENTE LID/PERMANENT MEMBER: R. M. CRAIG

SUIDELIKE BANTOE-APPÈLHOF
SOUTHERN BANTU APPEAL COURT

VOORSITTER/PRESIDENT: E. J. H. YATES
PERMANENTE LID/PERMANENT MEMBER: A. J. ADENDORFF

61046—7

Bladwyser van Sake
Case Index
1970

Inhoudsopgawe
Index of Subject Matter
1970

CENTRAL BANTU APPEAL COURT

BUTHELEZI versus ZULU

B.A.C. CASE 22 OF 1969

JOHANNESBURG: 27 November 1969, Before Potgieter, President, and Thorpe and Bowen, Members.

BREACH OF PROMISE, INJURIA, PATERNITY AND MAINTENANCE

Promise of marriage by married man—injuria—*onus in issue where intercourse and paternity admitted in respect of first child but denied in respect of subsequent child—corroboration requirements of paternity matters—quantum of maintenance and facts in relation thereto discussed.*

Summary: Plaintiff alleged that Defendant had made an offer of marriage to her which she had accepted, Defendant having informed her that he was not married whereas he was in fact a married man. She claimed R300 damages for *injuria* as well as affiliation orders and maintenance in respect of two children alleged to have been born as a result of illicit intercourse between them. Paternity of first child admitted but denied in respect of second child. Question of onus. *S. vs Swart,* 1965 (3), S.A. 54 (A.D.), discussed.

Held: Damages on *contumelia* for *injuria* not proved.

Held, further: That as *S. vs Swart,* dealt with the paternity of only one child born after the admitted intercourse, the ruling therein as to onus does not apply to the present situation, where intercourse in respect of the birth of a subsequent child is denied.

Held, further: That it would be inequitable to order Defendant to pay more *pro rata* for the maintenance of his illegitimate child than for the maintenance of his legitimate children.

Cases referred to:

Viljoen vs Viljoen, S.A.L.R. (C.P.D.), 1944, 137;

Kannenmeyer vs Gloriosa, 1953 (1), S.A. 580 (W);

Mogoai vs Tshabalala, 1953, N.A.C. 294 (C.D.);

S. vs Swart, 1965 (3), S.A. 454 (A.D.);

Maharaj vs Parandaya, 1939, N.P.D. 241;

Mackay vs Ballot, 1921, T.P.D. 430;

Wiehman vs Simon, 1938, A.D. 447;

R. vs W, 1949 (3), S.A. 772;

S. vs Snyman, 1968 (2), S.A. 582 from 589 (c);

Twigger vs Starweave (Pty) Ltd, 1969 (4), S.A. 369 (N);

Buch vs Buch, 1967 (3), S.A. 83 (T).

Works referred to:

Dutch and German authorities referred to in *S. v. Swart* except *Van Hoogendorp.*

South African Cases and Statutes on Evidence by May, 4th edition, paragraph 94.

Appeal from the Court of the Bantu Affairs Commissioner, Johannesburg.

Cur. ad. vult.

POSTEA: 27 January 1970.

Potgieter, President:

Plaintiff in the court below (now Respondent) sued the Defendant (now Appellant) for (a) R300 damages for *injuria* alleging that he informed Plaintiff that he was not a married man and that he promised to marry her by civil rites, repeating this promise up to July 1967, whereas he was at all material times a married man and; (b) maintenance at the rate of R8 per month for each of the two children born to her as the result of her association with the Defendant, the children being David, born on 27 October 1967, and Promise, born on 2 December 1968. There were no express prayers for affiliation orders but it appears that the court *a quo* by consent dealt with the matter as if there were, and this court will do the same.

In his plea the Defendant denied the alleged promise of marriage; he admitted paternity of the child David, but stated that he last had intercourse with the Plaintiff early in 1967 and denied paternity of the child Promise. As to the claim for maintenance the Defendant pleaded that R3 per month was adequate for the support of the child David.

Judgment was entered as follows:

"For Plaintiff, R50 damages for *injuria,* affiliation order as sought for two children, and maintenance at the rate of R6 per month per child. Plaintiff declared a necessary witness. Costs of suit."

Against the whole of this judgment appeal was noted on the grounds that—

"(1) the learned Bantu Affairs Commissioner erred in finding that Plaintiff had proved that she did not know Defendant was married as in April 1965, and that she became aware of the fact only at about July 1968;

(2) the learned Bantu Affairs Commissioner erred in finding that an unequivocal promise of marriage had been made by the Defendant as the evidence does not support such a finding;

(3) the learned Bantu Affairs Commissioner erred in finding that Plaintiff had proved that she had suffered any damages as claimed or at all;

(4) the learned Bantu Affairs Commissioner erred in finding that Defendant was the father of the Plaintiff's child born on 2 December 1968, as the evidence does not support such a finding;

(5) the learned Bantu Affairs Commissioner erred in making an order for maintenance without first investigating the financial obligations of both parties to the action;

(6) the learned Bantu Affairs Commissioner erred in finding that the Defendant was able to pay an amount of R6 per month per child considering that he has a wife who is unemployed and five children to support from a salary of about R12 per week;

(7) the learned Bantu Affairs Commissioner should have accepted as more probable the version testified to by the Defendant and corroborated by his wife and the Plaintiff herself in some respects."

I intend to deal only with Claim A as my brother Thorpe has dealt with B and I concur with his findings.

The Plaintiff's claim for damages is based upon—

(a) the Defendant's alleged promise to marry her, and

(b) the injuria and/or contumelia she suffered through the action of Defendant by not telling her, at the time he made the promises to her, that he was a married man and thereby inducing her to allow him to have intercourse with her and render her pregnant twice.

Defendant denied that he had promised to marry Plaintiff, but stated that she knew all along that he was a married man and could not marry her. He admitted that he had rendered Plaintiff pregnant, but added that he only did so once and not twice as alleged by Plaintiff, and that he was prepared to pay maintenance in the amount of R3 for the child David born on 27 October 1967, and of which he admitted he was the father.

It is trite law, as was stated in *Viljoen vs Viljoen,* S.A.L.R. C.P.D. 1944 (at page 137), per Sutton J. as follows:

"As a married man cannot make a valid promise to marry the nature of the action which a woman has for breach of such promise when she is unaware that at the time of the making of the promise that the man is married is based upon the *injuria* suffered by her" . . . "In the view I take of the law, I can only give damages for the *injuria* suffered by the Plaintiff for *contumelia,* for the insult that this man, not only proposed to this woman, and was accepted by her, but made love to her, and so on".

Two essential requirements must therefore first be satisfied and proved by the Plaintiff in the present case before she can succeed in her action for damages—

(i) that a promise to marry *was* made by the Defendant; that he *was* married at the time he made it and that the Plaintiff, at the time, was unaware that he was a married man; and

(ii) that as a result hereof she is entitled to be compensated for the injuria suffered by her for *cantumelia.*

The Plaintiff in her claim stated that Defendant promised to marry her and that promise was repeated from time to time, the last time being July 1967. Nowhere in the evidence led could I trace any corroboration of when, where and in whose presence such promises were made, except in Plaintiff's own evidence who stated that such promises were made twice; once in her evidence in chief where she said "In February, 1965, Defendant proposed

love to me, saying that he wanted to marry me: I agreed to a marriage by civil rites". And again in cross-examination where she said "I say Defendant promised me marriage". Daniel, Plaintifff's only other witness, did not mention that Defendant had informed him that he wanted to get permission to marry his sister because he had promised to marry her. His version reads: "I first met him when he approached me for my consent to marry my sister on 30 March 1967, if I am not mistaken". He only testifies to a request made to him for consent to marry not of having been present when a promise to marry her was made by Defendant:

(1) Great reliance was placed on the letter (Exhibit "A"), on which the Defendant admitted he was the author except for three words at the end, which in translation read "until we get married Thandi", the authorship of which he denied, to support the allegation that a promise to marry was made by the Defendant.

I have perused the letter carefully and to my mind this letter is nothing more and nothing less than a statement of fact on behaviour. It opens with "my Mrs the Zulu" and then continues in the most endearing terms. In one place he wrote: "Remember that a promise can never be broken without a reason; because you promised to die for me and I promise you". It would appear that they reciprocally promised to die for each other and did not make a promise to marry; and again further on "Mummy forgive me for all I have done . . . I am yours". To me this letter conveys an expression of Defendant's feelings towards Plaintiff's only, and not that it contains a promise of some future event still to take place. The whole tenor of the letter is clothed in terms a husband would normally employ in writing to his wife or to a woman he considers to be his wife, and here I am in full agreement with the Commissioner's conclusion in his reasons, where he said "Defendant's actions in arranging for Plaintiff's confinement, and bringing her back to his house afterwards tend to indicate that he treated her as his wife".

To strengthen her argument and allegation that there was a promise to marry, the Plaintiff and her brother Daniel Zulu gave evidence of lobolo negotiations that were supposed to have taken place between the parties, and that her brother was only agreeable that a civil marriage could take place after lobolo had been paid for his sister.

(2) From the evidence that was laid before the court *a quo* in this case it would seem that practically all customary formalities and usages, which ordinarily are observed during negotiations of this nature were simply thrown overboard, and that the Defendant in defiance of Bantu custom and tradition—just went up to Plaintiff's brother and paid R25 on the lobolo account. Tradition is so deeply entrenched in the Bantu way of life, that it is almost unthinkable that such a gross disregard thereof could have taken place. Consequently due to the scantiness of the evidence produced, a doubt has arisen in my mind whether the amount of R25 paid to Plaintiff's brother Daniel was in fact paid as a part payment of lobolo or as damages as alleged by Defendant, who emphatically denied that there ever were any lobolo discussions between the parties, seeing that he was already a married man at the time they took place.

Having considered the question of the promise to marry carefully and due to the paucity of corroborative independent evidence and particularly in view of the apparent conflict in the evidence given by Plaintiff on the one side and Daniel Zulu on the other in regard to the payment of the R25 as part payment of lobolo where she (Plaintiff) stated that she was standing in the doorway and saw Defendant's representative pay the money over to Daniel but was unable to say whether it was the full amount and he, Daniel, that the first time he saw Defendant was when he (Defendant) came to him to pay the R25 and then made no mention of a representative, and whereas there is also no proven evidence, except the separate uncorroborated evidence, by both Plaintiff and Daniel, that Defendant ever visited Daniel to ask for Plaintiff's hand in marriage, and whilst Plaintiff said it was in February 1967, and that at that time she was not yet pregnant, and was being contradicted by her brother Daniel, who said that it was approximately the 30 March 1967, and his sister was then already pregnant, and whereas Defendant strenuously denied that any negotiations for the payment of lobolo ever took place, as Plaintiff knew that he was already a married man and that the R25 was paid as damages for having rendered Plaintiff pregnant with the child David, any conclusive inference as to the precise nature of the negotiations, at this stage, appears to be, out of place.

(3) To arrive, therefore, at a definite conclusion, either way, in this particular dispute between the parties, I consider would be inappropriate and I feel that the Commissioner must have found himself in the same predicament when he stated in his reasons for judgment, "The Court having decided that Defendant had made a promise of marriage, it follows that Plaintiff has suffered *injuria*", without giving more detailed grounds for his decision. As the probabilities of the whole issue at this stage still seem to be in a fluid stage, it becomes necessary to see what other evidence is available to the court.

The Commissioner accepted as a fact proved that Defendant approached Daniel Zulu in February 1967, representing himself as a single man. The Commissioner misdirected himself when he came to this conclusion. There is no evidence on record in this regard to support his view, as shown above. His conclusions in this regard could only have been based on uncorroborated circumstantial evidence given by Plaintiff and Daniel Zulu, but denied by Defendant.

The Commissioner seems to have accepted the evidence that a fight did take place in 1966, between the Plaintiff and Defendant's wife, but to have rejected the possibility that Plaintiff knew the other woman was Defendant's wife and consequently came to the conclusion that Plaintiff has suffered an *injuria* in that Defendant had made a promise to marry her whilst he was already a married man, that fact being unknown to her. Having closely examined the available evidence pertaining to this aspect of her claim I was unable to arrive at the same conclusion as the Commissioner and am of the opinion that Plaintiff must have become aware either at the time of the fight that the other woman was Defendant's wife, and he therefore a married man, or at the time when she came to live with him in his house. According to

evidence produced, and not refuted, Defendant's wife was alleged to have been in the house also at that time, particularly during the period from July 1967 to September 1967, when Defendant's wife stated she was kicked out and said she left her children behind.

Plaintiff's replies in cross-examination that she neither saw Defendant's wife nor his children in the house during her stay there are not very convincing and must militate against her.

Finally the onus was upon the Plaintiff to convince the court that she had suffered damages as the result of an *injuria,* the contumelia inflicted upon her good name and reputation and therefore entitled to be adequately compensated. The following was the evidence placed before the court and upon which it had to rely for a decision:

That—

(i) Plaintiff had a child by one Opperman in 1962 who deflowered her, promised to marry her, but failed to do so;

(ii) in 1965 she fell in love with Defendant, who, according to her, promised to marry her, repeating the promise in 1967, rendered her pregnant, but also failed to fulfil his promise to her;

(iii) after the birth of her child by Defendant, according to her own admissions, and that of her brother Daniel Zulu, Defendant was in the habit of calling her to come and stay with him and she did so on several occasions up to a week at a time;

(iv) Defendant denied that he had had intercourse with her subsequent to the birth of David on 27 October 1967;

(v) she, however, continued to live in his house until January or February 1968, when she returned to her brother's house;

(vi) she again became pregnant and a third child was born to her on 2 December 1968. Although she claimed that Defendant was also the father of this child, this she failed to prove, as shown in the judgment of my brother, Thorpe. It would, therefore, seem to appear that the Plaintiff was rather freely bestowing her favours upon men, who, whilst promising to marry her, never did so. The Commissioner also felt "that her dignity and chances of marriage had not been impaired to the extent she claimed."

After due consideration of all the evidence placed on record by the Plaintiff I am satisfied that Plaintiff has failed to establish her claim for any damages for *injuria* suffered by her, on the weight of the probabilities of the evidence produced, and Defendant is found to be entitled to receive judgment in his favour on this claim.

Although the Defendant has been successful both in this court and in the court *a quo,* his behaviour leaves much to be desired and he should pay his own costs in both courts.

It is ordered that the appeal be, and it is hereby, upheld and the judgment of the Bantu Affairs Commissioner is altered to read:

Claim (a) damages for injuria—judgment for Defendant.

Claim (b) (1) Affiliation order in respect of the child David (male) born on 27 October 1967—confirmed.

(2) Affiliation order in respect of the child Promise (female) born on 2 Desember 1968—absolution from the instance.

(3) Maintenance order in favour of the child David—confirmed, but the amount is reduced to R3 per month. There shall be no order to costs either in this Court or in the Court below.

Bowen, Permanent Member:
I concur in the Order made by the learned President.

Thorpe, Permanent Member:

I concur with the order made by the learned President at the conclusion of his judgment. As far as the claim for damages is concerned, I agree that it is by no means clear that the alleged promise was made, but if it was it does not necessarily follow, as the Commissioner seems to have thought, that damages must be awarded if it is not fulfilled. *Kannenmeyer vs Glorosa* 1953 (1) S.A. 580 (W) and *Mogoai vs Tshabalala* 1953 N.A.C. 294 (C.D.). It is possible that the Plaintiff did not discover that the Defendant was a married man until after she had ceased to consort with him, but even if this is so, on the Plaintiff's own evidence she is not entitled to damages for injured feelings which she is claiming. In addition to what the learned President has said I would point out that the Plaintiff did not testify that her feelings had been injured and she did not explain why she waited for about half a year before suing for damages. According to the Plaintiff, the promise was made in February 1965, but for three years she never tried to get a date for the civil marriage fixed and was prepared to live with the Defendant indefinitely without being married to him by civil rites. By her conduct the Plaintiff must be taken to have forfeited any right she may have had to claim damages. At the President's request I will now deal with the appeal concerning the affiliation and maintenance orders made in respect of the child Promise, and that concerning the quantum of maintenance awarded in respect of the child David.

On the paternity issue, the incidence of the onus of proof must be established where, as in this case, the Defendant admitted intercourse prior to the birth of the one child, David, but denied having had intercourse thereafter and consequently denied paternity of the subsequent child, Promise. The Commissioner indicated in his reasons for judgment that he considered that the onus in such circumstances was on the Defendant to show that he could not be the father of the last child. Reliance was placed on *S. vs Swart* 1965 (3) S.A. 454 (A.D.) where it was held that were a woman claims maintenance for her illegitimate child, an admission of intercourse, no matter when it occured, by the man indicated by the mother, creates a presumption that that man is the father and it places an onus on him to prove that he cannot be the father. However, that case dealt with the paternity of only one child, namely, the child born after the admitted intercourse, and the ruling therein as to onus does not seem to have any application to the situation now before us. None of the South African decisions or articles referred to in that case dealt with the question of onus in regard to the issue of the paternity of a child born as

the result of a pregnancy subsequent to that during which or before which the last admitted intercourse had taken place. I have also consulted all the Dutch and German authorities referred to in *Swart's* case, except *Van Hoogendorp,* whose works apparently are not in the library of the Witwatersrand Local Division; in regard to *Carpzovius,* I could not find the 1772 edition of the work referred to and consulted that of 1752, in which section 61.67 seemed relevant; all these authorities also appear to deal only with the first birth following on the admitted intercourse. As the Defendant had not admitted any intercourse after the birth of the child David, I am of the opinion that there was no onus on the Defendant and that the onus was consequently on the Plaintiff to prove on the probabilities that the Defendant is the father of the child Promise.

Where the onus is on the Plaintiff in paternity or seduction suits there must also be corroboration, which is defined as follows in *Maharaj vs Parandaya* 1939 N.P.D. 241, per Feetham, J.P., as he then was:

"Corroboration is required not only as to the fact of intercourse having taken place but also as to the identity of the person who is alleged to have had intercourse with the Plaintiff and that corroboration means some evidence, other than that of the Plaintiff, which is in some degree consistent with her story and inconsistent with the evidence of the Defendant".

In the *Maharaj* case the issue was paternity and the definition of corroboration given therein was taken from *Mackay vs Ballot,* 1921 T.P.D. 430 and was regarded by Feetham, J.P., as having been confirmed in *Wiehman vs Simon,* 1938 A.D. 447. That the required corroboration may be afforded by occurrences after the intercourse in question is clear from the *Maharaj* case and other decisions of the Supreme Court.

In passing, note could be taken of the anomaly that, whereas corroboration is required in civil causes concerning seduction or paternity, none is necessary for a conviction on a criminal charge of sexual assualt. See May's *"South African* Cases and Statutes on Evidence", 4th edition, paragraph 94. The Appellate Division has since *Wiehman's* case indicated that it doubts whether corroboration in such civil cases is essential. *R. vs W.* 1949 (3) S.A. 772, at 779, and *S. vs Snyman* 1968 (2) S.A. 582, from 589C. However, *Mackay's* case has not as yet been overruled, either expressly or by implication, and must be followed, where, as here, the Defendant denies having had intercourse since a previous pregnancy.

As the Court *a quo* misdirected itself on the incidence of the onus of proof, this Court is at large to embark on a reconsideration of the evidence on the issue of paternity of the child Promise: *Twigger vs Starweave* (Pty) Ltd, 1969 (4) S.A. 369 (N).

In paternity cases a Plaintiff should give evidence as fully as possible. It would be helpful if she could testify as to for example:

(1) The date of birth;

(2) the place(s) and approximate date(s) of the act or acts of intercourse which could have caused the pregnancy;

(3) when she first noticed she was pregnant;

(4) what steps were taken to notify the Defendant and especially, if he denied paternity, what further action, if any, was taken prior to the issue of summons; and

(5) whether the child was full term, premature or overdue.

The Plaintiff gave no evidence on any of these points. She did not testify as to the fact of the birth or the date thereof, though perhaps it was not necessary for her to do so, as the Defendant, when he pleaded a denial to being the father of Promise, said nothing about the existence of the child or its date of birth, and consequently it is not disputed that Promise was born on 2 December 1968. However, there is nothing to link the Defendant with that pregnancy. The Plaintiff does not show that she and the Defendant were in the same vicinity when the relevant intercourse took place. She said no more than that after the birth of David on 27 October 1967, she continued to consort with the Defendent and became pregnant again. She did not say how long the pregnancy lasted, so the date of conception cannot be calculated from the date of birth. If it was for normal period of between thirty-eight and forty weeks, then she should have conceived between the 26th February, and the 12 March 1968. But, once again, where was she when the relevant intercourse took place? The Plaintiff's evidence is that the Defendant sent her back to her brother in February, but she does not mention the date. On the other hand, the Defendant's wife says that she came back to the Defendant's house in January and that the Plaintiff was no longer there then; also, the Plaintiff's brother says that he cannot deny that the Plaintiff was brought to him during the second week of January. Furthermore, it must have been on the Plaintiff's instructions that her attorney put it to the Defendant that the Plaintiff was in domestic employment in Yeoville from February (meaning presumably the beginning of February), to October 1968. In these circumstances it is not improbable that the Defendant's evidence on this point is true, namely, that he sent her to her brother in January, long before the date on which she would, in the normal course, have conceived. It is to be noted that the Plaintiff dit not say that she had become pregnant before she returned to her brother. The next occasion on which the Plaintiff and Defendant met, according to the Plaintiff's evidence, was on the 10th March. The Plaintiff did not testify that intercourse with the Defendant took place on the 10th March or, for that matter, on any date after she had been taken back to her brother.

As the Plaintiff has not shown on the probabilities that the Defendant is the father of the child Promise and as there is a complete lack of evidence inconsistent with the Defendant's innocence, the judgment on the claim for an affiliation order should be one of absolution. The ancillary claim for maintenance for this child consequently should not succeed.

In regard to the last issue, namely, that of maintenance, it is clear that the Defendant should contribute towards the maintenance of the child David, only. The dispute concerns the quantum. As indicated by the Commissioner, he was not dealing with an enquiry under the Maintenance Act, No. 23 of 1963, in which he would have been obliged to ensure that a full investigation was made, as indicated in *Buch vs Buch* 1967 (3) S.A. 83

(T), concerning the needs of the child and the ability to pay of those persons legally liable to maintain it. The Commissioner was entitled to make an order on the evidence as presented. However, the Commissioner does not appear to have taken into consideration the fact that the Defendant has to support his wife, who is apparently not in receipt of any income, as well as five minor children by her, some of them presumably much older than David. It would be inequitable to order the Defendant to pay more pro rata for the maintenance of David, his child by the Plaintiff, than for maintenance of each of his children by his wife, especially as (a) the Plaintiff is earning R20 per month and (b) David is still small. The Defendant earns R12 per week, which on the average comes to about R52 per month, and it would seem that he cannot afford more for the child David than he offered, namely R3 per month, I would alter the maintenance order accordingly.

For Appellant: Mr J. N. Madikizela, Johannesburg.

For Respondent: Mr Henry Helman, Johannesburg.

SOUTHERN BANTU APPEAL COURT

B.A.C. CASE 32/69

NOMATI NOMADUDWANA vs NTUMBATYA MCINGA

UMTATA: 3 February 1970. Before Yates, President, and Messrs Adendorff and Hooper, Members

DEFAULT JUDGMENT—APPLICATION FOR RESCISSION

Summary: An application was made by Defendant 4 to rescind a default judgement given against him and three others. He averred in his affidavit which accompanied his application that he had a good defence, that he had not been wilfully and deliberately in default and that he had instructed an attorney to appear on his behalf.

Held: That an enquiry directed to his attorney from time to time was sufficient to rebut an inference of negligence on Defendant's part.

Held further: That the presiding officer should record at each hearing whether parties present or not.

Held further: That it was not necessary for Defendant to notify the co-defendants of his application to rescind the default judgment against him.

Appeal from the Court of the Bantu Affairs Commissioner, Elliotdale.

Yates (President) delivering the judgment of the Court:

Plaintiff (now Respondent) sued the four Defendants for R1 000 damages and costs which he alleged he had suffered as a result of an assault upon him. The summons was served on 6 May 1968, appearance to defend was entered on 9th *idem* and on 13 June a plea was filed on behalf of all the Defendants denying the assault. The case was set down for trial on 26 July and the entry on the record for that day reads as follows:

"Mr Rose, for Plaintiff.

Mr Ntswayi, for Defendants.

Mr Ntswayi informs Court that some of Defendants are away at work.

Mr Rose says he is prepared to give one postponement for three months.

Postponed to 1 November 1968. Defendants to pay wasted costs."

On 1 November 1968 the entry is:

"Appearances as before.

By consent postponed to 24 January 1969."

On 24 January 1969 the entry is·

"Appearance as before.

By consent postponed to 21 February 1969."

On 21 February 1969 Mr Rose appeared for Plaintiff and Mr Ntswayi who appeared for Defendants withdrew as his clients were not present. Formal evidence was then led and a default judgment entered "for Plaintiff by default as prayed with costs". The entry on the face of the record, which was also signed by the presiding officer, however, reads "Default judgment R500, as prayed with costs against Defendants jointly and serverally." It is thus not clear whether judgment was given for R500 or R1 000.

On 28 July 1969, an application was lodged on behalf of Defendant 4 for an extension of time within which to apply for rescission of the judgment given against him on 21 February 1969 and if granted for rescission of the judgment.

On 25 August the application for rescission was refused with costs and an appeal has now been lodged against this decision on the grounds—

"(a) that the judgment is against the weight of evidence and probabilities of the case;

(b) that the Judicial Officer erred in holding that Applicant, Nomati Nomadudwana, was negligent to the point of being in willful default in spite of Applicant's diligence in engaging the services of an attorney of the court and placing his defence on the attorney in whom Applicant had faith and who purported at all times to watch Applicant's interests."

In the affidavit which accompanied the application for rescission of the judgment, Defendant 4 averred that he had a good and bona fide defence in that he was not a party to the assault on Plaintiff and was not cited in the criminal proceedings which resulted in the other three Defendants paying admissions of guilt. He averred further that on receipt of the summons he immediately instructed Mr Attorney Ntswayi to appear for him and thereafter enquired from time to time in regard to developments but was assured that he would be notified of the day of hearing in good time. However, he heard nothing further until 10 head of his cattle were attached in March 1969, in pursuance of a default judgment obtained against him on 21 February 1969. He reported the attachment to his attorney immediately and that he did so is confirmed by the fact that he signed an affidavit in regard hereto on 17 April and an application for rescission of the judgment was lodged with the Clerk of the Court on 21 April. The fact that the application was returned to his attorney on 25th *idem* because the costs previously incurred had not been paid was not Defendant's fault.

An interpleader action followed but the details thereof are not clearly explained in the affidavit. Obviously, however, Defendant was still fighting the matter.

According to his affidavit he learned on 28 July 1969, that his attorney had taken ill and been removed to East London before the application for rescission was returned to his attorney's office in April.

No replying affidavit was filed nor was any attempt made to refute the statements contained in Defendant's affidavit. It is clear from the contents thereof that Defendant intended all along to defend the action. He apparently took no interest in the matter from June 1968 when his plea was filed until the attachment of his cattle in March 1969 but his affidavit indicates that he had approached his attorney from time to time and relied on the latter's assurance that everything was in order. His attorney may well have been negligent but his apparent neglect of his client's interests may have been due to illness and to the fact that in the absence of the other defendants at work he expected a postponement to be granted and thus omitted to notify Defendant 4 of the dates of hearing. In somewhat similar circumstances an applicant's inaction was not regarded as negligence sufficient to debar him from the relief sought. See *Mtshotana v. Ngonyama* 1962 B.A.C. 78 (S). The Commissioner in his "reasons for judgment" stated that the inaction of the Defendant over a lengthy period in this case cannot be considered in the same light as in Mtshotana's case but his reason for saying so is not apparent.

The Commissioner also held that Defendant was present in court on 24 January 1969, i.e. the date of hearing preceding the date on which the judgment was given, and if this was so then indeed he was at fault. The record, as indicated above, however, makes no mention of whether the parties were present personally or not. The Commissioner has drawn the inference that because nothing appeared on the record the parties must have been present on that date but there has been no suggestion that Defendants 1, 2 and 3 were present and in my view the obvious inference is that if Defendant 4 had been present the presiding officer would have recorded that fact.

As stated in the case of *Gxaleka v. Mabamle* 1945 N.A.C. (C. & O.) 67, there are three matters to be taken into account when considering an application for rescission of a judgment. The first is whether there has been wilful or deliberate default and manifestly in the instant case Defendant has all along intended to defend the action and not let it go by default. The next question for consideration is whether the non-appearance has been reasonably occasioned and in my view the Defendant has submitted a satisfactory explanation of his failure to attend. Thirdly if the default was not wilful but was reasonably occasioned then the Court should consider whether there is a good defence to the claim and it is clear that if Defendant can prove that he was not a party to the assault he cannot be mulcted in damages.

Mr Mpotulo also raised the point that the requirements of subrule 59 (1) of the Rules for Bantu Affairs Commissioner's courts contained in Government Notice 2083 of 1967 had not been complied with in that the Defendants who would be affected by any order made by the court were not notified of the intention to apply for the rescission of the judgment.

Mr Muggleston argued that as the other three Defendants had allowed the matter to go by default they had no further interest in the case and that therefore there was no necessity to give them notice. He also pointed out that in the case of *Semane v. Semane,* 1962 B.A.C. 61 (S) referred to by the Commissioner the Applicant who intervened was a third person and not a party to the original

case. The default judgment was against all four Defendants "jointly and severally" (although this prayer was not contained in the summons) and each was therefore liable for the full amount of the judgment so that if one succeeded in having the judgment against him altered it would not affect the liabillity of the other three who would each remain liable for the full amount. At this stage of the proceedings, i.e. the "rescission of judgment" stage, the other Defendants were not affected although it may well be that when the matter comes to trial and a decision has to be made whether or not Defendant 4 is or is not liable then the other defendants might be affected to the extent that being joint and several defendants their right of recourse for a refund of a share of any damage paid by them might be reduced to actions against two instead of three other Defendants.

In the result the appeal is allowed with costs. The judgment of the Court *a quo* is altered to read "The application by Defendant 4 for the rescission of the default judgment against him is granted with costs."

For Appellant: Mr K. Muggleston.

For Respondent: Mr S. M. Mpotulo.

SOUTHERN BANTU APPEAL COURT

B.A.C. CASE 38/1969

ZANEKE MAFULELA vs SISIPENI MXEZENI

UMTATA: 4 February 1970, before Yates, President, and Messrs Adendorff and Botha, Members

Customary union—illegitimate child born before marriage—damages not paid in full by seducer—Woman's kraalhead entitled to rights in child

Summary: The dowry-eater and the husband of a woman each claimed the property rights in her illegitimate child born before her marriage and for whom damages had not been paid in full by the seducer.

Held: That the dowry-eater is entitled to the lobolo of the illegitimate child.

Appeal from the court of the Bantu Affairs Commissioner, Lusikisiki.

Yates (President) delivering the judgment of the Court:

Good cause having been shown the late noting of the appeal was condoned.

This case emanated from the Court of the Amakwalo Tribal Authority. The pleadings in that Court, as recorded, are somewhat difficult to follow but Plaintiff (now Appellant) apparently sued Defendant (now Respondent) for a declaration of rights in respect of a certain woman Nozogweba and judgment was given in his favour. On appeal to the Court of the Bantu Affairs Commissioner the claim was amplified as follows:

"1. The parties to this claim are Bantu in terms of Act 38 of 1927, as amended from time to time.

2. Plaintiff sues in his capacity as eldest son of Mafulela Mtintanyoni and as agent and manager of the affairs of the kraal of the said Mafulela Mtintanyoni who is old, sickly and senile and unable to manage his affairs.

3. The said Mafulela Mtintanyoni has duly authorised the Plaintiff to act on his behalf.

4. Plaintiff's father Mafulela Mtintanyoni is dowry-eater according to Bantu Law and Custom of certain female Zagweba @ Tobani.

5. The said Zagweba @ Tobani is the illegitimate daughter of Plaintiff's aunt Mgukuzo by Dodela Mhletywa in respect of whom three head of cattle were paid by the said Dodela Mhlatywa leaving a balance of two head of cattle still due and payable to the said Mafulela Mtintanyoni.

6. The said Zagweba @ Tobani grew up at the kraal of Mafulela Mtintanyoni and has now been given in marriage.

7. Defendant wrongfully and unlawfully claims to be the dowry-eater of the said Zagweba @ Tobani.

8. Plaintiff therefore claims a declaration of rights in respect of the dowry custody of the said Zagweba @ Tobani."

Defendant's attorney in his verbal plea, stated that Defendant had no knowledge of paragraphs 2 and 3 above, denied paragraphs 4, 5 and 6 and asked for a declaration of rights in his favour. The appeal was allowed with costs and the judgment of the Chief's Court altered to read "For Defendant with costs."

Plaintiff has now appealed against this judgment in the grounds that—

"(1) the learned Bantu Affairs Commissioner erred in giving judgment for the respondent in that—

(a) it was proved that the paternity of the child Nozagweba was by Dodela Mhletywa;

(b) there was agreement between Appellant's family and said Dodela Mhletywa concerning payment of customary damages of which three head of cattle were paid leaving balance of two head due and payable;

(c) custody of the child Nozagweba was in Appellant's family and said Dodela Mhletywa by agreement at all relevant times;

(d) Respondent has not disputed the evidence as to paternity of the child Nozagweba and as to her custody;

(2) the learned Bantu Affairs Commissioner erred in not finding that Respondent's claim has not been proved;

(3) the learned Bantu Affairs Commissioner erred in not finding the appellant is the rightful person to sue in view of acceptance of fact by the Chief's Court and the explanation given that appellant is authorised to manage the affairs of his father's kraal during his father's illness."

At the close of Plaintiff's case Defendant's attorney submitted that Plaintiff was the wrong person to sue and also drew the Court's attention to the case of *Tsotsa vs Mbulali*, 4 N.A.C. 45 (1918) Flagstaff and asked that the appeal be allowed with costs.

In his reasons for judgment the Commissioner indicated that he had not gone into the merits of the first submission but that on the facts as disclosed by Plaintiff's evidence he (Plaintiff) could not succeed.

The facts are shortly that Plaintiff's sister Mkukuse was seduced and rendered pregnant by one Dodela Mhletywa. Customary damages were claimed and Dodela paid three head of cattle leaving a balance of two head owing. After the birth of the child, Nozagweba, Mkukuse married Defendant by Bantu custom and lobolo was paid to her father. The Plaintiff on behalf of his father; and her husband, the Defendant, each now claim that they are entitled to the property rights in the girl Nozagweba.

The Commissioner based his judgment on Tsotsa's case (*supra*) where the assessors stated that "If a man renders a woman pregnant and pays the full fine before she marries, the child born of the pregnancy belongs to him, but if he pays no fine or only portion of the full fine before the woman marries he cannot claim the child which becomes the property of the man the woman marries." He also referred to the case of *Tshali vs Gcogqo* 1947 N.A.C. (C. & O.) 83, in which, he stated, the point of law was confirmed. The Commissioner, however, has overlooked the fact that in the cases referred to by him the customary union was entered into before the birth of the child whereas in the instant case the child was already born when they married. In Tsotsa's case the woman was three months pregnant by another man before her marriage to Plaintiff and it was in those circumstances that the assessors gave their opinion. It is trite law that amongst the Cape Nguni tribes the children of a spinster belong to the father of the woman or his heir; and also that should the natural father pay the customary fine the ownership in the child immediately vests in him. See "Native Law in S.A." (2nd Ed.) by Seymour at p. 152; and "South African Native Law" by Whitfield (2nd Ed.) at page 67, and the authorities cited therein; and Warner's Digest of S.A. Native Civil Case Law at paragraphs 722, 723, 734, 736, 737 and 740. The question was referred to assessors from Eastern and Western Pondoland who unanimously stated that this was also the custom applicable in Pondoland.

In the instant case, therefore, as the fine was not paid in full the ownership in the child vested in Plaintiff and subsequent payment of a full dowry after the birth of the child for the mother of the child by another man does not entitle the latter to the property rights in the child.

The ownership of the child will only vest in the woman's husband where (a) the woman's guardian did not receive a fine from the seducer and the bridegroom did not know of the pregnancy when the matter is regarded as adultery, or (b) if the pregnancy is discovered before the consummation of the union and the suitor decides not to break off the engagement but to marry the woman. The child born after the union is consummated then belongs to him, provided the seducer has not paid the fine to the woman's guardian. If the child was born before the consummation of the union the husband has no claim to it. (*Vide* Seymour at p. 153.)

In the circumstances as disclosed at the end of Plaintiff's case he was therefore entitled to judgment. Defendant, however, did not close his case and is entitled to lead evidence if he so desires.

The appeal is allowed with costs.

The judgment of the Bantu Affairs Commissioner is set aside and the case is returned for hearing to a conclusion.

For Appellant: Mr T. N. Makiwane.

For Respondent: Mr J. J. Swartz.

OPINION OF ASSESSORS

Headman Nongonwana Jiyajiya, Libode, Silowana Mtshazi, Port St Johns, Msila Edward Pinyana, Tabankulu, Daniel Tom and Daniel Matha, Lusikisiki.

The question put to the assessors was—

if a woman gives birth to an illegitimate child for whom no fine or only portion of a fine is paid by the seducer and she subsequently marries another man, has the latter any property rights in the child?

The answer was—

the child belongs to the mother's home. The lobolo of the illegitimate child belongs to the mother's home. The subsequent husband has no claim at all.

The decision was unanimous.

SOUTHERN BANTU APPEAL COURT

B.A.C. CASE 45/1969

MLILWANA MDUDUMA vs SIMENUKANA SITWAYI

UMTATA.—4 February 1970. Before Yates, President, and Messrs Adendorff and Botha, Members.

Procedure—not necessary to appeal against a Judgment of a Chief's Court dismissing a claim—plaintiff may issue a fresh summons in a Bantu Affairs Commissioner's Court.

Summary: Plaintiff sued defendant in a Chief's Court for return of five head of cattle. Before trial he issued a summons in the Bantu Affairs Commissioner's Court. He did not appear in the Chief's Court and his claim was dismissed.

Held: That the dismissal of the claim was equivalent to an absolution judgment and was not a final judgment. It was therefore not necessary to note an appeal and Plaintiff was entitled to issue a fresh summons in the Bantu Affairs Commissioner's Court.

Held further: Issue of summons in a Bantu Affairs Commissioner's Court while a case is pending in a Chief's Court is to be deprecated.

Appeal from the Court of the Bantu Affairs Commissioner, Lusikisiki.

Yates (President) delivering the judgment of the Court:

Plaintiff (now Appellant) issued a summons against the Defendant (now Respondent) for the return of five head of cattle which he alleged had been spoliated from him and for damages in the amount of R35.

Defendant pleaded that the cattle were legally attached by writ issued by the Qaukeni (i.e. Chief's) Court. He also entered a special plea at a later date which reads:

"Defendant avers that the Plaintiff instituted a claim in the Qaukeni Tribal Court in Case 51 of 1966 in respect of the same cattle in issue. In the said case the Plaintiff claimed ownership of the said cattle. The Plaintiff was in default at the hearing on 22 June 1966, and the Plaintiff's claim was dismissed. The effect of the said judgment was to declare the cattle executable. The Plaintiff has not applied for a rescission of the said judgment nor has he appealed against the said judgment. Defendant accordingly avers that Plaintiff is debarred from instituting the instant action."

The Bantu Affairs Commissioner upheld the special plea and dismissed the claim with costs. An appeal has been brought against this judgment on the grounds:

"1. The said judgment is against the weight of evidence and the evidence.

2. The learned Bantu Affairs Commissioner erred in ruling that the appellant cannot proceed in the Bantu Affairs Commissioner's Court in the present case in view of the evidence before the Court.

3. Alternatively appellant asks for review of the whole of the judgment of the learned Bantu Affairs Commissioner herein on the ground of irregularity thereof in view of the said evidence."

The appeal must succeed on Ground 2 above.

The Clerk of the Bantu Affairs Commissioner's Court testified that he had registered Case T122/66 being an interpleader action in the Chief's Court in which present Plaintiff sued present Defendant for delivery of certain five cattle or their value R250 which he alleged were wrongly attached. The record contained a note that Plaintiff was in wilful default and on 22 June 1966 his claim was dismissed with costs. As pointed out by the Commissioner Plaintiff must have instituted the action in the Chief's Court prior to 22 June. He also issued summons in the instant case in the Bantu Affairs Commissioner's Court on 7 June, which was served on Defendant on the 15th and a plea was filled on 17th *idem*, i.e. before judgment was given in the Chief's Court so that defendant was aware at that time of the pending action in the Bantu Affairs Commissioner's Court. As pointed out in the case of *Mdumane vs Mtshakule*, 1948 N.A.C. 28 (C. & O.), referred to by the Commissioner, where courts of Bantu Affairs Commissioners and Chiefs have concurrent jurisdiction when a case is pending in one court proceedings based on the same cause of action should not be instituted in the other courts. There is, however, no rule prohibiting this procedure.

In the instant case the default judgment was one dismissing the summons which is equivalent to an absolution judgment, *vide* the numerous cases cited at paragraph 3391 of Warner's "Digest of S.A. Native Civil Case Law". It was therefore not necessary for Plaintiff to apply for a rescission of the default judgment or to lodge an appeal against it. He was at liberty to issue a fresh summons in regard to the same cause of action. See "Jones & Buckle", 6th Ed. at page 771/2.

The Commissioner has stated in his "reasons for judgment" that this was a final judgment but it in no way resolved the matter and Plaintiff was entitled to proceed as he did. The fact that the summons was issued on 7 June and not after the Chief granted the absolution judgment on the 23rd in my view does not effect the issue. In any event no one was prejudiced as the actual hearing of the case took place more than three years later.

The Plaintiff was not debarred from instituting the present action and the special plea should not have been upheld.

The appeal is allowed with costs. The judgment of the Bantu Affairs Commissioner is set aside and the case is remitted to the Court *a quo* for hearing to a conclusion.

For Appellant: Mr T. N. Makiwane.

For Respondent: Mr J. J. Swartz.

NORTH-EASTERN BANTU APPEAL COURT.

CHRISTIAN APOSTOLIC CHURCH IN ZION OF SOUTH AFRICA vs BEN MADONSELA

B.A.C. CASE 79 OF 1969

PRETORIA: 18 June 1970. Before Craig, Acting President, and Gafney and Welman, Members.

BANTU LAW
COMMON LAW

Church Body—written constitution—failure to produce constitution—legal entity—Bantu—jurisdiction of Bantu Affairs Commissioner's Court.

The reader is referred to the full text of the judgment below.

Cases referred to:

Ndebele vs Bantu Christian Catholic Church in Zion, 1956, N.A.C. 184 (C).

Zulu Congregational Church vs Maseko & Ano. 1957, N.A.C. 146 (N.E.).

Gumede vs Bandla Pukani Bakithi Ltd, 1950 (4) S.A. 560 (N).

Legislation referred to:

Bantu Administration Act, No. 38 of 1927.

Appeal from the Court of the Bantu Affairs Commissioner, Amersfoort.

Craig, Acting President:

The Plaintiff duly represented by the Trustees (now Respondent) sued for and was granted an Order of Ejectment against Defendant (now Appellant) from premises situated on land registered in the name of the Plaintiff's Church Property Committee as Trustee.

An appeal to this Court was noted on a variety of grounds which will not be set out here.

The Court, *mero motu*, raised three points viz.—

(a) whether the omission to produce and admit the Plaintiff's written constitution was tenable; (b) whether the Plaintiff, despite the admission in the pleadings, is a Bantu in terms of the Bantu Administration Act, No. 38 of 1927; and (c) whether the Bantu Affairs Commissioner's Court had jurisdiction to hear this case.

It is clear from the pleadings and the evidence that the Plaintiff has a written constitution and that through its Church Property Committee it holds immovable property.

That immediately raises the questions of whether it is a legal entity apart from its members and whether it is a Bantu as defined in the Bantu Administration Act, 1927 (Act 38 of 1927) *vide Ndebele vs Bantu Christian Catholic Church in Zion*, 1956 N.A.C. 184 (C) and *Zulu Congregational Church vs Maseko & Ano.*, 1957 N.A.C. 146 (N.E.) and so puts the question of the jurisdiction of the Bantu Affairs Commissioner's Court directly in issue.

In the case of *Gumede vs Bandla Vukani Bakithi Ltd.* 1950 (4) S.A. 560 (N) the test to be applied in determining whether a person was a Native or not was held to be one of race and it was held further that the Defendant was not susceptible of such a test and that jurisdiction lay with the Magistrate's Court.

In the view of this court the admission of the written constitution was a *sine qua non* to enable consideration, *inter alia* of the basic legal points raised *mero motu* and the Bantu Affairs Commissioner's judgment could not be allowed to stand. As the appeal turned on points not raised by the Defendant by way of notice no order was made as to costs.

The appeal was allowed with no order as to costs and the judgment of the Bantu Affairs Commissioner's Court was set aside. The case was remitted back to the Court *a quo* for production and admission of the written constitution of the Plaintiff, should the Plaintiff decide to continue his action in that court, and for such other evidence as the parties may desire to produce with the leave of that Court.

Gafney and Welman, Members, concurred.

For Appellant: Adv. J. S. Rossouw i.b. Kleyn & Strydom, Volksrust.

For Respondent: Mr M. Phillips, Standerton.

NORTH-EASTERN BANTU APPEAL COURT

BULOSE vs GUMEDE

B.A.C. CASE No. 2 OF 1970

DURBAN: 3 August 1970. Before Craig, Acting President, and Gafney and Addison, Members.

ISONDHLO
ZULU CUSTOM

Isondhlo—right of natural father to claim.

Summary: Plaintiff successfully reared his five natural but illegitimate children with the implied consent and without the assistance of their legal Bantu custom guardian, Thereafter the guardian took possession of the children in assertion of his rights and Plaintiff claimed *isondhlo* from him.

Held: That Plaintiff was entitled to the gift or reward known as isondhlo.

Cases referred to:

Xaba vs Xaba, 1965, B.A.C. (N.E.) 45.

Bingwa vs Ndinisa, 1947, N.A.C. (C. & O.) 64.

Manzi vs Mngomezulu, 1943, N.A.C. (N. & T.) 85.

Nzimande vs Pungula, 1951, N.A.C. (N.E.) 386.

Mahaye vs Mabuzo, 1951, N.A.C. (N.E.) 280.

Mahloze vs Luvuno, 1952, N.A.C. (N.E.) 45.

Mahaye vs Mabaso, 1 N.E.C. 280.

Works referred to:

"Principles of Native Law and the Natal Code" by Stafford & Franklin.

"Bantu Law in South Africa" by Seymour.

Appeal from the Court of the Bantu Affairs Commissioner, Port Shepstone.

Craig, Acting President, delivering the judgment of the Court:

The Plaintiff (now Appellant) sued Defendant (now Respondent) for seven head of cattle in respect of *isondhlo* and a statement of account in respect of cattle allegedly paid as lobolo. The matter of the lobolo was not persisted in and the question of *isondhlo* became the sole issue. After the award and rescission of a default judgment and after the trial the Court *a quo* pronounced a judgment of "For Defendant with costs".

Plaintiff (and not Defendant as stated in the notice of appeal) appealed to this Court on the following grounds viz.:

"1. The said judgment was against the weight of evidence.

2. The learned Bantu Affairs Commissioner erred in finding that Plaintiff was not entitled to claim isondhlo from the Defendant in respect of the seven children which Annie Gumede bore to Plaintiff.

3. The said judgment was contrary to Bantu Law in Natal in that Plaintiff having brought up the children with Defendant's knowledge and Defendant not having taken any steps to assert his rights to the children until after the death of Annie Gumede, Plaintiff was entitled to claim isondhlo from the Defendant in respect of his maintenance of the children."

This appeal was originally set down for hearing on 9 March 1970, but was deemed to have lapsed in default of prosecution and struck off the roll with costs on that date. An application for re-instatement was granted on 3 August 1970 and leave granted to proceed forthwith with the appeal.

It is common cause that there was an association between Plaintiff and Defendant's sister Annie, that she lived in concubinage with him for 20 years or more, that seven children were born to them, that two of the children died at an unknown age, that certain cash payments were made by Plaintiff to Defendant though it was not established whether these were for lobolo or *imvala* (imvimba—damages for the several pregnancies), that there was an agreement that the matter be legalised by payment of lobolo, that the children were reared by Plaintiff and that, after the death of Annie in 1965 Defendant took the children away from Plaintiff and that they now live with him.

Undoubtedly Defendant is the legal guardian and is entitled to the custody of the five surviving children and is the "lobolo holder" in respect of the girls among them, as all are illegitimate. The question for decision is whether Plaintiff, as their natural father is entitled to the customary one beast "isondhlo" in respect of each child.

According to Stafford & Franklin's "Principles of Native Law" and the Natal Code at page 283 *et seqq*. "*Isondhlo* is pure Native law and custom. It can arise from agreement or from implied contract as where the guardian is content to leave his ward with another. As the guardian is responsible for the maintenance he cannot escape liability if someone else undertakes the duty and the doctrine of non-enrichment applies. *Isondhlo is not payment of moneys, etc., disbursed but is a gift and reward for the successful rearing of a ward.* It is also payable for boys".

Two of the children died so, obviously, Plaintiff was not successful in rearing them and cannot claim a reward in respect of them —see *Xaba vs Xaba* 1965 B.A.C. (N.E.) 45.

The Commissioner was not satisfied that Plaintiff as natural father of the children concerned was entitled to *isondlilo* and based his belief on the decision in *Bingwa vs Ndinisa* 1947 N.A.C. (C. & O.) 64, a Transkei case in which is was held that a

natural father was not entitled to *isondhlo* for maintaining his illegitimate children. It is trite Zulu law that there is no civil responsibility on a natural father to maintain his illegitimate children vide Stafford & Franklin, supra, at para. 3 on page 283. The Bantu Affairs Commissioner accepted that the position in the Transkei, as laid down in that judgment, would also apply to Natal and, in consequence, he gave judgment for Defendant.

In that case Sleigh, President, remarked, *inter alia,* as follows:

"It is, however, contended on behalf of Respondent that a natural father is not entitled to *isondhlo* in respect of his illegitimate children. No authority has been quoted for this contention and it is admitted by counsel for appellant that he has not been able to find a decision in which a natural father has been awarded *isondhlo.* The facts of this case were therefore referred to the Native Assessors. They state that a natural father is not entitled to *isondhlo* for maintaining his illegitimate children because they were procreated illicitly *and there was no agreement between the father and the woman's guardian that the former should maintain them* (my underlining). Although this expression of opinion is contrary to the fundamental rule that a person who maintains the child of another is entitled to compensation we accept the Assessors' opinion, since we have been unable to find any previous decisions on the point to the contrary. At first sight this may appear to be inequitable, but it is not so since the Defendant had the right to pay dowry for the woman and thus legitimise the children".

The decision in that case is thus as admitted by the learned President, no more than an acceptance of the Assessors' opinion. Not only is it contrary only to one fundamental rule, it also appears to lose sight of another fundamental rule viz. that the father of an illegitimate child, unless he is or subsequently becomes the husband of the child's mother, cannot be held liable for the maintenance of the child and cannot, in accordance with the principles of Bantu law, be compelled to contribute towards the child's maintenance—*vide, inter alia, Manzi v Ngomezulu,* 1943 N.A.C. (N. & T.) 85; *Nzimande vs Pungula,* 1951 N.A.C. (N.E.) 386; *Mahaye v Mabuzo,* 1951 N.A.C. (N.E.) 280 and *Mahloze v Luvumo,* 1952 N.A.C. (N.E.) 45.

Prima facie, at any rate, where the natural father does maintain his illegitimate children, he would appear, conversely, to have a claim against the guardian and I am, with respect, not persuaded that his right to claims *isondhlo* from the guardian should be so lightly dismissed.

It remains to be pointed out, also, that in the Transkei the natural father has, apart from paying *lobolo,* an alternative remedy of obtaining full custody and guardianship of his illegitimate child by paying the customary fine for seduction of the child's mother and, in addition, by paying customary *isondhlo vide* Seymour's "Bantu Law in S.A.", third edition, pages 220-221 but this custom does not obtain among the Zulu *vide* page 223 of the same work.

It follows, therefore, that, in the instant case, the only manner in which Plaintiff could have retained his children was through the payment of *lobolo* which, according to his evidence he could

obviously not afford. Although, in Bantu law, he was under no obligation to maintain them, he nevertheless did. Consequently Defendant—whose duty it was in accordance with Bantu law to have maintained the children—obtained custody and guardianship of the children without in any way complying with the obligations of a guardian of illegitimate children.

Plaintiff's claim seems also *prima facie* to accord with the generally accepted basic principles of *isondhlo* viz. that whenever a Bantu person maintains a person other than one over whom he possesses property rights, he is entitled to compensation known as "isondhlo". Plaintiff, even though he is the natural father of the children is such a person. In this connection see Stafford & Franklin's work, *supra*, at para. 1 on page 283 which reads, *inter alia* "whenever a person maintains a girl or woman whose dowry rights vest in another, such person is entitled to compensation for the maintenance at the rate of a beast for each girl so maintained . . .". As pointed out earlier *isondhlo* is also payable for boys.

Contract or obligation is usually in respect of children, but is not necessarily confined to them. The obligation may be based on agreement, or may arise from an implied contract as where the guardian is content to leave his wards to remain with a particular person, who has no property rights in them—*vide* Stafford and Franklin: "Principles of Native Law and the Natal Code" at page 281, and the authorities quoted by the authors.

Ex facie the record Defendant made two abortive attempts to assert his rights in respect of Annie and the children born up to that time, within the first two years of the association between Plaintiff and Annie but thereafter, possibly deluded by an alleged lobolo agreement, sat back for 18 or more years and did nothing. His acquiescence in the rearing of the children by Plaintiff must be inferred. The instant case is, accordingly, further distinguishable from *Bingwa's* case, supra, where there was no consent by the legal "lobolo holder". It is also clear, as stated earlier, that Defendant made no effort to maintain these children as was his duty—see *Mahaye vs Mabaso* 1 N.E.C. 280. To permit him, in all the circumstances, to assume possession of the children without compensating Plaintiff would be a defiance of the doctrine of non-enrichment.

My conclusions are, therefore, that as far as the Zulu people are concerned a natural father of illegitimate children may fall within the category of those who are entitled to claim *isondhlo* where the legal holder of proprietory rights in such children has consented to his rearing the children.

In the result the appeal is allowed with costs and the judgment of the Court *a quo* is altered to read "For Plaintiff for five head of cattle with costs".

Gafney and Addision, Members, concurred.

For Appellant: Adv. P. C. Combrinck.

For Defendant: Adv. J. M. S. Bristowe.

NORTH-EASTERN BANTU APPEAL COURT

MBATHA vs MABASO

B.A.C. CASE 8 OF 1970

ESHOWE, 21 July 1970. Before Craig, Acting President and Noble and Luwes, Members of the Court.

BANTU (ZULU) LAW PROCEDURE

Summons—*defective—non compliance with rules*—locus standi *of parties to be alleged—contradictory and untruthful testimony —evidence on points not alleged in summons—execution in accordance with tribal law and custom—substitution of heir before execution—Bantu custom—immediate inheritance by heir—liability for predecessor's debts—limited to extent of assets inherited.*

Summary: Plaintiff failed in an action in which he sued Defendant for four head of cattle said to be his own property by way of purchase and allegedly wrongfully removed from the possession of people with whom he said he had sisa'd them. His summons was defective though this point was not taken in the Court *a quo*. His evidence was contradictory and, at times, blatantly untruthful: He said he had not been sued before execution but it was clear there was a judgment against his late father and that the latter had owned three cattle which Plaintiff had inherited after the former's death and had not acquired by purchase. It was clear that Plaintiff's father had sisa'd the cattle with other persons and that Plaintiff had not done so.

Held: That Plaintiff "inherited" his late father's debts immediately upon the latter's death and must pay them to the extent of assets inherited by him.

Held: That the judgment awarded against his deceased father and not satisfied prior to death was such a debt.

Held: That Plaintiff had inherited assets to the extent of three head of cattle immediately on his father's death.

Held: That substitution of an heir for his late father as judgment debtor before execution can be levied is unknown to Bantu law and custom.

Cases referred to:

Sokhele vs Shelembe, 1964 B.A.C. (N.E.) 21.

Works referred to:

Native Law in South Africa, second edition by Seymour.

Laws referred to:

The Natal Code of Bantu Law.

Rules referred to:

'Bantu Affairs Commissioners' Courts Rule 35 (7).

Chiefs' and Headmen's Civil Courts Rule 8 (1).

Appeal from the Court of the Bantu Affairs Commissioner, Mahlabatini.

Craig, Acting President:

Plaintiff (now Appellant) sued Defendant (now Respondent) in the Bantu Affairs Commissioner's Court for the return of four head of cattle or their value R170 allegedly wrongfully removed by the latter from the possession of one Foshole Mbata during 1968 and judgment was given "for Defendant with costs".

An appeal to this Court against that judgment was noted by Plaintifl on the following grounds:

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

2. That the Court erred in finding that Plaintiff was liable to satisfy the judgment of the late Mfelafuthi Mbatha in the absence of a judgment directed against Plaintiff.

3. That the evidence of both Respondent and his witness Fosholo Mbatha disclosed that the late Mfelafuthi Mbatha had no attachable assets, and his heir could therefore not be held liable."

At the outset I express this court's displeasure at the haphazard and excipiable manner in which Plaintiff's summons was prepared by his attorney who was either unaware of or deemed it unnecessary to comply with the peremptory requirements of Rule 35 (7) of the Rules for Bantu Affairs Commissioners' Courts. That rule prescribes, *inter alia*, that the summons shall also show the "sex, occupation and the residence or place of business of the Plaintiff". There was no compliance with this requirement. The summons is further defective in that in the "particulars of claim" the person who claimed "Against the Defendant for the return of four head of cattle, etc., etc." was not identified although such identification was made in the alternative claim nor was there a disclosure of the ground on which this unnamed person based his *locus standi in judicio*.

It is common cause that late Mfelafuthi, father of Plaintiff was indebted to present Defendant to the extent of three head of cattle as the result of a Chief's Court judgment, that Plaintiff is Mfelafuthi's heir and that cattle in the possession of Fosholo and Masunduzini were attached in settlement of the judgment.

Plaintiff's efforts to prove that the cattle concerned were at all times his own property and not those of his late father Mfelafuthi were an insult to the intelligence of the Court *a quo*. This evidence was a mass of inconsistencies, contradictions and at least one blatant untruth.

He said he *sisa'd* four cattle with Fosholo and then changed that information and said he *sisa'd* one beast with Fosholo and that it had increase of a red heifer and two red bullocks. In the next breath he said the original *sisa'd* cow had had increase of three heifers. In valuing the cattle he said that that of the original cow was R60, of the first calf R40, of the second R32 and of the third calf R80. In the next breath the third calf became an ox.

Plaintiff went on his way by stating that the third calf was not the progeny of the cow he had *sisa'd* with Fosholo but that of a cow bought by himself, which he said he *sisa'd* with Msunduzeni and finally under cross-examination he gave himself the lie direct by saying that the cow *sisa'd* with Fosholo had had increase of only two heifers.

In examination in chief Plaintiff said he did not *sisa* cattle with anyone but Fosholo. Under cross-examination he was blatantly deceitful when he said he had not been asked if he had *sisa'd* cattle with Masunduzini. He continued on his path of deception by saying that Msunduzini and Fosholo live in the same kraal and in the next breath by saying they live in neighbouring kraals.

Plaintiff said that the cow he *sisa'd* with Fosholo had been bought by him from one Mkukuleni Mbata for R20 while Mkukuleni stated that he had sold Plaintiff a female beast over 10 years ago for R18. It is perhaps fortunate that Plaintiff was not asked to explain how this cow's value had increased to R60.

Defendant admitted the attachment and said it was made after he had consulted the Chief who maintained a *sisa* register. Further, according to him, the cow *sisa'd* with Fosholo was originally bought by Mfelafuthi from him (Defendant). Plaintiff did not describe the cow which he alleged he bought from Mkukuleni and *sisa'd* with Fosholo but Mkukuleni said it was a red cow with white sides. In view of the unacceptable nature of Plaintiff's evidence it cannot be accepted that Plaintiff and Mkukuleni spoke of the same beast.

Fosholo Mbata testified that late Mfelafuthi *sisa'd* a red heifer with him and that it bore one red heifer calf.

This lends support to the view that the beast which Plaintiff bought from Mkukuleni was not concerned in this matter at all as the latter said he sold Plaintiff a *cow* and calf. He denied that cattle were *sisa'd* with him by Plaintiff. There seems to be no reason to doubt this evidence.

Plaintiff brought no evidence in corroboration of an alleged purchase of a beast from one Mkwanazi and subsequent *sisa* of that beast with Msunduzeni. I question his right to testify on that point at all as his summons did not mention a claim for a beast attached in Msunduzeni's possession and no application was made or granted for amendment of the claim. For some reason

best known to himself Defendant's attorney allowed this evidence to be led without demur and in refutation, led hearsay evidence of an admission by Msunduzeni. Admittedly, the beast was in Msunduzeni's possession and the Court elicited direct evidence that it was registered in his name.

In the light of Plaintiff's highly unsatisfactory evidence of ownership generally I have not been persuaded that the Commissioner erred in rejecting his evidence and preferring that led by Defendant and am of the view that the first ground of appeal fails and that the cattle were the property of late Mfelafuthi, that they were *sisa'd* by him with Fosholo and Msunduzeni and that Plaintiff never acquired ownership in them by way of purchase.

It is common cause that Plaintiff is the son and heir of the late Mfelafuthi. As such he acquired ownership of the cattle by way of inheritance. It is common cause that Defendant was awarded a judgment for three head of cattle against Mfelafuthi during the latter's lifetime but did not execute on it until after his death. Execution was obviously levied under Bantu Law and Custom *vide* Regulation 8 (1) of Government Notice R. 2082 of 1967 (Rules for Chiefs' and Headmen's Civil Courts) i.e. in accordance with the recognised customs and laws of the tribe. No evidence was tendered by Plaintiff that the law and custom of his tribe requires that he be substituted judicially for late Mfelafuthi as a prerequisite to execution. I am not aware of any such requirement under the Bantu system.

It is trite law that a Bantu heir steps into the shoes of his predecessor immediately on the death of the latter and inherits, *inter alia*, his debts and obligations—see Seymour "Native Law in South Africa", second edition, page 195-197, but that in Natal he becomes liable for such debts and obligations only to the extent of the assets to which he has succeeded *vide* section 116 of the Natal Code of Bantu Law (Proclamation R. 195 of 1967).

There can be no doubt that the award of the Chief became a "debt" by way of novation *vide Sokhele vs Shelembe* 1964 B.A.C. (N.E.) 21 and the remarks of Wessels J. quoted at page 22. This debt was "inherited" by Plaintiff.

In the light of these remarks I find no substances in the second ground of appeal.

I can find no virtue in the third ground of appeal as, *vide* my remarks *supra* these cattle were the property of late Mfelafuthi and Plaintiff inherited them. He is, accordingly, liable to discharge the debt he inherited to the extent of the assets he inherited viz. three head. His evidence that there were four cattle attached is based on hearsay and unacceptable.

In the result the appeal was dismissed with costs.

Noble and Luwes, Members, concurred.

For Appellant: Mr D. T. Gardner i.b. H. L. Myburgh, Vryheid.

For Respondent: Mr W. E. White i.b. Uys & Boshoff, Vryheid.

IN THE SOUTHERN BANTU APPEAL COURT.

ERIC GWILIZA vs SILBA ROSE BULELWA NGCEZU

B.A.C. CASE 14 OF 1970

UMTATA: 15 June 1970. Before E. J. H. Yates, Esq., President and Messrs Adendorff and Matthews, Members.

SEDUCTION

Written undertaking to pay damages admissible as evidence—document in vernacular should be translated into an official language—damages under Common Law—considerations

Summary: Defendant sued Plaintiff for R300 as damages for seduction resulting in her pregnancy. An unstamped document in Xhosa admitting the seduction and undertaking to pay R300 damages was handed in as evidence.

Held: The document was admissible even though unstamped as it was not relied upon as a promissory note.

Held further: That documents written in the Xhosa language should be accompanied by a translation into an official language but this is not peremptory.

Held further: Defendant is entitled to lying-in expenses calculated as the equivalent of three months earnings.

Held further: Damages of R200 for loss of virginity not excessive in the circumstances.

Appeal from the Court of the Bantu Affairs Commissioner, Mount Ayliff.

Yates (President) delivering the judgment of the Court:

This is an appeal from a judgment of a Bantu Affairs Commissioner's Court for Plaintiff (now Respondent) for "R100 loss of earnings and R200 for damages for loss of virginity and costs of suit", in an action in which she sued Defendant (now Appellant) for R300 damages alleging that he had seduced her and rendered her pregnant and that he had admitted and agreed in writing to pay this amount.

Defendant denied the allegations and stated that he had promised to pay the damages demanded under duress.

An appeal has been brought on various grounds which it is not necessary to set out in extenso and which included an appeal against the quantum of damages.

Mr Berrange contended first of all that the document which was admittedly signed by Defendant in which he agreed to pay R300 for causing Plaintiff's pregnancy was a promissory note and was not properly stamped and therefore could not be relied upon but it is clear that Plaintiff only produced the document as corroborative evidence of the seduction. He further argued that as the document was written in the Xhosa language and a translation had not been handed in at the inception of the case it should not have been admitted. However, it is clear from a perusal of the judgments in the cases of *Mda vs Gcanga* 1957 N.A.C. 50 at p. 52 and *Dlamini vs Mbele* 1953 N.A.C. 37 that the injunction not to admit such documents without a translation was directed at the presiding officer to ensure that the contents were fully intelligible to all concerned with the case. See also *Batelo vs Vapi* 1957 N.A.C. 74 at p. 77. In the instant case the document was translated into English during the hearing and Defendant admitted in evidence that it had been done correctly.

Once these two points were disposed of no further argument was addressed to the Court in regard to the merits of the case.

In regard to the quantum of damages, however, Mr Berrange referred to the case of *Masunda vs Xazwe* (1949) I N.A.C. (S.D.) 87 as authority for the proposition that because seduction took place in 1964 and Defendant did not become pregnant until 1967 she was not entitled to any compensation for loss of earnings. A reference, however, to the case of *Ngqaka vs Kula* 1946 N.A.C. (C. & O.) 71 at p. 73 makes it clear that although a woman in such a case is not entitled to loss of earnings she is entitled to be compensated for lying-in expenses which may be calculated as the equivalent of three months salary, and that the particulars of claim are wide enough to cover a claim for lying-in expenses at Common Law. See also *Bujela vs Mfeka* 1953 N.A.C. 119 at the bottem of p. 122, Mda's case, *supra* at p. 53 and Ngwane *vs Vakalisa* 1960 N.A.C. 30 at p. 33.

Plaintiff was an educated woman and a teacher as was her mother and the circumstances here are similar to those in Ngwane's case *supra* where damages for defloration of R200 were awarded.

In my view the damages granted here were not excessive and the appeal is dismissed with costs. However, the judgment is altered to read "For Plaintiff for R100 for lying-in expenses and R200 for loss of virginity and costs of suit."

Adendorff and Matthews, Members, concurred.

For Appellant: Mr A. T. Berrange

For Respondents: Mr M. G. K. Moshesh

NORTH-EASTERN BANTU APPEAL COURT

BUTHELEZI vs MAGWAZA

B.A.C. CASE 16 OF 1970

PIETERMARITZBURG: 7 July 1970. Before Craig, Acting President and Neuper and Warner, Members.

DEFAMATION

"Report back" meeting—consultation of witchdoctor—witchcraft—volenti non fit injuria.

Summary: Plaintiff was awarded R100 as damages for defamation involving an imputation of witchcraft, in a Chief's Court and an appeal to the Bantu Affairs Commissioner's Court was dismissed. Both Plaintiff and Defendant took part in one or more visits to a witchdoctor undertaken for the purpose of establishing the cause of the illness of one Kanyile. After the second visit the Defendant reported to a meeting of those interested, including the Plaintiff, what had been said by the witchdoctor without associating himself in any way with the contents of the statement and Plaintiff chose to assume the role of the party "pointed out".

Held: That Defendant had merely "reported back" what he had been told by the witchdoctor.

Held: That in so doing he had not defamed Plaintiff.

Held: That by taking part in the visits to the witchdoctor Plaintiff made himself a party to these supernatural proceedings and the maxim *volenti non fit injuria* was applicable.

Cases referred to:

Miya vs Miya, 1947, N.A.C. 108.

Ziqubu vs Ziqubu, 1954, N.A.C. 72 (N.E.).

Legislation referred to:

Bantu Administration Act—Act 38 of 1927, sections 10, 12 (4), 17 (4).

Appeal from the Court of the Bantu Affairs Commissioner, Babanango.

Craig, Acting President:

This case had its inception in a Chief's court where the Plaintiff (now Respondent) sued Defendant (now Appellant) for and was awarded R100 as damages for defamation. The nature of the defamation was not recorded nor did the court insist, as it should have done, on the inclusion of the Chief's written Record.

An appeal to the Bantu Affairs Commissioner's Court was dismissed, without an order regarding costs being made, and the Chief's judgment was confirmed.

An appeal to this Court was noted on the following grounds:

1. The learned Assistant Bantu Affairs Commissioner erred in coming to the conclusion that the Defendant had been defamed and that he was entitled to any damages.

2. The learned Assistant Bantu Affairs Commissioner erred in concluding that the Defendant had uttered and published any defamatory words of and concerning the Plaintiff.

3. The learned Assistant Bantu Affairs Commissioner erred in coming to the conclusion that the weight of evidence was in favour of the Respondent.

4. The learned Assistant Bantu Affairs Commissioner should have on the evidence before him arrived at the conclusion that the Plaintiff had not been defamed and had suffered no damages.

5. The learned Assistant Bantu Affairs Commissioner failed to attach sufficient weight to the material conflicts in the evidence of the Respondent and his witnesses.

6. Taking the evidence as a whole the learned Assistant Bantu Affairs Commissioner should have come to the conclusion that the balance of probabilities was in favour of the Defendant and should have given judgment in favour of the Defendant."

From the evidence recorded it appears that Plaintiff's complaint was that Defendant had alleged that he was a wizard and that he had killed a man called Kanyile.

The Commissioner's "Reasons for Judgment" were of little assistance to this Court because although he recorded his findings of fact he gave no indication of how he arrived at them, nor did he comment on the demeanour of the witnesses. In support of his judgment he embarked on a short discourse on the seriousness of an imputation of witchcraft and quoted several decided cases. This Court did not require to be reminded of this view of such imputation.

Plaintiff alleged that Defendant called him a wizard and accused him of having killed Kanyile. This evidence stood alone as Plaintiff's witness Ntombela did not support him. He stated that he did not hear Defendant call Plaintiff a wizard. He also alleged that Plaintiff and Kanyile's son were together on the occasion of the 'first visit' to the "sangoma". This suggests that Plaintiff believes in witchcraft.

Defendant's evidence is to the effect that he and six others went to consult a "sangoma" on behalf of Kanyile to find out what was the cause of the latter's illness. This was subsequent to the visit paid by Kanyile's son and Plaintiff for the same purpose. According to Defendant the sangoma "pointed out" the "man who came with Kanyile" as the wizard without naming such man. At a meeting called by Kanyile thereafter Defendant said he reported what the sangoma had said whereupon Plaintiff stood

up and said "I'm the one who accompanied Kanyile it means now I'm the wizard". Defendant denied having said that Plaintiff was a wizard.

Defendant's evidence was confirmed by William Kanyile except in regard to the number of persons who went to the sangoma.

In my view the evidence shows that all Defendant did was to state at a "report back" meeting what the sangoma had said, that he did so without malice: and that he did not specifically name any person as having been pointed out as a wizard nor did he call Plaintiff a wizard. It is clear that Plaintiff, apparently a believer in witchcraft, chose to assume the role of the person who was pointed out. It is clear, too, that Plaintiff was a party to the proceedings entailing visits to the *sangoma* for the purpose of discovering what the cause was of the elder Kanyile's ailments and the maxim *volenti non fit injuria* applies [Miya vs Miya 1947 N.A.C. 108 and Ziqubu vs Ziqubu 1954 N.A.C. 72 (N.E.)].

In these circumstances the Court *a quo* erred in finding in favour of Plaintiff and the appeal was allowed with costs and the Bantu Affairs Commissioner's judgment was set aside and for it was substituted one allowing "with costs the appeal against the Chief's judgment and altering the latter's judgment to one for Defendant with costs".

The judicial officer in this matter appears to have tried this case in his capacity of a magistrate. He should be well aware that a magistrate has no jurisdiction in such cases vide sections 10 and 17 (4) of the Bantu Administration Act (Act 38 of 1927). It will be presumed that he used the magisterial title inadvertently. Furthermore he signed his reasons for judgment in the capacity of A/Bantu Affairs Commissioner, whatever that may mean. If the letter "A" was intended to indicate "Assistant" then he had no jurisdiction to hear the appeal vide section 12 (4) of Act 38 of 1927, supra. If the "A" was intended to indicate "acting" he should have made this plain. The use of ambiguous diminutives is deplorable and must be refrained from in the future.

Neuper and Warner, Members, concurred.

For Appellant: Adv. W. O. H. Menge i.b. Meer & Singh, Verulam.

For Respondent: Adv. P. D. Allan i.b. R. Dunn & Co., Dannhauser.

NORTH-EASTERN BANTU APPEAL COURT

COMMISSIONER

MAJOLA vs NGUBANE

B.A.C. CASE 17 OF 1970

PIETERMARITZBURG: 7 July 1970. Before Craig, Acting President and Neuper and Warner, Members.

DEFAMATION

Privileged occasion—what is—what is not—family matter for discussion.

Summary: Plaintiff was awarded damages for defamation in a Chief's Court. An appeal to the Bantu Affairs Commissioner's Court was upheld as it was held, *inter alia,* that the occasion on which the defamation occurred was a privileged one, as the subject for discussion and settlement was a family dispute between Defendant and his uncle.

Held: That the circumstances disclosed established that what should have been a family gathering was, in fact, a public meeting and, accordingly, was not a privileged occasion.

Cases referred to:

Lokwana *Mlilo vs Ndolongo Mlilo,* 1936, N.A.C. (T & N) 44.

Appeal from the Court of the Bantu Affairs Commissioner, Kranskop.

Craig, Acting President:

This case had its inception in a Chief's Court where Plaintiff (now Appellant) sued Defendant (now Respondent) for R100 damages for defamation by means of an imputation of witchcraft and was awarded R10 and costs. An appeal to the Bantu Affairs Commissioner's Court was upheld, without an order being made in respect of costs in that Court and the Chief's judgment was altered to "Judgment for Defendant with costs".

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

"1. That the said judgment is contrary to Law and against the weight of evidence.

2. That the Respondent failed to establish that the defamatory utterances complained of were uttered upon a purely privileged occasion in as much as Respondent in evidence contended that only members of his family were present, whereas it was proved that neighbours unrelated to Respondent were also present at the meeting.

3. That the privileges claimed by the Respondent was destroyed when these utterances were made in the presence and hearing of such neighbours.

4. That in the case of *Lokwana Mlilo vs Ndolongo Mlilo*, reported in Native Appeal Court decisions (Transvaal and Natal) 1936—Case 17 at page 44, it was held that the repetition of defamatory words is actionable.

5. That if it be held that the words complained of were uttered upon a privileged occasion then the Appellant has discharged the onus of establishing express malice on the part of the Respondent.

6. That by his actions and words express malice can be inferred as the Respondent identified himself with the defamatory utterances he was repeating, and the evidence as a whole including that of the induna has established that when Respondent realised Appellant was present he addressed the following words to the Appellant 'Majola, you have failed to kill me and you are the Mtakati—You must not walk around here at Mambulu'.

7. That the learned Bantu Affairs Commissioner erred in holding that the Appellant was not entitled to damages to cleanse himself of the stigma cast upon him by the Respondent."

It seems that a meeting was convened by an induna at the request of Defendant the primary object being to settle differences between Defendant and his uncle: This was supposed to have been a family gathering so it is not clear why the induna should have convened it. Apparently it was not held within the precincts of a kraal but out in the veld beside a road and neighbours were invited to be present. Apparently passers-by were not prohibited from attending and it seemed that that is how it was that Plaintiff came to be there.

In my view the nature of the meeting was changed from that of a private family gathering to that of a public meeting and, thus, it was not a privileged occasion.

There is no doubt that Plaintiff was the subject of an imputation of witchcraft by Defendant albeit that the latter only repeated what had been told him by his aunt, Kanyisile.

I hold the view that this appeal must succeed.

The appeal was allowed with costs and the Bantu Affairs Commissioner's judgment was set aside and for it was substituted "The appeal is dismissed with costs and the Chief's judgment is confirmed".

Neuper and Warner, Members, concurred.

For Appellant: Adv. N. M. Fuller.

For Respondent: Adv. W. O. H. Menge.

IN THE SOUTHERN BANTU APPEAL COURT

BUNGQU SIYANGE vs NTAMEGUSHA BONENI

B.A.C. CASE 40 OF 1969

UMTATA: 19 June 1970. Before Yates, President and Messrs Adendorff and Mbuli, Members.

REVIEW PROCEEDINGS

Refusal to afford Applicant an opportunity to be represented—no irregularity in the circumstances

Summary: Plaintiff sued five Defendants for damages for assault. Plea filed in which Defendant 3 (now Applicant) admitted inflicting injuries on Plaintiff but alleged this happened when Plaintiff was found amongst his sheep at night. After numerous postponements default judgment granted which was later rescinded. At subsequent hearing, Defendant 5 only present, Defendants' attorney was reported to be ill. Judgment again granted against the Defendants jointly and severally. Immediately thereafter Defendants' attorney wrote to say that he has been instructed to apply for rescission. Some six months later he filed an application. On day of hearing only Defendant 3 present and he intimated he could not proceed in the absence of his attorney. The application was refused. Applicant then brought the matter on review alleging gross irregularity.

Held: Contents of affidavit accompanying application for rescission disclose relevant facts. Proceedings had been protracted and furthermore application for rescission was hopelssly out of time. No prejudice had been suffered by refusal to grant a further postponement to brief another attorney.

Application from the Court of the Bantu Affairs Commissioner, Mqanduli.

Yates (President):

Yates (President) delivering the judgment of the Court:

On 24 January 1962 Plaintiff (now Respondent) issued a summons against the five Defendants claiming damages of R180 for assault, wrongful detention and contumelia. The Defendants filed a plea in which Defendant 3 (now Applicant) admitted inflicting injuries on Plaintiff but alleged that this happened when Plaintiff was found inside his sheepfold at night with intent to steal. There were a number of postponements and eventually on 4 August 1966, after the Defendants' attorney had stated that he could not account for the absence of his clients, and had withdrawn from the case, Plaintiff's evidence was recor-

ded and a default judgment granted in his favour. Despite the opposition of Plaintiff's attorney this judgment was rescinded on 4 April 1968.

Plaintiff's attorney then set the case down for hearing on 25 September 1968 and on that day Defendant 5 was present but the other Defendants and their attorney, Mr Ntswayi, who was ill, were absent. Plaintiff's evidence was again taken and a judgment recorded against all the Defendants jointly and severally. In an undated letter received by Plaintiff's attorney on 26 September 1968 Mr Ntswayi informed him that he had been instructed to apply for a rescision of the judgment and on 29 March 1969 (some six months later) he filed an application, on behalf of Defendant 3 only, for the rescission of the default judgment granted against him on 25 September 1968. The application was heard on 30 July 1969. Defendant 3 was present but his attorney was absent on account of illness. Plaintiff's attorney addressed the court pointing out that the application did not comply with Rule 77 (1) of the Rules for Bantu Affairs Commissioners' Courts (Government Notice 2083 of 1967) as it had not been filed within one month after the default judgment came to the knowledge of the party (which includes the legal practitioner) against whom it was given and further that there was no request for an extension of time in which to file it. Vide Rule 87 (5) (b). Defendant 3 intimated that he could not proceed in the absence of his attorney and that he had made no other arrangements. The application was then dismissed with costs and the judgment confirmed after Defendant 3 had been given an opportunity to address the court and had failed to do so.

The matter has now been brought on review on the ground that the judicial officer committed a gross irregularity in not affording Applicant an opportunity to be represented in the matter either by his attorney of choice or by any other legal practitioner that he could have chosen.

However, it is difficult to see what prejudice he could have suffered. His affidavit which accompanied his application for the rescission of the default judgment against him set out the grounds of his application which were, briefly, that he was not notified by his attorney that the case had been set down for re-hearing on 25 September 1968. Respondent's replying affidavit laid stress on the fact that Defendant was present in court on 4 April 1968, when the default judgment was rescinded and pointed out that it was incumbent on him to keep himself informed of future developments, which he failed to do.

Bearing in mind that the Assistant Bantu Affairs Commissioner had these affidavits before him and that there was little, if anything, that Applicant could add; that this was the second application for rescission of the judgment; the protracted nature of the proceedings and that there must be finality in these matters; and furthermore that the application was hopelessly out of time, it does not seem to me that any gross irregularity or illegality has been committed.

Having come to this conclusion there will be no order except that Applicant must pay the costs of these proceedings.

Adendorff and Mbuli, Members, concurred.

For Applicant: Mr D. Koyana.

For Respondent: In default.

IN THE SOUTHERN BANTU APPEAL COURT.

TYIWA MPUNGA vs GONGQONGQO MPUNGA and NONKUMBI MPUNGA

B.A.C. CASE 49 OF 1969

UMTATA: 18 June 1970. Before Yates, President and Messrs Adendorff and Botha, Members.

EXECUTION

Risk of loss of cattle attached in excess of judgment and dying under attachment to be borne by judgment creditor—Point on which case turned not raised in the pleadings.

Summary: In execution of a judgment for 25 head of cattle in favour of Defendant, 25 head were attached from Plaintiff and because of movement restrictions, handed to the Headman for custody. Subsequently a further three head were attached from him and also handed to the headman. Of the 28 head attached three died and Defendant took 25 head in satisfaction of his judgment.

Held: That as the judgment was satisfied by the attachment of the original 25 heard of cattle the attachment of the remaining three was unauthorised and the Plaintiff was entitled to their return.

Held further: Where the real question to be decided was not raised in the pleadings but was fully canvassed and the judgment was based thereon the appeal should be considered accordingly.

Appeal from the Court of the Bantu Affairs Commissioner, Mqunduli. Yates (President):

Yates (President) delivering the judgment of the Court:

This is an appeal from a judgment of Bantu Affairs Commissioner's Court for Plaintiff 1 (now Respondent) for three head of cattle or their value R30 each plus costs.

During the hearing of the case the claim by Plaintiff 2 was withdrawn and the claim of Plaintiff 1 was amended to one for three head of cattle or their value R150. Plaintiff averred in his particulars that Defendant (now Appellant) had in 1963 obtained a judgment against him and one Keke Mpunga, which was confirmed on appeal to the Bantu Affairs Commissioner's Court, for 25 head of cattle or their value R40 each, 50 sheep and 20 goats or their value at R6 each and that in execution of that judgment three of his cattle were attached which did not form part of the specific cattle claimed by Defendant.

Save for admitting executing judgment in his favour by way of writ and admitting that the stock referred to in the judgment had been handed to him, Defendant specifically denied having caused Plaintiff's stock to be attached as alleged.

An appeal has been brought on the following grounds:

"(a) That the judgment is against the weight of evidence and probabilities of the case.

(b) That the judgment in effect negates a judgment and further obstructs the execution of finality of a judgment of the Southern Bantu Appeal Court, sitting in Umtata on 25 October 1967, in the matter of *Gongqonggo Mpunga and Keke Mpunga* (Appellants) *vs Tyiwa Mpunga* (Respondent), Case 49/67 which dismissed the appeal with costs, thereby affirming the judgment of the Bantu Affairs Commissioner's Court, Elliotdale, for Plaintiff for stock or its alternative value.

(c) That judgment in effect leaves present Appellant's judgment in Case 49/67 unsatisfied in that it reduces the number of cattle received by Appellant by virtue of the Warrant of Execution in Case 49/67 from 26 to 23.

(d) That the Court having come to the conclusion that the beasts claimed by present Respondents in the instant case were valued at R30 per beast, erred in holding that 26 head of cattle at the Court's valuation of R30 per beast could satisfy a judgment of 25 head of cattle at R40 per beast in terms of the judgment in Case 49 of 1967.

(e) That the three head of cattle which died in the custody of the Headman included in the 29 head of cattle attached by virtue of the Warrant of Execution in Case 49/67 (B.A.C. Court Case 77/1963) died to the prejudice of the Appellants in the case as the Messenger of the Court had not as yet accounted to the Respondent in Case 49/67 who is Appellant in the instant case.

(f) That the Appellant in the instant case, who was Respondent in Case 49/67 cannot by reason of the judgment in the instant case re-issue the Warrant of Execution in Case 49/67 on which is endorsed the execution of the full judgment in the said case."

It is not disputed that a warrant of execution was issued against Plaintiff 1 and Keke in terms of the above judgment and that, excluding sheep and goats which are not here in question, the Deputy Messenger of the Court attached on 29 February 1968 20 head of cattle from Keke and six from Defendant 1, i.e. 25 to satisfy the judgment and one to cover the Messenger's costs, and that they were handed over to the headman for custody as a permit was not immediately available for their removal. On 3 April 1968 the Messenger received a letter from Defendant's attorney directing him to attach five more cattle which Plaintiff was alleged to have hidden away and subsequently three were attached. Of the 29 head attached 25 were taken by Defendant, three died and one was for costs. Defendant contended that he had received 25 head in satisfaction of his judgment and was not responsible for the loss occasioned by the death of the other three which died under attachment.

Mr Muggleston who appeared for the Defendant did not press ground (d) of the appeal. However, he contended that the basis of the claim as set out in the plea was that the three cattle claimed belonged to Plaintiff and were not liable to attachment as the judgment on which the writ was based only related to specific cattle which did not include those belonging to Defendant. In other words the question to be decided on the pleadings was whether the three cattle belonged to Defendant or not. However, it is quite clear from the evidence led in the case, and the Commissioner's reasons for judgment and the notice of appeal, that the question where the Plaintiff or the Defendant should suffer the loss occasioned by the death of the three cattle after attachment and before delivery to defendant should be borne by the former or the latter was fully canvassed and was the point on which the case was decided.

The original judgment was, *inter alia,* for delivery of 25 head of cattle or their value at R40 each and when the Messenger took possession of the cattle in the presence and with the concurrence of the Defendant they were judicially attached vide subrule 70 (4) of the Rules for Bantu Affairs Commissioners' Courts contained in Government Notice 2083 of 1967, and "The Civil Practice of the Magistrates' Courts in S.A." by Jones & Buckle, 6th Ed. at p. 653/4. The writ was satisfied and as conceded in the last paragraph of the Notice of Appeal, it was of no further force and could not be re-issued.

An interpleader action was instituted by Plaintiff after the 26 cattle had been attached and the letter written to the Messenger by Defendant's attorney was obviously an attempt to have more cattle available should the interpleader claim succeed. He clearly had no right to instruct that more cattle should be attached nor should the Messenger have acted on his letter. See Jones & Buckle at p. 649 and the case of *Duba* and others *vs Ketsikili* and others, 1924, E.D.L. 332, and p. 343, in which it is stated: "Now in the case of *Clissold vs Cratchley* [(1912) (2) K.B.D., p. 244] it was held that upon payment of judgment debt to a party authorised to receive it the judgment is *ipso facto* at an end and the subsequent issue of a writ and levy of execution was held to be an actionable trespass without proof of malice." In the instant case the Messenger was the person authorised to receive the judgment debt, i.e. the cattle, and the Headman held them as his agent. Immediately the Messenger took possesson the cattle were held for the benefit of and at the risk of the judgment creditor, i.e. present Defendant. In this regard it is interesting to note that the money for the skins of the three cattle which died was paid to Defendant. The Plaintiff is therefore entitled to the return of the cattle seized over and above the requirements of the writ and the appeal is dismissed with costs.

Adendorff and Botha, Members, concurred.

For Appellant: Mr K. Muggleston.

For Respondent: Mr A. T. Berrange.

IN THE SOUTHERN BANTU APPEAL COURT

MAPHOTHOZA MLENGANA vs BHUBHANI DALIBANGO

B.A.C. CASE 50 OF 1969

UMTATA: 16 June 1970. Before Yates, President and Messrs Adendorff and Toni, Members.

ACTION FOR DEFAMATION—PRIVILEGED OCCASION

Summary: At a public meeting held at the Headman's (Defendant's) kraal to discuss stock thefts and methods of preventing them Plaintiff was accused of being a stock thief.

Held: As the meeting was a public one and Defendant was in a position of authority and responsible for ensuring law and order in his location it was a privileged occasion and no speaker would incur liability for contumelia unless *animus injuriandi* was proved.

Appeal from the Court of the Bantu Affairs Commissioner, Elliotdale.

Yates (President) delivering the judgment of the Court.

Due cause having been shown an application for condonation of the late noting of the appeal was granted.

This is an appeal against a judgment of absolution from the instance with costs at the close of Plaintiff's case in an action in which Plaintiff (now Appellant) sued Defendant (now Respondent) for an amount of R360. His particulars of claim were as follows:

"Against Defendant for payment of R360 being in respect of—

(a) value of the houses, R100;

(b) fencing, R60;

(c) I had to run away with my family in view of the attitude of the Defendants and in consequence my dignity was impaired, in the result I suffered damages in the extent of R200.

Wherefore Plaintiff prays for judgment against the Defendants jointly and severally the one paying the others to be absolved."

The summons, as was conceded by Mr Koyana, did not disclose a cause of action. No reason is given for claiming R100 for houses or R60 for fencing and the Court is left completely in the

dark in regard to the basis of these claims. The third claim is not one for damages for defamation nor is any indication given of how Plaintiff's dignity was impaired, or what Defendant's "attitude" was. Finally there is only one Defendant cited so that the "joint and several" claim has no application.

However, Defendant did not except to the summons and his plea is as follows:

"1. He denies being liable to Plaintiff in the R360 claimed or in any other amount and puts Plaintiff to the proof thereof.

2. Ad paras A & B, he denies causing any damage to Plaintiff's house and fencing and puts Plaintiff to the proof thereof.

3. Ad para (C) he denies causing Plaintiff to run away with his family and puts him to the proof thereof.

He accordingly denies that Plaintiff has suffered any damages whatsoever and puts Plaintiff to the proof thereof."

The Court and the attorneys appear to have accepted that Claims A and B were for damage to Plaintiff's property resulting from his enforced departure and that Claim C was for contumelia in that he was accused of being a stock thief.

An appeal has been brought against the judgment on the grounds: "1. That none of the parties concerned in this matter had a right to evict the Plaintiff in the way they did. (2) That the learned Bantu Affairs Commissioner erred in holding that the Plaintiff has suffered no damages inasmuch as evidence shows that he in fact suffered damages. (3) That the judgment is against the weight of evidence and probabilities of the case and is not supported thereby."

Plaintiff alone gave evidence to the effect that at a meeting of the residents of the location of which Defendant was the headman it was stated that he was a stock thief and Defendant, amongst others, suggested that he should be compelled to leave the area. The matter was subsequently taken to the Tribal Authority where he was ordered to leave within three days. He took his personal belongings and the doors of his huts but left everything else behind and did not go back to retrieve anything as he was afraid that he would be killed.

He gave evidence as to the value of his huts and fencing left behind but his evidence in regard to damage thereto was hearsay and no damage was proved.

If it is accepted that the third claim was one for defamation then obviously the defence must be that the words were uttered on a privileged occasion. As this was a public meeting presumably called to discuss the question of stock thefts and means for preventing them and where the Defendant was in a position of authority and responsible for ensuring the maintenance of law and order in his location then there can be no doubt that this was a privileged occasion (see Maasdorp, Vol. IV, Seventh Ed. at pages 111/113) and that therefore speakers would incur no liability unless *animus injuriandi* i.e. malice is proved which is not the case here. See cases cited in Warners' Digest of S.A. Native Civil Case Law at paragraphs 2325/6.

The appeal therefore is dismissed with costs.

Adendorff and Toni, Members, concurred.

For Appellant: Mr D. Koyana.

For Respondent: Mr P. Rose.

IN THE SOUTHERN BANTU APPEAL COURT

SINYUDU MAKINZI, duly assisted by NOKWEDINI NKUMBI vs SABAWU MTEZA

B.A.C. CASE 53 OF 1969

UMTATA: 17 June 1970. Before Yates, President and Messrs Adendorf and Jordaan, Members.

RESCISSION OF JUDGMENT—WHO SHOULD APPLY

Summary: Plaintiff had obtained a default judgment. An application was made for its rescission by a relative of Defendants. Plaintiff contended that not the Applicant but another relative was the correct person to represent the Defendant. This contention was upheld and a subsequent application by the person so designated was made for the rescission of the judgment. This, however, was refused on the ground that the matter was *res judicata.*

Held: That *res judicata* did not apply.

Held further: In the absence of wilful default and as a *bona fide* defence was disclosed by the affidavits the rescission of the default judgment should be granted.

Appeal from the Court of the Bantu Affairs Commissioner, Elliotdale.

Yates (President) delivering the judgment of the Court:

In this case Plaintiff (now Respondent) sued Defendant, whom he alleged was a minor and dowry eater of Novangile, duly assisted by his uncle and guardian Nokwedini Nkumbi, for the return of his wife or seven head of cattle or their value of R30 each. He averred that he had paid dowry of 10 head of cattle and a horse and that Novangile had deserted him seven years previously and although "putumaed" on several occasions she had refused to return to him. Three children were born of the marriage and a wedding outfit supplied so that failing the return of his wife he claimed seven head of cattle. No appearance to defend was entered and on 4 September 1969, a default judgment was granted.

One Malayilayi Mgwaxulana on 19 September 1969, applied on behalf of the Defendant for the rescission of the judgment and stated in his accompanying affidavit that he was Defendant's uncle and the "eye" of his kraal in the absence of Nokwedini Nkumbi who had left for the mines in May of that year.

He stated further that on receipt of the summons he had consulted Plaintiff's attorney and that Plaintiff's wife was subsequently returned to him (Plaintiff) and he considered that the matter was then closed. It was not until Defendant's cattle were attached that he learned of the default judgment. He also averred that Defendant had a good and *bona fide* defence to Plaintiff's claim in that even if Novangile had deserted Plaintiff, five head of cattle only has been paid as dowry and four children were born of the union so that in the event of a dissolution of the customary union only one beast was repayable.

Plaintiff in his replying affidavit confirmed that he had fetched his wife but alleged that she had only stayed at his kraal for one night before deserting again.

Plaintiff also denied that Malayilayi was entitled to act for Defendant Sinyudu and stated that the person who was entitled to act was one Sixaku.

On 13 October 1969, this application for rescission of the judgment was refused with no order as to costs. Sixaku Zwilibi then applied on behalf of the defendant for a rescission of the judgment alleging in his accompanying affidavit that he was the paternal uncle of defendant and nearest male relative in the absence of Nokwedini. No replying affidavit was filed and this claim was not refuted.

This application was dismissed on 21 November 1969, again with no order as to costs (although in his written reasons for judgment the Commissioner stated that costs were awarded).

An appeal has now been brought on the grounds that:

"(1) The Presiding Officer erred in accepting that the matter was Res Judicata in view of the fact that the application on 13 October 1969, was dismissed solely on the ground that Malayilayi Mgwaxulana had no locus standi and not on the merits;

(2) the allegations of Sixaku Zwilibi regarding the merits of the application stand uncontradicted and the Presiding Officer should therefore have allowed the application."

There is nothing on the record to indicate for what reason the first application was refused but in view of Plaintiff's allegations in his affidavit that Sixaku and not Malayilayi was the correct person to represent the defendant, that this was not refuted and that in fact Sixaku did then apply for the rescission it is probable that it was refused because the court was satisfied that Malayilayi had no *locus standi,* and that the merits of the application were not considered. If he had no *locus standi* then of course his application was a nullity and the way was left open for a proper application to be made.

As pointed out at page 88 of "Native Law in S.A." by Seymour, 3rd. Ed. " . . . in the event of the inability of the absent kraal-head to give instructions, it is competent for his nearest male major relative in the district to conduct or give instructions for the conducting of the defence."

Sixaku was thus entitled to take the necessary steps.

The Assistant Bantu Affairs Commissioner came to the conclusion that because the first application was refused then *res judicata* applied and had the matter been decided on its merits there might have been some force in his contention for, as pointed out by Mr Koyana, it is only when a final judgment has been given that *res judicata* applies. See S.A. Law of Evidence by Hoffmann at page 392. Plaintiff cannot have it both ways. He cannot first contend that Malayilayi was the wrong person to sue and then when the correct person institutes proceedings turn round and contend that the matter had already been decided.

This view finds support in the comments at page 682 in Jones and Duckle, 6th Ed. to Rule 46 (9) (which is the same as Rule 77 (7) of the Rules for Bantu Affairs Commissioners' Courts) i.e. " 'If such application is dismissed'. These words are equivalent to 'if such application is finally disposed of on its merits'; they do not apply to dismissal on account of short service, non-appearance, defects in procedure, etc. In the latter cases the application should merely be struck off the roll."

It is quite clear that in the absence of Defendant's guardian his other male major relatives have all along been desirous of defending the action and there can be no question of being in wilful default. Furthermore the affidavits accompanying the application set out a bona fide defence and an acceptable explanation for defendant's failure to enter an appearance to defend and file a plea.

The appeal is allowed with costs. The judgment of the Bantu Affairs Commissioner's Court is set aside and for it is substituted: "Application for rescission of the default judgment which was granted on 4 September 1969 is allowed with costs."

Adendorff and Jordaan, Members, concurred.

For Appellant: Mr D. Koyana.

For Respondent: Mr P. Rose.

NORTH-EASTERN BANTU APPEAL COURT

DHLAMINI vs DHLAMINI

B.A.C. CASE 76 OF 1969

PIETERMARITZBURG: 6 July 1970. Before Craig, Acting President, Neuper and Warner, Members.

APPEAL AND REVIEW

PROCEDURE

Appeal—Application for review—condonation.

Summary: Defendant sought to bring a matter on appeal and review on the same grounds and to apply for condonation of late noting of both all by means of one document.

Held: That appeal, review and application for condonation are separate facets of the approach to the Appeal Court and must be tendered by means of separate and distinct documents.

Held: That grounds of appeal and for review must, of necessity, differ.

Cases referred to:

Mbende vs Nkengwana, 1930, N.A.C. (C. & O.) 22.

Nzimande vs Funeka, 1938, N.A.C. (N. & T.) 82.

Matonsela vs Matonsela, 1952, N.A.C. 257 (C).

Mbanjwa vs Tshezi, 1933, N.A.C. (N. & T.) 17.

Tynyiswa vs Dinyana, 1945, N.A.C. (C. & O.), 85.

Works referred to:

A Digest of S.A. Native Civil Case Law by Warner.

Rules referred to:

Bantu Appeal Court Rules 7, 22.

Proceedings from the Court of the Bantu Affairs Commissioner, Paulpietersburg.

Craig, Acting President, deliverng the judgment of the Court:

The Court questioned the acceptability of the procedure adopted by Defendant's attorney to bring this matter before this Court. It consisted of a document, to which was attached an affidavit, and which purported to to be (1) an application for condonation, (2) a notice of appeal and (3) an application for review of the proceedings in question, all lumped in one. The document reads as follows:

"Sirs, Please take notice that an application on behalf of the above-named Defendant will be made to the Bantu Appeal Court (North-Eastern Division) on a date, time and place to be fixed by the Registrar of the said Court for: (a) An Order of Court, condoning the late filing of an application to review the proceedings in the above case; and (b) an Order condoning the late noting of the appeal against the judgment granted in the above Court in the above case on 24 February 1969.

Take further notice that the Defendant's affidavit, and a copy of the Chief's written record, duly certified by the Clerk of the above Court, and which will be used in support of the application are herewith annexed.

Upon the application being granted, the appeal and review will be prosecuted forthwith on the following grounds:

(1) According to the certified copy of the Chief's written record annexed hereto, the judgment of the Chief was granted against a woman Santjie Dhlamini, and not against Defendant. It is therefore irregular for the name of Santjie to be omitted and substituted by the name of the Defendant, when the case came for hearing on appeal before the above Court.

(2) The judgment of the Chief was granted on 27 April 1968 and the time for noting the appeal against the judgment had therefore expired when the notice of Appeal was issued on 12 November 1968, and in the absence of an application to condone the late noting of the appeal, having been made and granted, it was not competent for the Court to entertain the Appeal and consider the merits of the case."

(3) In any event the Court erred in giving judgment before Defendant closed his case."

Each of these items is a separate facet of the approach to this Court and each is governed by a different rule or rules. Each facet must be presented by a separate document or documents—*Mbende vs Nkengwana,* 1930, N.A.C. (C. & O.) 22 Warner's "Digest" para. 414).

What purports to be a notice of appeal is no more than a statement of intention to prosecute an appeal on certain specified grounds. It contains no formal noting of an appeal against the whole or part of the judgment—see Bantu Appeal Court Rule 7 which is peremptory.

Applications for review are governed by Bantu Appeal Court Rule 22. A review must, *inter alia,* be addressed to the judicial officer concerned and not to the Clerk of Court. [*Nzimande vs Funeka,* 1938, N.A.C. (N. & T.) 82 (Warner 4341.)]

The grounds for appeal and for review must of necessity differ—*Matonsela vs Matonsela,* 1952 N.A.C. 257(C) and *Mbanja vs Tshezi,* 1933, N.A.C. (N. & T.) 17 (see Warner's "Digest" paras 4342 and 4339, respectively). The document complained of gave one set of grounds and sought to leave it to this Court to decide which supported an appeal and which a review. It was for the attorney concerned to decide on which grounds he proposed to appeal and on which he proposed to apply for review.

The Court ruled that no appeal was properly before it and rejected that portion of the notice.

Wit much reluctance the Court decided to consider the question of reviewing the proceedings before it because of what the record revealed.

In the first place the applicant's attorney has misdirected himself. The first two grounds for review are directed at the case between Elfas Dhlamini (Plaintiff) and Santshi Dhlamini (Jotham Dhlamini) vide the Chief's written Record A/353750 handed in by applicant himself when he applied for review. That case was not, however, the subject of appeal in the Court *a quo* so it appears to be irrelevant. The matter which was in issue was the judgment of the Chief's Court in the case of Elfas Dhlamini (present Plaintiff/Respondent) and Jotham Dhlamini (present Applicant) who was, vide his own evidence, the Defendant in both Courts below. At this stage I pause to point out to the Bantu Affairs Commissioner that the original Chief's Written Record in this latter case should have been filed of record with the Notice of Hearing of Appeal—Form B.A. 503 and his Clerk of Court should be instructed accordingly.

The first and second grounds for review were inapt and were rejected.

The third ground of review was then considered. The Bantu Affairs Commissioner erred in not indicating clearly that Defendant had closed his case and the omission should in the future be guarded against. There is nothing on record however, to indicate that the Applicant (Defendant) had further evidence to tender or that he desired to address the Court [see *Tynyiswa vs Dinyana*, 1945, N.A.C. (C. & O.) 85 (Warner's "A Digest of S.A. Native Civil Case Law" para. 4245)] so whether or not there was an irregularity within the ambit of Bantu Appeal Court Rule 22 is not known.

Mr Menge argued that it was irregular for the Chief to have tried the instant case as paragraphs 8 and 9 of his reasons for judgment appear to indicate that he was or should have been a witness in the case and was not unbiased. This point, however, was not raised in the Court below, as it should have been, nor was it specifically raised in the application for review in this Court.

In the result the application for review was refused, with costs.

Neuper and Warner, Members, concurred.

For Appellant: Adv. W. O. H. Menge.

For Respondent: Adv. D. P. Kent.

IN THE CENTRAL BANTU APPEAL COURT

HLABATHI vs NKOSI

CASE 18 OF 1970

JOHANNESBURG: 29 October 1970. Before Potgieter, President; and Thorpe & Bowen, Members.

MAINTENANCE

Enquiry under Maintenance Act, 1963.—*Absence of maintenance officer during hearing—Maintenance of illegitimate child—Means of mother—Representation of parties and functions of presiding officer and maintenance officer discussed*

Summary: Complainant alleged that the Respondent was the father of her five illegitimate children. The Respondent admitted paternity of the eldest child but denied that he was the father of the other four. Though it appeared that a maintenance officer had duly instituted the enquiry, he was not present during the proceedings in Court. After hearing the evidence of the Complainant and the Respondent, and their witnesses, the presiding officer declared that the Respondent was the father of all five children and made an order that he should maintain them at the rate of R7 per month. There was no evidence as to the Complainant's means.

Held: There was insufficient evidence to support the affiliation order in so far as it related to the four younger children.

Held, further: No Maintenance Order could be made in the absence of evidence of the Complainant's means.

Held, further: (Potgieter, President; and Bowen, Permanent Member): The absence of a maintenance officer during the hearing constituted a fatal irregularity, and this alone necessitates the setting aside of the proceedings.

Cases referred to:

S. vs Swart 1965 (3) S.A. 454.

Pieterse vs Pieterse 1965 (4) S.A. 344.

Moodley vs Gramani 1967 (1) S.A. 118.

Buch vs Buch 1967 (3) S.A. 83.

Central Bantu Appeal Court—Unreported

Mlotja vs Mpela Roll 10/66.

Magabane vs Magabane Roll 4/68.

Buthelezi vs Zulu Roll 22/69.

Appeal from the Maintenance Court of the Bantu Affairs Commissioner, Germiston.

Thorpe, Permanent Member:

As the Respondent in the present appeal proceedings (hereinafter referred to as the Complainant) was apparently not *au fait* with an official language and as Mr Roth, Counsel for the Appellant (hereinafter referred to as the Defendant), addressed us in English, I shall use that language in this judgment.

This is an appeal by the Defendant against the finding by the Bantu Affairs Commissioner, Germiston, in proceedings under the Maintenance Act of 1963, Act 23 of 1963 (hereinafter referred to as the Act), that the Defendant is the father of five children born to the Complainant, despite his denial of paternity of all but the first child, and against an order that he pay maintenance in respect of the five children.

The ground of appeal are—

"1. the Commissioner erred in finding that the Respondent was the father of the Applicant's children, Hendry, Limon, Elizabeth and Lydia;

2. the Commissioner erred in finding that the Respondent should pay the sum of R7 per month as and by way of maintenance;

3. (a) the parties being unrepresented, the Commissioner failed to make full use of his powers in terms of Act 23 of 1963, to—

(i) ascertain the full extent of the Respondent's expenditure;

(ii) ascertain the earning capacity and or other income of the Respondent;

(iii) ascertain the needs of the children;

(iv) fully cross-examine all witnesses as to the paternity of the four children referred to above;

(b) the Commissioner erred in finding that the Applicant had discharged the onus on the balance of probabilities of proving that the Respondent was the father of the four children referred to above;

(c) the Commissioner errred in presiding over the enquiry in the absence of and without the due fulfilment of the duties of a maintenance officer within the meaning of the Act aforesaid;

(d) the Commissioner erred in not taking into account sufficiently, or at all, the joint responsibility of support of the children by the Applicant as well as the Respondent;

(e) the Commissioner erred in ordering the Respondent to pay the sum of R7 per month as and by way of maintenance for the five children."

Proceedings were initiated in the court *a quo* by means of a sworn statement by the Complainant that the five children in question were her children and that the Defendant was their father; that since the birth of these children the said Defendant had not provided for their maintenance; that she had asked the Defendant to contribute towards the maintenance of the said children but that he has neglected to do so. This affidavit was

sworn to before a certain "A. Spies" who signed as Clerk of the Court, Bantu Affairs Commissioner, Germiston. The form used for this affidavit is a printed form J.495 which is headed: Complaint under section 18 (2) of Act 33 of 1960, Act 7 of 1895 (C.), Act 10 of 1896 (N.), Ordinance 44 of 1903 (T.) or Ordinance 51 of 1903 (O.F.S.). None of these enactments have any bearing on an enquiry under the Maintenance Act, 1963; in fact all except the first have been repealed. It would seem desirable that a form more suitably headed should be used and that any reference to civil or criminal proceedings should be omitted. Perhaps the Complainant could be required to state whether the Defendant admits or denies paternity of the children in question, as this would be of assistance to the maintenance officer in deciding what witnesses should be called.

There is also a summons requiring the Defendant to appear before the Bantu Affairs Commissioner's Maintenance Court, Germiston. This was on a roneod form requiring him to give evidence and to show cause (if any) why an order under the provisions of the Act should not be made against him to maintain or contribute towards the maintenance of five minor children to wit: Elsie, Henry, Limon, Elizabeth and Lydia. The form also contains an order that the Defendant should produce at the trial a statement signed by his employer giving full particulars of all his earnings. The summons was signed by the same person before whom the complaint had been sworn namely A. Spies, but on this occasion in his capacity as Maintenance Officer, Germiston.

Mr. Roth conceded that if A. Spies was the maintenance officer then the minimum requirements of section 4 (1) of the Act for the institution of a maintenance enquiry had been complied with. It is noted that in his reasons the Commissioner stated that the complaint was handed in by the maintenance officer.

A large proportion of appeals heard in this Court are from orders made by maintenance courts. It would seem that the requirements of the Act and the functions of a maintenance officer are not properly understood. *Buch vs Buch* 1967 (3) S.A. 83 clarifies the position. That case deals with an application to vary a maintenance order but the same principles would be applicable to an enquiry before a maintenance court instituted with a view to an original order. At pages 86 and 87 appears the following:

"Under the Maintenance Act, No. 23 of 1963, an enquiry into maintenance is no longer a matter left to the parties who can submit such evidence as they deem fit . . .

In my opinion the Act has introduced new concepts. It is no longer a party who is *dominus litis* and who launches the action or application.

It seems that any interested person including of course a former husband or wife, may lay a complaint with a maintenance officer concerning the failure to pay maintenance for another person or himself or herself. Such a maintenance officer having investigated the complaint may then institute an enquiry in a maintenance court.

Where a Maintenance Order is in existence the person laying the complaint must show to the maintenance officer that sufficient cause exists for the substitution or discharge of the Maintenance Order. He then investigates the complaint and may then institute an enquiry. It seems therefore that if the maintenance officer is not satisfied that sufficient cause exists he need not institute the enquiry.

If he decides on an enquiry he is then entitled and I think is in duty bound to lay all the relevant evidence obtainable before the Court. He may summon persons and cause books, documents and statements to be laid before the Court.

It follows that, if the parties are legally represented, his task is considerably lightened, but it does not follow that he is *functus officio*. If the parties do not produce existing relevant evidence, he is entitled to do so and where necessary should probably do so. He would also be guided by the presiding officer, because the Rules promulgated under section 15 of the Act as printed in the *Gazette*, dated 22 January 1966, provide in Rule 8:

"The Court may at any stage of the enquiry summon or cause to be summoned any person as a witness or examine any person in attendance, though not summoned as a witness, and may recall and re-examine any person already examined."

In view of these provisions it seems to me no longer correct to speak of an onus resting on a party in connection with proceedings before a maintenance court."

The last paragraph of the above excerpt lays down no more than that there is no onus on a party to show cause why an order should be made or varied, but this dictum would not affect considerations which the Court after a full enquiry would have to take into account when deciding whether, for example, paternity is proved.

It is to be noted that is is the duty of the maintenance officer to call where necessary any witness who may advance the enquiry whether favourable to the complainant or defendant. *Buch* makes it clear that the maintenance officer does not represent either party and it was for this reason that in *Magabane vs Magabane* heard in the Central Bantu Appeal Court, Roll 4 of 1968 (unreported), it was held that a maintenance officer cannot agree, on behalf of a complainant, to a variation of a maintenance order. It would appear that the maintenance officer must *inter alia* assist the presiding officer in the examination and cross-examination of witnesses, whether for the complainant or the defendant.

The investigation leading to the decision whether or not to institute an enquiry need not be exhaustive. Presumably where paragraph (a) of section 4 (1) is applicable the maintenance officer need merely satisfy himself from the sworn complaint that the Respondent is *prima facie* legally liable to maintain and is either not doing so at all or at least not to the extent that could be

expected. Section 4 does not empower a maintenance officer to cause any person to be summoned to appear before he has instituted an enquiry, so a maintenance officer apparently cannot compel a respondent or any one else to appear before him to enable him to investigate a complaint.

The interests of justice require that a sufficiently full enquiry should be held and generally this end would be easier of attainment if a maintenance officer could be present throughout the hearing in Court so that he could do the bulk of the questioning in so far as this task is not performed by a legal representative. On the subject of legal representation, it is not clear whether a Complainant who is herself legally liable to maintain the child in question is entitled to bring her own legal representative to the enquiry for the purpose of assisting her by leading her evidence, by cross-examining the Defendant and his witnesses and by addressing the Court. Section 5 (2) of the Act provides that "any person against whom an order may be made under this section may be represented by counsel or an attorney," but would it be competent for a maintenance court to make an order against a Complainant where she happens also to be legally liable to contribute towards the maintenance of the child in question? One view could be that an enquiry is limited to deciding whether an order should be made against the Respondent in the enquiry proceedings. For present purposes it is not necessary to decide this question. In any event, if the interpretation of the Act in *Buch* is correct, it would seem, as already indicated, that a maintenance officer has the right and possibly at times the duty to question or cross-question any witness for either party, including the parties themselves. Especially where there is no legal representative the examination and cross-examination of witnesses by the maintenance officer would lighten the task of the presiding officer who is thus spared the necessity at times of himself descending into the arena, thereby possibly "having his view clouded by the dust of conflict." The presiding officer's right to ask questions would not be affected, but the less the need therefor the easier his task of giving a balanced judgment. It seems desirable that a complainant who is not legally represented and who seeks maintenance for herself (or himself) or for a person she (or he) is legally liable to maintain should be afforded the opportunity further to cross-question a Respondent and his witnesses, even though a maintenance officer may have undertaken this task, for the reason already mentioned, namely, that a maintenance officer does not represent a complainant.

There is nothing in the record to indicate that the maintenance officer took part in any way in the proceedings after handing in the complaint, and it must be accepted that that is the position. That the presiding officer and the maintenance officer are two distinct persons is clear from a reference to section 3 of the Act, which deals with the appointment of a maintenance officer, and section 5 (5), which refers to a request which the maintenance officer may make to the Court. Mr Roth's submission was that *Buch* makes it clear that a maintenance officer has certain duties to perform in court during the hearing and that the fact of his absence is a fatal irregularity. Claassen, J., in *Buch* seemed to assume that a maintenance officer would be present throughout the hearing, but he did not consider the situation that would

arise if he was not and I think we should hesitate to decide that the mere absence of a maintenance officer vitiates the proceedings, especially as we did not have the benefit of bilateral argument. It is possible to conceive of an enquiry conducted so thoroughly by a presiding officer without a maintenance officer being in court that the Respondent in such an enquiry suffered no prejudice. In those circumstances the absence of the maintenance officer may, possibly, not affect the validity of the proceedings. On the other hand it is possible that the absence of a maintenance officer during a hearing signifies that no enquiry has been held in terms of the Act. However, it is not necessary to decide this point, because there is another ground on which the present proceedings must be set aside, namely that material aspects of the case were not enquired into at the hearing, and the Appellant may well have been prejudiced thereby. This ground must now be dealt with in some detail, although it will not be necessary to do so exhaustively. I shall quote the evidence obtained from each witness in turn and comment thereon before proceeding to the next witness.

The Complainant gave the following evidence:

"Ek is 'n Bantoevrou en is 28 jaar oud en woon Nkakistraat 1548, Tokoza, Alberton. Ek het die Verweerder gedurende 1955 ontmoet. Ek het met Verweerder vir eerste keer gemeenskap gehad gedurende 1956. Dit was Februarie 1956. Daarna het ons gereeld gemeenskap gehad. Gedurende Februarie 1956 het ek swanger geraak. Gedurende Oktober 1956 het ek geboorte gegee aan 'n dogter Elsa. Verweerder het R36 seduksie gelde aan my pa betaal. Verweerder het nie die kind onderhou nie alhoewel ek hom gevra het. Ek is toe na Volksrust waar ek toe gewoon het. Verweerder het ook in Volksrust gewoon. Verweerder het aanhou om vir my te kuier. Ons het gereeld gemeenskap gehad. Ek het weer gedurende Maart 1958 swanger geraak en op 25 Desember 1958 is 'n seun Hendry gebore. Verweerder het nie onderhoud betaal. Na die geboorte van Hendry het Verweerder steeds by my besoek afgelê en met my gemeenskap gehad. Gedurende Julie 1959 het ek weer swanger geraak en op 17 Maart 1960 geboorte gegee aan Limon 'n seun. Gedurende 1961 het ek en Verweerder saam na die Rand gekom. Ons het bymekaar gebly en gedurende Augustus 1962 het ek weereens swanger geraak en op 30 April 1963 is Elizabeth gebore. Ek en Verweerder het met ons verhouding aangegaan en gemeenskap gehad. Gedurende Februarie 1967 was ek weer swanger en na geboorte is die kind oorlede. Gedurende Februarie 1968 het ek weer swanger geraak. Ek het toe nog by Verweerder gewoon. Op 23 November 1968 het ek geboorte gegee aan Lydia. Na die geboorte is ek terug na Volksrust. Nadat ek teruggekeer het, het ek in Tokoza gaan woon by my suster. Verweerder het nog af en toe vir my kom kuier. Ek het Verweerder vir onderhoud vir die kinders gevra maar hy het nie gegee nie.

XX. Verweerder: Geen.

XX. Hof: Gedurende 1964 tot 1966 het ek en Verweerder saamgewoon en gereeld gemeenskap gehad, maar ek het nie swanger geraak nie. Ek was daardie tyd sieklik."

It is desirable that the issues should be made clear as early as possible in the proceedings. So far there was nothing in the record to indicate that the Court was aware of what the issues were. The Defendant had not as yet indicated whether he admitted paternity. It is realised that Bantu Affairs Commissioners have to contend with multitudinous duties and lack of staff and it may be of assistance to indicate how an enquiry under the Maintenance Act could be conducted. The suggestions that I make now are not to be regarded as hard and fast rules. It would seem that the Complainant could have been asked first to state under oath the names and dates of birth of the children in question and at that stage the Defendant could have been asked whether he admitted paternity of all or any of these children. Then in respect of the children of whom he did not admit paternity more detailed evidence could have been elicited. Obviously the fact that the Defendant asked no questions did not indicate that he was admitting any particular allegation of the Complainant. It is clear that neither he nor the Complainant understood that their failure to ask questions could be construed as meaning that they did not dispute the evidence that had been given. Thus, when the Defendant gave evidence he denied paternity of the last four children and although he did this the Complainant asked no questions in cross-examination. If after the Complainant had given the names and ages of the children the Defendant had been asked whether he admitted paternity of these children it would have transpired that he denied paternity of the last four.

One commendable method of eliciting evidence from an unrepresented litigant at an enquiry is first to obtain, by having the witness questioned by the maintenance officer, with supplementary questions by the Court, as full and as accurate a picture as possible on all material aspects, including aspects on which corroborative evidence from another witness should be available at a later stage. After that and before turning the litigant over for cross-examination the litigant should be asked whether he wishes to add anything further.

Where an unrepresented litigant says that he has no questions to ask in cross-examination, and the witness has given relevant evidence against him, it is advisable, especially at an enquiry, to ask the litigant whether this means that he admits the evidence of the witness to be correct in all material particulars. If he answers, as he usually does, that this is not so, then all material parts of the evidence of that witness should be put to him for his admission or denial, point by point. Any denial should be put to the witness to ascertain whether the witness wishes to modify his or her evidence. A litigant in an enquiry should be encouraged to ask relevant questions.

In the present enquiry it was the duty of the presiding officer to see that more details were obtained from the complainant so that her evidence could be tested. For example, the Complainant could have been asked *inter alia* the following questions:

Has Defendant ever admitted paternity, if so to whom?

When? Where?—

Were you present?

Was anyone else present?

Have you birth certificates or baptismal certificates?

Was the child full-term?

When did you first miss your periods?

How long before that did you last have intercourse with the Defendant?

Where was this?

Did anybody see the Defendant in the vicinity on that occasion?

Could you bring that person to Court? Or would a subpoena be required?

How often did he visit you?

Was the pregnancy reported to the Defendant?

By whom?

At what place?

When?

If it was reported, what did he say?

Have you any letters from the Defendant?

Please produce them with the envelopes, if possible.

The evidence of the complainant contains not much detail which could be corroborated. Some of her evidence is not clear e.g. she does not say where the first child was born, nor when she went to Volksrust or at what address she stayed. She says that Defendant stayed in Volksrust, but she does not say where. She does say that he continued to visit her, but she does not say where. She does not say that anyone saw them together. She says she and the Defendant came to the Rand together and that they stayed together and she gives the impression that she and the Defendant continued to stay together until after the birth of the child Lydia on 23 November 1968, but she does not give the address or addresses of the place or places at which they stayed. She does not say that anybody saw them living together. The Complainant mentioned her sister but did not give her name and consequently it is not clear whether Alesina or some other sister was referred to. Where a litigant or other witness mentions someone who may be able to give material evidence or who may be referred to by a subsequent witness (or who has perhaps already been mentioned by a previous witness), but does not give the name of that person, as often happens, then the witness should immediately be asked for that person's name, for the purpose of identification.

The next witness was Jeremiah Nkosi who testified as follows:

"Ek is Bantoeman en is ongeveer 70 jaar oud. Ek ken die Klaagster sy is my dogter. Verweerder het aan my seduksie geld betaal vir my dogter die Klaagster. Verweerder het R36 aan seduksie betaal. Verweerder moes toe lobolo betaal maar hy het nie. Terwyl Verweerder en Klaagster in Volksrust gewoon het, het Klaagster geboorte gegee aan drie kinders nl. Elsie, Hendry en Limon.

XX. Verweerder: Geen."

It would appear that Jeremiah Nkosi wished to convey that the Defendant and Complainant stayed together at Volksrust though he does not say so expressly. If he intended to convey this then it would appear to be contrary to the evidence of the Complainant who has said that while at Volksrust the Defendant *visited* her. Jeremiah Nkosi does not say that the three children mentioned by him had been fathered by the Defendant. Here again the Commissioner or maintenance officer should have clarified these points.

As mentioned in the headnote of *Pieterse vs Pieterse* 1965 (4) S.A. 344, "it is not sufficient for the presiding officer to take up the normal passive attitude of a judicial officer presiding at a trial. He may have to cross-examine."

The next witness was the Defendant and his evidence reads as follows:

"Ek is Bantoeman en is ongeveer 30 jaar oud. Ek ken die Klaagster. Sy was my minnares. Ek het met Klaagster gemeenskap gehad en 'n kind was gebore. Ek het seduksie aan haar pa betaal teen R36. Nadat hierdie kind drie maande oud was het ek nooit weer by die Klaagster gebly nie. Ek is gedurende 1960 met 'n ander vrou getroud en het nie 'n verhouding met Klaagster gehad nie.

XX. Klaagster: Geen.

XX. Hof: Nadat ek van Volksrust weg is het ek in Denver gaan woon. Ek het in die hostel gewoon. Ek weet nie waar die Klaagster gewoon het nie, want ek het haar nie weer gesien nie. Elsie is my kind. Ek het die kind onderhou. Ek verdien R40 per maand. Ek betaal R2,10c huishuur. Ek betaal ongeveer R12 per maand aan kos. Ek het geen ander uitgawes nie."

As pointed out previously, little turns on the fact that the Complainant asked no questions. The Defendant should have been more thoroughly examined by the maintenance officer or by the Court than he was. The Complainant's version conflicted with that of the Defendant in so far as he said that he stayed in a hostel and he should have been asked whether he had any corroborative evidence to show that he did stay in a hostel; if so, that evidence should have been produced. He could have been asked more about this alleged marriage with another woman e.g. whether he and this other woman ever stayed together and is so, where? Defendant could have been asked to produce a marriage certificate, if this was possible. His statement that he stayed at a hostel in Denver is not sufficiently full. During the period 1960 to 1968 did he never stay anywhere else? Did he ever stay with Jane? If so, where and over what period or periods? With reference to the Defendant's evidence that "nadat hierdie kind drie maande oud was het ek nooit weer by die Klaagster gebly nie." he could have been asked whether he admitted having had intercourse with the Complainant during those three months. If he admitted this a presumption would have been raised that he was the father of the Complainant's next child [*S. vs Swart* 1965 (3) 454] and this could have affected the course of the trial as to the paternity of that child.

The next witness is Jane Hlabathi who stated:

"Ek weet my man het 'n kind by die Klaagster. Terwyl Verweerder in Denver gewoon het het ek in Alberton gewoon. Ek weet niks van Verweerder se verhouding met die Klaagster nie.

XX. Klaagster: Geen."

In the case of this witness clarification could also have been obtained in view of her statement that she was married to the Defendant. She could have been asked whether she and the Defendant ever lived together; if so, where and for how long.

The next witness was Alesina Zwane whose evidence reads:

"Ek ken die Klaagster sy is my suster. Verweerder en Klaagster was minnaars. Ek weet nie van wanneer af nie. Ek het na Durban gegaan gedurende 1951 toe was hulle al minnaars. Ek het in 1963 teruggekom toe was hulle nog minnaars. Verweerder en klaagster tesame het vir my kom kuier.

XX. Verweerder: Julle het by my kom kuier.

XX. Hof: Sedert 1964 toe ek van Durban teruggekeer het tot end 1968 het ek die Verweerder en Klaagster baie in mekaar se geselskap gesien. Hulle het soms by my aan huis gekom."

It would appear from the cross-examination by the Defendant that he denied that he had ever visited Alesina. Her evidence would appear to be incorrect as regards her reference to 1951, because if the evidence of the Complainant and the Defendant as to their respective ages is accepted then according to Alesina they were lovers when they were respectively nine and eleven years old. Possibly she meant 1961. Alesina does not say from what address or place she left when she went to Durban or how she knew that the Complainant and the Defendant were lovers at that time. She does not say to what address she came when she returned from Durban in 1963. She gives no details as to the dates or addresses at which the visits were made or their frequency.

The last witness was Belina Msimanga. She testified as follows:

"Ek ken die Klaagster sy is 'n broerskind van my. Klaagster en Verweerder het ongeveer twee jaar gelede na my huis gekom en vir my kom kuier. Die kind was die dag ook daar. Verweerder het aan my gesê dat die jongste kind van die Klaagster lyk net soos hy. Verweerder het aan my gesê dat dit sy kind is. Ek het die twee nie weer gesien nie.

XX. Verweerder: Jy weet waar ek woon."

She does not say to what address the Complainant and Defendant came when they visited her and there is no explanation as to why the Defendant should have said that the youngest child looked just like himself or why he should have said this was his child. Without further explanation this witness is certainly suspect. It would seem from her evidence that only one visit may have taken place namely approximately two years previously. If that is so it is remarkable that the Defendant should have no apparent reason to say that a particular child was his. It would appear that the Defendant denied the incident.

On the issue of paternity of the four younger children the enquiry has been inadequate.

In his reasons for judgment the Commissioner expressed the view that there was an onus on the Defendant to show that he was not the father of the four younger children. He mentioned *S. vs Jeggels* 1962 (3) S.A. 704 as authority for this proposition and quoted the following:

"The effect is to create a presumption that the man pointed out as the father by the mother is in fact the father. Onus to rebut presumption on the man. Can be rebutted only by clear proof."

But this presumption is only created, *inter alia*, when the man had admitted intercourse. An even more apposite authority on this point is *S. vs Swart supra,* in which the Appellate Division decided that the presumption is created when a man admits intercourse "watter tyd ookal." However, the significance of this expression was dealt with by this Court in *Buthelezi vs Zulu,* Roll 22 of 1969 (still to be reported), in which it was held that an admission of intercourse prior to the birth of one child casts no onus on the man to show that he could not be the father of a subsequent child. In the present case the Defendant did not admit having had intercourse with the Complainant after the birth of the first child, and therefore there was no onus on him to prove that he was not the father of the four younger children. The Court *a quo* had to come to a decision on the probabilities, with due regard to the caution which the Court must exercise in dealing with an allegation by an unmarried woman that the man she names is the father of her child. *Moodley vs Gramani* 1967 (1) S.A. 118 at 120A.

There is the question whether this Court should allow the order in so far as it relates to the maintenance of the child Elsa who is admittedly the child of the Defendant. Mr Roth's submission on this point is that it is not competent for a maintenance court to make an order as to the quantum of maintenance until it has enquired into various factors, and this would appear to be the position. It must be remembered that especially in regard to illegitimate children the obligation to support is shared by the mother and the mother's income must be enquired into, as a matter of law, before an order can be made, and this was not done. In *Mlotja vs Mpela* Roll 10 of 1966 of the Central Bantu Appeal Court (unreported) the following appears:

"In deciding what amount a father should pay as maintenance for his child, various factors must be investigated and considered by the officer conducting the enquiry. Amongst these are the means of the father, his obligations to others, the needs of the child having regard to its age and health, the means of the mother and her ability to fulfil her duty of contributing towards the child's maintenance and the normal standard of living of the parties."

In the instant case the Defendant did not consent to any Maintenance Order, but even if he had consented it is debatable whether an order could have been made without an enquiry into the factors mentioned above, although it is to be observed

that section 5 (7) of the Act provides that a defendant could consent, in writing, to a Maintenance Order and that this consent, if produced at the enquiry by the maintenance officer, may be made an order of Court even in the absence of the Defendant.

The appeal is upheld, with no order as to costs. The case is remitted to the Court *a quo* to conduct a new enquiry *de novo* in terms of the Maintenance Act, 1963, No. 23 of 1963, and before a different Presiding Judicial Officer, who must thereafter deliver a fresh judgment.

I would like to add a few words in clarification of my views as to the legal representation of a Complainant who is himself or herself also legally liable to maintain another person.

Section 5 (2) of the Act reads:

5 (2) Any person against whom an order may be made . . . may be represented by counsel or an attorney.

It follows that if an order can be made against a Complainant he or she is entitled to be represented by counsel or an attorney. Proceedings in terms of the provisions of section 4 (1) (a) or (b) of the Act are instituted for the purpose of "enquiring into the provision of maintenance in respect of the person concerned," and "an order may be made against any person found to be legally liable to maintain any other person." See section 5 (4). The phrase "legally liable to maintain any other person" is not defined in the Act and must therefore be construed according to common law. Thus, a mother and a father are both legally liable to maintain an illegitimate child, and an order may be made against either or both of them. If both parents are summoned to appear at a maintenance enquiry, perhaps both are entitled to be legally represented. Perhaps it does not matter who lodges the complaint. The purpose of an enquiry is general. It is not to enquire only whether a specific person should maintain, but it is for the purpose of "enquiring into the provision of maintenance in respect of the person concerned." On the other hand, if a child is staying with its mother and a maintenance enquiry is instituted on her complaint that the absent father does not maintain, would a maintenance court have jurisdiction to make an order not only against the father but also against the Complainant merely because it finds that she should also contribute? I think that no order against the mother would be competent, and that her ability and duty to help in supporting the child is no more than a factor to be considered in fixing the quantum payable by the father. Where, however, the child stays with a grandparent and the mother complains that the father is not providing sufficient maintenance, the enquiry might disclose that the child is not being maintained adequately and that the father is unable to contribute whereas the mother, who is well able to do so, is not making any contribution. A Maintenance Order could then perhaps be made against the mother; if this is so she would be entitled to legal representation. It may be argued that if the legislature had intended that a Complainant should be entitled to representation it would have said so. The answer to this could be that *locus standi* to lodge a complaint is not limited by the Act to any particular category of person. It would seem that anyone who considers, for example, that a child is not being properly

maintained may make a complaint in terms of section 4 (1). The situation could thus arise that the Complainant is a person against whom an order cannot be made and this could be the reason why section 5 (2) is worded as it is, without referring to a Complainant. However, whether certain categories of Complainants are entitled to legal representation is a question which does not arise out of anything in the record of the proceedings of the Court *a quo* and has not been mentioned in or during argument before us, and for this reason I feel that we should not commit ourselves to a ruling thereon.

Bowen, Permanent Member:

I do not feel that it was necessary to comment on the question of legal representation of a complainant as it was not an issue in this case. It is however clear from the Act that any person against whom an order may be made, may be legally represented. I am of opinion, therefore, that a Complainant is entitled to legal representation provided that such person is legally liable to maintain any other person and provided that he/she has been summoned to appear before the Court in terms of section *four* of the Act.

I would moreover go further in regard to the question whether the presence of a maintenance officer during the hearing of the enquiry is essential. This aspect formed one of the grounds of appeal in the present case and it was also raised in another maintenance enquiry appeal which came before us this session. In the latter case the Bantu Affairs Commissioner ruled that a maintenance enquiry may be held in the absence of the maintenance officer. This ruling was given by the Commissioner notwithstanding an objection by the Respondent to the holding of the enquiry in the absence of the maintenance officer.

In the present case Mr Roth on behalf of the Appellant, argued convincingly that the holding of a maintenance enquiry in the absence of a maintenance officer constituted a fatal irregularity. I am in agreement with his views and following the reasoning of the learned Judge in the case of *Buch vs Buch supra*, I am of opinion that the absence of the maintenance officer at the hearing of a maintenance enquiry can be prejudicial to either party and constitutes therefore, a fatal irregularity in the proceedings. On this ground alone, I feel the appeal should succeed.

Subject to these remarks, I concur in the judgment and generally with the reasons expressed therein.

Potgieter: President:

I concur in the judgment of my Brother Thorpe except that in my view it is implicitly clear from the Act that any party to a maintenance enquiry, who is legally liable to maintain (including a complainant) is in law entitled to be legally represented at the enquiry.

I furthermore concur with my Brother Bowen's opinion that the absence of a maintenance officer at an enquiry constitutes a fatal irregularity.

For Appellant: Adv. P. S. Roth i/b J. Carlson, Johannesburg.

For Respondent: In person.

IN THE CENTRAL BANTU APPEAL COURT

NGCOBO vs. MAKHUBELA

CASE 19 OF 1970

JOHANNESBURG: 29 October 1970. Before Potgieter, President; and Thorpe & Bowen, Members.

MAINTENANCE

Enquiry under Maintenance Act, 1963—*Paternity of child born during marriage—Mother's evidence that child is illegitimate—Operation of* maxim pater est quem nuptiae demonstant

Summary: The Respondent alleged that a child to whom she had given birth while her husband was still alive was not the latter's child but was fathered by the appellant. The alleged adulterer appeared to have made an extra-judicial admission that he was the father. The possibility that the husband had had intercourse with his wife at about the time she had conceived had not been excluded. The Commissioner nevertheless found the Appellant to be the father and made a Maintenance Order against him.

Held: That the child must be held to be legitimate unless it could be shown that the husband could not be the father and that the case should be remitted for further evidence.

Cases referred to:

Fitzgerald vs Green 1911 E.D.L. 432.

Williams vs Williams 1925 T.P.D. 538.

S. vs Swart 1965 (3) 454 (A.D.).

Appeal from the Maintenance Court of the Bantu Affairs Commissioner, Benoni.

Thorpe, Permanent Member:

This is an appeal against an order that the Appellant pay maintenance for a child Winnie born to the Complainant on 7 September 1967, and especially against the finding implicit therein that the Appellant is its father.

Before us the Appellant was represented by Adv. Van Schalkwyk. The Complainant though present was not represented. We did not call on Mr Van Schalkwyk to address us, as he stated that he would be content with the order which we intended to make, and did make, namely:

The appeal is upheld with no order as to costs and the judgment of the Court *a quo* is set aside. The case is remitted for the Court *a quo* to hear evidence as to the absence or otherwise of opportunity for sexual intercourse between the Complainant (Respondent in the appeal) and her late husband at about the time she conceived the child in question and thereafter to pronounce a fresh judgment.

The reason for this order is that even though the Appellant may have had sexual intercourse with the Complainant at the time she conceived a Court cannot make an order which would have the effect of bastardising the child unless it is in addition satisfied on the probabilities that the Complainant's husband could not have been the father.

The Complainant's evidence does not exclude the possibility that her husband could also have had intercourse with her at the time she conceived. She does say her husband was in hospital when she and the Appellant fell in love (August, 1966), but she does not say where her husband was when she become pregnant (January, 1967). The husband was apparently a tuberculosis patient and was discharged from hospital after the birth of the child, but it cannot be assumed from the foregoing that he was in the hospital continuously from August, 1966, or before, until after the child had been conceived.

The presumption of legitimacy expressed by the maxim "*pater est quem nuptiae demonstrant*" exists to protect the child. *Voet's* Commentaries 1.1.6,7 and 8. That the mother under oath points to a man other than her husband as the father and that the adulterer admits paternity is insufficient to rebut the presumption. *S. vs Swart* 1965 (3) S.A. 454 (A.D.) would apply, if at all, only after the child has been found to be illegitimate, that case referring as it does to all admissions as to intercourse, even admissions made extra-judicially.

In *Williams vs Williams* 1925 T.P.D. 538 at 540 Tindall, J. (as he then was), quoted with apparent approval the following dictum of Kotze, J. P., in *Fitzgerald vs Green* 1911 E.D.L. 432 at 461:

"And although the mother were carrying on an adulterous intercourse with another at the time of conception, if the husband and wife were living together, or he had the opportunity of access to his wife, the child, when born, will be taken to be legitimate. (*Voet* Comm. 1.6.8 and of Taylor on *Evidence*, 10th ed., sec. 106)."

Of course, this dictum would not apply if it could be shown that despite access the husband could not be the father, due to impotence etc.

From his reasons for judgment it appears that the Commissioner considered that the evidence showed sufficiently clearly that the husband could not be the father, but this is not so.

Potgieter, President: I concur.

Bowen, Permanent Member: I concur.

For Appellant: Adv. R. T. van Schalkwyk, instructed by B. A. Dlamini, Johannesburg.

For Respondent: In person.

IN THE SOUTHERN BANTU APPEAL COURT

B.A.C. CASE 7/70

MAHONONO NGCAWE vs. JOSEPH TENTU

KING WILLIAM'S TOWN: 12th October 1970, before Yates President and Messrs Adendorff and Kruger, Members.

PRACTICE AND PROCEDURE

Sufficiency of evidence—corroboration of guilty wife concerning adultery—award of costs

Summary: Plaintiff sued Defendant for five head of cattle or their value as damages for his adultery with the former's wife, Nowandile, in September 1968 as a result of which she had given birth to a child of which Defendant was the alleged father. The judgment of the Court was one of absolution from the instance with no order as to costs. The Plaintiff appealed against the judgment on the ground that Defendant had admitted that he was intimate with Plaintiff's wife in December 1966, and that this evidence afforded the necessary corroboration entitling him to a judgment in his favour. The Defendant who had denied the adultery cross-appealed against the judgment depriving him of his costs.

Held: That in the absence of any rebutting evidence and where the fact was not a point in issue Plaintiff's evidence of a customary union between himself and his wife must be accepted even though it was denied in his plea.

Held further: That the admission of intercourse in 1966 had no bearing on the instant case when intercourse was alleged to have taken place in September 1968.

Held further: That there were no good grounds for depriving Defendant of his costs.

Appeal from the Court of the Bantu Affairs Commissioner, Indwe.

Adendorff Pemanent Member:

Adendorff (Permanent Member) delivering the judgment of the Court:

This is an appeal against a judgment of the Bantu Affairs Commissioner's Court declaring absolution from the instance with no order as to costs, in an action in which Plaintiff (now Appellant) claimed from Defendant (now Respondent) the customary damages of five head of cattle or their value R150, alleging in his particulars of claim that in or about September 1968, Defendant committed adultery with his customary wife, Nowandile in consequence whereof she was rendered pregnant and gave birth to a female child in or about June 1969, of which Defendant is the alleged father. Plaintiff further alleged that at all relevant times he was at work in the Cape and did not have access to his wife.

Defendant in his plea denied the allegations and pleaded as follows: "Save that Defendant pleads no knowledge of the allegations that the said Plaintiff's wife, Nowinile (sic), gave birth to a female child in or about June 1969, which allegation he does not admit the Defendant denies each and every allegation therein contained and puts the Plaintiff to the proof thereof."

An appeal has been brought against this judgment on the following grounds:

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

2. That on a balance of probabilities the Judicial Officer should have given judgment in favour of the Plaintiff;

3. That from the clear and honest manner in which Nowandile gave her evidence, coupled with the unsatisfactory demeanour of the Defendant in the witness box, and his admission that he had committed adultery with the said Nowandile, which he chose to cite as December 1966, in most unusual circumstances, affords evidence *aliunde* entitling the Court to accept the testimony of the said Nowandile as against that of the Defendant"

Defendant noted a cross-appeal on the grounds that "the judgment is bad in law in that there was no evidence *aliunde* corroborating the evidence of the Complainant and since the Defendant had given evidence under oath denying the allegations made by the Complainant he was entitled to judgment with costs."

At the outset it must be pointed out that the standard of proof required in adultery cases is the same as that in ordinary civil cases, viz. proof on a preponderance of probabilities "with this reservation that in considering the question whether there is a balance or sufficient balance of probabilities that the alleged adultery has in fact taken place, the general improbability of such an occurrence dictated by moral and legal sanctions against immoral and criminal conduct, is a factor to be weighed". See *Gcukumani v. N'Tshekisa* 1958 N.A.C. (S) at p. 29, and also Seymour's Bantu Law in South Africa (3rd Ed.) p. 347.

The Commissioner found as a fact that Plaintiff had not proved that Nowandile was his customary wife despite the fact that both of them stated under oath that such a customary union existed. However, except for the denial in the plea the existence of the customary union was not contested. Plaintiff and his wife were not cross-examined in this regard nor was any evicence led in rebuttal so that it must be accepted as a fact.

In the instant case Plaintiff's wife Nowandile stated that she had previously met Defendant at a shop near the Doornrivier dam and had accepted his proposal of love in January 1968. However, it was not until September 1968, when she met him at Indwe that at his invitation she accompanied him towards the Location and on the way they then were intimate for the first time in a sloot. No corroborative evidence of any sort

was produced nor any explanation as to why Nowandile consented to intercourse in such casual circumstances. Except for her word there was nothing to link Defendant with her pregnancy. She did not report her condition and it was not until after the child was born that Defendant was confronted with a claim party.

Defendant denied the adultery but under cross-examination stated that he had had intercourse with Nowandile in December 1966 when she came to his house at the dam unexpectedly after he had proposed love to her. The latter, however, on being recalled, emphatically denied that this evidence was true so that either she or Defendant was lying.

The Commissioner apparently accepted Defendant's evidence that he had committed adultery with Nowandile in 1966 and correctly came to the conclusion that even if he had done so that would have no bearing on the present case in which it was alleged that intercourse had taken place in September 1968.

Mr Kelly who appeared on behalf of Plaintiff, however, contended on appeal that Nowandile's denial that she and Defendant were intimate should be accepted and argued that Defendant had merely altered the date of intercourse to suit himself and that this false testimony supplied the necessary corroboration of Nowandile's story. However, apart from the fact that there was no necessity for Defendant to make any such admission, as pointed out by Mr Njamela who appeared for Defendant, the latter's evidence was no more improbable than that of Nowandile.

The appeal therefore is dismissed with costs.

With regard to the cross-appeal the award of costs is, of course, in the Court's discretion but this discretion must be exercised judicially and the fundamental rule is that the successful party is entitled to his costs except in exceptional circumstances. The grounds upon which a successful party may be ordered to forfeit costs are set out at page 733 of Jones & Buckle (6th Ed.) and the only item which might apply is "being guilty of misconduct generally." In the instant case the Commissioner gave as his reason for depriving Defendant of his costs that the latter had misled his attorney and had given his evidence in an unsatisfactory manner. However, these actions would tend to harm his own case and would certainly not prejudice Plaintiff's claim. It seems to me that this is not a case where the normal rule should be departed from. The cross-appeal is allowed with costs and the judgment of the Bantu Affairs Commissioner's Court altered to one of "Absolution from the instance with costs."

Yates and Kruger, members, concurred.

For Appellant: Mr H. J. C. Kelly.

For Respondent: Mr S. Njamela.

IN THE SOUTHERN BANTU APPEAL COURT

B.A.C. Case 19/70

LUTANDO NOGANTA and MALCOM NOGANTA vs KIPTON MNGENI

UMTATA: 23 September 1970, before Yates, President, and Adendorff and Hutchison, Members

DAMAGES FOR SEDUCTION and PREGNANCY—DELAY IN REPORTING —EVIDENCE OF PREVIOUS VISITS ADMISSIBLE—EFFECT OF ADMISSION OF INTERCOURSE PRIOR TO CONCEPTION

Summary: Plaintiff sued Defendant for damages for the seduction and pregnancy of his ward Nompendulo. The latter stated she fell in love with Defendant in April 1967. They were intimate from time to time and in December 1968 she missed her periods. A child was born in August 1969. It was not until March 1969 that she reported her pregnancy to her people as she was a teacher and hoped to conceal the birth of the child and resume her profession. Defendant admitted previous visits to Nompendulo and stated that they had last had intercourse in March 1968.

Held: The girl's explanation that she did not report her pregnancy at once because she hoped to retain her position as a teacher was not improbable and in any event as she had informed defendant of her condition he was not prejudiced.

Held further: That evidence of previous visits was admissible as pointing to a consistent course of conduct.

Held further: Admission of intercourse prior to conception placed onus on defendant to prove by satisfactory evidence that he was not in fact the cause of her pregnancy.

Appeal from the Court of the Bantu Affairs Commissioner, Butterworth.

Yates, President:

This is an appeal from a judgment of a Bantu Affairs Commissioner's Court for Plaintiff (now Respondent) for payment of five head of cattle or their value R150, in an action in which he sued Defendant 1 as tortfeasor and Defendant 2 as his kraalhead (now Appellants), for damages for the seduction and pregnancy of his ward Nompendulo.

Defendant 1 denied that he seduced Nompendulo.

An appeal has been brought on grounds which amount to—

1. that the explanation given by Nompendulo for her delay in reporting her pregnancy was unsatisfactory;

2. that Nompendulo's evidence was not sufficiently corroborated;

3. that the judgment is against the weight of evidence and the probabilities of the case.

Nompendulo, who was a teacher, at Tobotshane School, stated that she fell in love with Defendant 1 in April 1967 and they were intimate from time to time thereafter. During 1968 she lived at Godsho's kraal where Defendant 1 visited her in June, October and November and had intercourse with her in a hut which she shared with her sister Ntombizonke and her cousin Mazibulo. She missed her periods in December and told Defendant 1. In January 1969, after she had consulted a doctor, Defendant accepted that he was responsible for her condition and they then discussed the possibility of getting a doctor to give her sick leave without mentioning that she was pregnant so that after the child was born she could resume her teaching career. Defendant then asked a Mrs Monakali to approach a doctor which she did but the doctor would not co-operate. Defendant 1 then repudiated liability and Nompendulo reported her pregnancy to her aunt in March of that year. She gave birth to a female child on 11 August 1969.

Mr Sogoni who appeared for the Defendants pointed out that although Nompendulo stated that she knew in December that she was pregnant she did not make a report to her relatives until March and contended that this delay was fatal to her case. It is correct that under tribal conditions failure to report is detrimental to Plaintiff's case but in the instant case the parties were both teachers and Christians and Nompendulo's explanation that she had discussed the matter with Defendant 1 and they had agreed that she should attempt to conceal her pregnancy by obtaining sick leave and then returning to her profession is not improbable in the circumstances. Further, as pointed out by Mr Muggleston in his argument for Plaintiff, the Defendant admitted that Nompendulo had informed him of her condition in December 1968, i.e. as soon as she was sure that she was pregnant, so that he was not prejudiced by any delay.

Mr Sogoni also referred to discrepancies in Nompendulo's evidence in regard to the reasons she gave for this delay but a reference to the record reveals that these so-called discrepancies are more apparent than real.

Mrs Monakali who also taught at Tobotshane School stated that she had been approached by Nompendulo and had mentioned the matter to a Dr Bala to whom she was related by marriage and who told her that he could not assist her. In evidence Dr Bala stated that female teachers did sometimes attempt to obtain sick leave in these circumstances without their condition being mentioned.

Mr Sogoni argued that the Commissioner was wrong in rejecting Mrs Monakali's evidence that Nompendulo alone and not Defendant had approached her for assistance in obtaining a false medical certificate. The Commissioner gave satisfactory reasons for making this decision. Moreover as pointed out by Mr Muggleston, even if her evidence is discarded the remaining evidence provides ample corroboration of Plaintiff's case.

Nompendulo's evidence was confirmed by Ntombizonke and Mazibulo. Ntombizonke stated that on the occasion of the visit in June both she and Mazibulo were asleep when Defendant 1 arrived but woke up and went to sleep again with him still in the hut. When she awoke next morning he was gone. The next occasion he arrived after school and spent the night in the room and on the third occasion in November he again arrived after school. She did not sleep in the same hut but next morning she found him there in bed. Mazibulo also confirmed the visits in June and November.

Mr Sogoni contended that because the two girls stated that they saw Defendant 1 still in bed on the morning after his arrival on the crucial November occasion whereas according to Nompendulo he had left before they arrived, this evidence was not to be believed and should be discarded. However, as pointed out by Mr Muggleston, this discrepancy was taken into account by the Commissioner and may well have been due to faulty recollection by Nompendulo. They all stated that Defendant had slept there that night. No reason was advanced why the evidence in regard to the previous visits should not be believed and this all pointed to a consistent course of conduct. The evidence in regard to the previous visits was admissable vide *Batyi,* d.a. v. *Nongcula & Ano*, 1962 N.A.C. 86 (S).

Defendant 1 admitted that he had been in love with Nompendulo and stated that he had last had intercourse with her in March 1968, in the room in which the other two girls were sleeping. His evidence that he had rejected her towards the end of that month because he had heard that she had other boy friends does not carry conviction bearing in mind that shortly before his discharge from hospital in that month after a leg injury he had written to Nompendulo stating that he would see her in a few hours. There was certainly no indication in the letter of any rejection. Furthermore he admitted having visited Nompendulo in June, October and November 1968 (thus bearing out the evidence of Nompendulo and her two witnesses in this regard), although he denied having had intercourse on these occasions and this too is an indication that there had been no rejection. The allegation was also not put to Nompendulo in cross-examination.

In the light of Defendant's admission of intercourse with Nompendulo even though at a time prior to that of conception the onus was on him to show by satisfactory evidence that he was not in fact the cause of her pregnancy. In other words, without such evidence, the woman's testimony is to be accepted in preference to that of the man unless the Court finds that she is not worthy of credence, vide *Baccla* v. *Mbontsi* 1956 N.A.C. 61 (S)

at p. 68. Applying this statement of the law to the instant case no good reason has been advanced why the evidence of Nompendulo should not be accepted and, as pointed out by the Commissioner in his "Reasons for Judgment", her conduct was entirely consistent with her allegation the Defendant 1 had rendered her pregnant in November 1968.

The Commissioner in his able "Reasons for Judgment" held on the other hand that the Defendant was a most unsatisfactory witness and gave cogent reasons for coming to this decision. This Court is of the same opinion. Further Defendant's allegations of previous improper conduct by Nompendulo were not substantiated in any way.

The apeal therefore is dismissed with costs.

Adendorff and Hutchison, members, concurred.

For Appellants: Mr R. Sogoni

For Respondent: Mr K. Muggleston.

IN THE SOUTHERN BANTU APPEAL COURT

B.A.C. CASE 22/70

DLAMINI GENRAL DEALER vs. ESTER MOKOROTO

KING WILLIAM'S TOWN: 13 October 1970, before Yates, President and Adendorff and Kruger, Members.

PRACTICE — ISSUE OF SUMMONS FOR DEBT AGAINST A BANTU WOMAN

Summary: Plaintiff issued a summons for debt against a Bantu woman who failed to enter an appearance to defend or file a plea. The Bantu Affairs Commissioner raised the point *mero motu* that Defendant had no *locus standi* to be sued and refused to grant a default judgment.

Held: That whether or not Defendant had the capacity to be sued was not a point in issue until specially pleaded.

Held further: That the Commissioner had no right to raise the question of Defendant's capacity *mero motu*.

Appeal from the Court of the Bantu Affairs Commissioner, East London.

Yates (President):

Good cause having been shown the application for condonation of the late noting of the appeal was granted.

This is an appeal from a judgment of a Bantu Affairs Commissioner's Court in which a request for a default judgment was refused.

Plaintiff issued a summons against "Esther Mokoroto, a Bantu female adult, of c/o 41 Kuze Street, Duncan Village, East London" for an amount of R4,75 for goods sold and delivered. The summons was duly served but no appearance to defend was entered and on 12/3/1970 a request for a default judgment was refused by the Court.

An appeal has been noted on the grounds that—

(1) The learned Additional Bantu Affairs Commissioner misdirected himself by refusing the application for default judgment and holding that *ex facie* the summons the Defendant has no *locus standi in judicio* when there is no allegation in the summons that the Defendant is a married woman;

(2) that the learned Additional Bantu Affairs Commissioner erred in law and in fact in presuming that the Defendant was a married woman as appears from his reference to the words "wife" and "married woman" on page 2 of his reasons for judgment as well as the cases cited on page 3 thereof;

(3) that the learned Additional Bantu Affairs Commissioner erred in law in refusing the Plaintiff's request for default judgment when the allegations in the summons fully comply with the Rules of the above Honourable Court."

In his original "Reasons for Judgment", furnished by the Additional Bantu Affairs Commissioner at the request of Plaintiff's attorney in terms of subrule 2 (1) of the Rules for Bantu Appeal Courts (Government Notice R. 2084 of 1967), he correctly stated that the only points in issue were whether the Court was correct in holding that *ex facie* the summons the Defendant could not be sued, and if so, whether Defendant had to raise the question of *locus standi* herself or whether the Court had the legal right to raise it *mero motu*.

The Commissioner dealt with the matter both under Bantu Law and Custom and under Common Law and in regard to the latter, came to the conclusion, if I read his "Reasons" correctly, that the Court had the right *mero motu* to raise the question of Defendant's *locus standi* to be sued and that a woman's status must be described in the summons either as a major spinster (*femme sole*) or as a married woman, in which case her capacity must be set out.

As pointed out by Mr Sogoni, who appeared on behalf of Plaintiff, the particulars required in a summons as set out in Rule 35 of the Rules for Bantu Affairs Commissioner's Courts contained in Government Notice 2083, dated 29/12/1967, do not include the status of the Defendant.

This matter is dealt with at p. 413 of the Civil Practice of the Magistrates' Courts in S.A. (Jones & Buckle, 6th Ed.) where it is stated:

"There is no presumption of incapacity where a woman is sued unless it is stated that she is a married woman (which is not the case here). It follows that there is no need to allege that a woman is a *feme sole*, but where she is stated to be a married woman, and it is contended that despite this she has *locus standi in judicio*, the person alleging this must prove it."

Furthermore whether or not she has *locus standi* is a matter peculiarly within her own knowledge—she knows her own status—and she can raise this point as a special plea or she can by a request for particulars get Plaintiff to plead facts which show that she has no *locus standi* and can then except on the grounds that no cause of action is disclosed. See Jones & Buckle (*supra*) at p. 390.

The defence that Defendant lacks capacity to be sued must be specially pleaded. See note 14 at p. 529 of *Jones & Buckle* (*supra*) *and Natalse Landboukoöperasie Bpk. v. Jordaan* 1961(2) S.A. 583 N.P.D. in which is quoted with approval an extract from the judgment of Ramsbottom J. in the case of *Neseman & Neseman v. Stratford* 1957 (2) S.A. 363 (W) viz. "There was no allegation in the summons that the Defendant was a married woman—the description did not show that she was married—and there was therefore nothing in the summons to show that she had no *locus standi in judicio*."

In the instant case therefore under common law it is clear that the summons is in order and that a default judgment should have been granted.

The Commissioner stated that had the matter been considered under Bantu Law, he would have come to the same conclusion because Bantu law does not recognise the right of a female to contract unaided. However, Bantu law and custom is not involved in this case in any way. It is a straight forward transaction of sale and purchase and in the absence of special circumstances it seems clear that matters of this nature should ordinarily be dealt with according to common law. See subsection 11 (3) of Act 38 of 1927 (The Bantu Administration Act), which provides that "the capacity of a Bantu to enter 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 Bantu, be determined as if he were a European . . ." and see also *ex parte* Minister of Native Affairs: in *re Yako v. Beyi* 1948 (1) S.A. 388 (A.D.) at pages 395/6.

The appeal is allowed and the judgment of the Bantu Affairs Commissioner's Court is altered to read: "Default judgment is granted as prayed with costs."

As this appeal is in the nature of a test case and as Defendant was not represented there will be no order as to costs.

Adendorff and Kruger, members, concurred.

For Appellant: Mr R. Sogoni.

For Respondent: In default.

IN THE SOUTHERN BANTU APPEAL COURT

B.A.C. CASE 9/1970

JIKELEZA SOGONI vs. DAVID JACISA

UMTATA: 30 November 1970, before Yates, President, and Adendorff and Hooper, Members.

BANTU CUSTOM

Dowry—Liability of dowry-eater to return dowry paid for *second customary union where first marriage by civil rites still existed.*

Summary: Defendant's sister was married by Christian rite in 1958 and dowry paid for her. She subsequently left her husband's kraal and purported to enter into a customary union with Plaintiff who paid dowry for her and with whom she lived for five or six years. The previous dowry had been ketaed, i.e. returned to the first husband. Plaintiff then discovered the marriage certificate and sued for the return of his lobola on the ground that the first marriage still existed.

Held: Where Plaintiff knew, when contracting a customary union, that the woman's previous marriage by Christian rites had not been dissolved, he is not entitled to return of lobola.

Appeal from the Court of the Bantu Affairs Commissioner, Mount Frere.

Yates, President:

This is an appeal from a judgment of a Bantu Affairs Commissioner's Court for Plaintiff (now Respondent) for the return of four head of dowry cattle or their value R160 with costs. He alleged in his particulars of claim:

"1. The parties are Bantu as defined in the Act.

2. Defendant is the brother and dowry eater of his sister Ntombokwenzani according to custom.

3. On or about six years ago Defendant wrongfully and unlawfully held out to the Plaintiff that the said Ntombokwenzani was marriagable.

4. That the said Ntombokwenzani did in effect effect a 'keta' from her previous husband.

5. That as a result of the assurance given by the Defendant, the Plaintiff entered into a customary union with the said Ntombokwenzani and paid the above described cattle as dowry.

6. That in 1968 the Plaintiff discovered a marriage certificate from the said Ntombokwenzani which certified that she had married by civil rites to her previous husband and that the marriage still subsists.

7. In the premises Plaintiff is entitled to the delivery to him of the said dowry cattle or payment of their value on the grounds of fraudulent misrepresentations."

Defendant (now Appellant) pleaded as follows:

"1. Paragraph 1 and 2 are admitted.

2. Paragraph 3 and 4 are denied and Plaintiff is put to the proof thereof.

3. Paragraph 5 is admitted sure (*sic*) and except the assurance referred to therein.

4. Paragraph 6 and 7 are denied and Plaintiff is put to the proof thereof.

5. Defendant avers that Plaintiff has always known that the said Ntombokwenzani was married by Christian Rites.

6. Defendant further avers that the said customary union entered into by Plaintiff and the said Ntombokwenzani will remain in force until properly dissolved be it on the ground that it is *void ab origine*. In the absence of a dissolution the said contract subsists."

An appeal has been brought against the judgment on grounds which amount to this, that it is against the weight of evidence and the probabilities of the case and that Plaintiff failed to establish that when he entered into a customary union with Ntombokwenzani he did not know that she was married to Milton Pundweni by civil rites.

It is common cause that Defendant is the dowry eater and guardian of Ntombokwenzani who was married to Pundweni by Christian rites in 1958. Dowry was paid for her. Subsequently Ntombokwenzani left her husband's kraal and during the subsistence of the marriage purported to enter into a customary union with Defendant who paid four head of cattle to Defendant's agent as dowry.

This customary union was void *ab initio* [vide Bantu Law in S.A. by Scymour at pages 105 and 250 (3rd Ed.)]. Until a marriage is dissolved it continues in force and therefore the woman's guardian in the instant case had no right to give her in a customary union. It has been held that where a second purported union has been entered into before the dissolution of the first, the second "husband" if *mala fide* cannot claim return of his deserting wife or restoration of dowry, but if he is *bona fide* the woman's guardian alone is *in delicto* and is thus obliged to restore the second dowry on demand, vide *Jela* v. *Qamba* 1963 N.A.C. 71 (S); and *Gqozi* v. *Mtengwane* 1960 N.A.C. 26 at p. 29 and Seymour (supra) at p. 190 and 343. The authorities cited refer to a prior customary union but that it should also apply where the first union is a civil marriage accords with one's conception of public policy and natural justice.

A decision in this case therefore hinges on the question whether or not Plaintiff knew, when he purported to enter into a customary union with Ntombokwenzani, that she was married to Pundweni by Christian rites.

According to Plaintiff's evidence he first approached Defendant at a beer drink in regard to a customary union with the latter's sister, Ntombokwenzani, whom at that stage he had not met, and later, at Defendant's kraal, he was told that she had been married before but that the union had been dissolved by the keta (return) of the dowry. No mention was made of the fact that the previous marriage had been by Christian rites. Under cross-examination, however, he stated that when he asked for Defendant's sister in marriage Defendant was away at work and he spoke to Defendant's brother. His only witness, August Mapoyi, stated that he accompanied Plaintiff and met Defendant at the latter's kraal. He also stated that Ntombokwenzani was wearing long dresses, i.e. that she was dressed as a married woman whereas according to Plaintiff she was dressed as a single girl. Mapoyi confirmed Plaintiff's evidence that they were told that the previous dowry had been ketaed and that the girl was available for marriage. Defendant, however, denied that he had been approached in the matter and William Sogoni, who was the "eye" of his kraal, and Ntombokwenzani confirmed that he was away at the time. It is clear that even if Plaintiff did originally speak to Defendant the principle negotiator on Defendant's side was William whom Mapoyi did not meet.

Plaintiff did not mention it but his witness Mapoyi confirmed the testimony of Defendant's witnesses that Ntombokwenzani was first twalaed by Plaintiff. Two head of cattle were paid by the latter and Ntombokwenzani was then returned to Defendant's kraal and only after the fourth beast was paid was she finally permitted to live with Plaintiff as his wife and she remained with him for at least five or six years.

William stated that he had told Plaintiff when he originally asked for Ntombokwenzani's hand in marriage that she was married by Christian rites and Plaintiff had replied that he would take steps to have the marriage dissolved. This evidence was confirmed by Ntombokwenzani who stated that she had informed Plaintiff that she was married by Christian rites and he had told her that he would give her money so that she could procure a divorce. Neither of these two witnesses was crossexamined on this point. The headman Pelepele Sogoni also testified that Plaintiff knew very well that Ntombokwenzani was married by civil rites when he paid dowry for her and had stated that he would institute divorce proceedings against her husband. It is true, however, that he did not explain how he knew this.

William was clearly wrong in negotiating with Plaintiff for Ntombokwenzani's marriage and in accepting dowry from him but according to his evidence he thought that by delivery (ketaing) this stock to Pundweni the Christian marriage could be dissolved. In fact the probabilities are that all the parties concerned were under this impression and it was only after

Plaintiff and Ntombokwenzani had lived together for some years and after they had parted as a result of a quarrel that Plaintiff decided to take advantage of the fact that Ntombokwenzani was legally married to another man and attempted to recover his lobola. We only have his word that he did not know at the time that Ntombokwenzani was married by civil rites whereas the weight of evidence and the probabilities point to the fact that he was aware of it.

Had the original contract been a customary union it is clear that there would have been no possibility of Plaintiff recovering his lobola in these circumstances and it would be inequitable if he were able to do so merely because some years after the event he discovered that the original contract had been concluded according to civil rites.

In my view Plaintiff has failed to discharge the onus of proving that at the time he entered into the customary union with Ntombokwenzani he did not know that she was legally married.

The appeal is allowed with costs and the judgment altered to one for defendant as prayed with costs.

Adendorff and Hooper, members concurred.

For Appellant: Mr T. Berrange.

For Respondent: Mr K. Muggleston.

IN THE SOUTHERN BANTU APPEAL COURT

JACKSON MAPONGWANA vs. NOVEMBER SIHEWULA

B.A.C. CASE 34/1970

UMTATA: 3 December 1970, before Yates, President and Adendorff and Botha, Members

PRACTICE AND PROCEDURE

Not necessary to withdraw a summons based on the same cause of action before issuing a fresh summons—Court has a discretion to allow the second action to proceed—further attempt to putuma constitutes a fresh cause of action where Plaintiff is suing for the return of his wife.

Summary: Plaintiff obtained a judgment for the return of his wife, failing which dissolution of the union and refund of lobola. An appeal was allowed and the case returned for hearing of further evidence. Plaintiff then made a fresh attempt to putuma his wife and on her failure to return issued a second summons without withdrawing the first.

Held: That there was nothing to prevent him doing so.

Held: That the Court had a discretion to allow the second action to proceed.

Held: That the fact that the second case was heard by the same judicial officer who heard the first was no ground for his recusal.

Appeal from the Court of the Bantu Affairs Commissioner, Mqanduli.

Yates, President.

The Plaintiff (now Respondent) sued the Defendant (now Appellant) for the return of his wife, Nowayilesi, failing which for an order dissolving the customary union and the return of dowry consisting of an existing red cow valued at R40 and seven other cattle or their value R30 each (ie. 10 head less a beast for each of two children). He alleged that in April 1967 Nowayilesi wrongfully deserted him and despite repeated putumas Defendant has refused to return her to him.

Defendant in his plea admitted that he had received eight head of cattle but denied the other allegations.

The Bantu Affairs Commissioner ordered that "Defendant returns to Plaintiff his wife, Nowayilesi, within 14 days from today, failing which the customary union subsisting between Plaintiff and Nowayilesi is dissolved and Defendant is ordered to refund Plaintiff eight head of cattle being returnable dowry or their value R30 each plus costs."

Against this judgment Defendant has appealed on various grounds which amount to this—

(a) that the judgment is against the weight of evidence and the propbabilities of the case;

(b) that Plaintiff had failed to putuma his wife; and

(c) that in view of the fact that a previous case between the same parties and in respect of the same subject matter had been remitted by the Bantu Appeal Court to enable the Defendant to call further evidence for hearing it to a conclusion, the present action was invalid as the first action had not yet been decided.

In 1967 the Plaintiff issued a summons against Defendant (District Case 159/1967) and obtained a judgment ordering the latter to return his wife within a specified time or failing which the customary union was to be dissolved and the dowry returned. The Defendant appealed against this judgment (Bantu Appeal Case 54/1968) on the grounds that his application to call further witnesses has been refused. The appeal was allowed on 22 January 1969, the judgment was set aside and the case returned to the Court *a quo* for hearing to a conclusion. No further steps were taken, however, and in November 1969 the present summons was issued and the case heard by the same judicial officer who presided at the first trial. That it was in order for him to do so is clear. See The Civil Practice of the Magistrates' Courts of S.A. by Jones & Buckle (6th Ed.) at p. 14 where it is stated "It is no ground for recusation that the judicial officer expressed on opinion at a previous stage in the same case which was based on the hearing of the case itself—even if it was between the same parties and involved the same facts." Had the original case been continued the same judicial officer would of necessity have presided so that there was no possibble prejudice to Defendant in him hearing the present case.

As pointed out by Defendant, subrule 54 (2) of the Rules for Bantu Affairs Commissioners' Courts (G.N. 2083 of 1967), provides that a Plaintiff desiring to withdraw an action "shall deliver a notice of withdrawal" but a perusal of Rule 54 indicates that apart from giving him notice it is designed to enable the Defendant to lodge a claim for his costs. The rule also provides that if the action is not proceeded with the Defendant may apply for the dismissal of the summons. There is no rule that a fresh summons may not be issued even though the original case is pending. On application the Court may in such circumstances stay the second action but the Defendant is not entitled as of right to a stay and the Court has a discretion to allow the case to proceed if it deems it just and equitable to do so or where the balance of convenience favours it. Vide Jones & Buckle *supra* at p. 542. The issue of the first

summons and the judgment indicated clearly to Defendant that if he wished to avoid repaying lobola he should return Plaintiff's wife. As long as she remained with Defendant the latter was in jeopardy and where a fresh attempt at putuma had been made, after the issue of the first summons, Defendant can hardly be said to have been prejudiced by the issue of a second summons.

It is common cause that Nowayilesi left the Plaintiff in about March 1967 and has not returned to mim. Plaintiff stated that he went to putuma her two weeks later and again a week after that but she did not return. He then issued summons but on appeal the judgment he obtained was set aside to enable Defendant to call supplementary evidence in regard to the alleged putuma. In winter of 1969 he again went to putuma his wife, accompanied by his son, but received a hostile reception and his wife was not returned to him. He then issued the present summons. His evidence was confirmed by his son Notata, a man of about 36 years of age and no good reason has been advanced why these witnesses should be disbelieved.

Defendant denied that Plaintiff ever putumaed his wife but admitted that in 1969 Plaintiff and his son came to see him. His statement that he was busy and did not ask nor was told what they had come for is unlikely. The evidence of Nondyendye Klaushe to the effect tha Plaintiff and his son did not go to Defendant's kraal to putuma does not carry much weight in view of the fact that he lived about ¾ mile from Defendant's kraal and admitted that from time to time he was away for two or three days.

The Commissioner who had the advantage of hearing and seeing the witnesses give evidence was satisfied that Plaintiff had attempted to get his wife back and this Court has not been persuaded that he was wrong in coming to this conclusion.

The appeal is dismissed with costs.

Adendorff and Botha, members, concurred.

For Appellant: In Person.

For Respondent: Mr K. Muggleston.

NORTH EASTERN BANTU APPEAL COURT

ELLIOT MTHETHWA vs. VIRGINIA NDABA

B.A.C. CASE 12 OF 1970

DURBAN: 30 November 1970, before Cronjé, President and Craig and Addison, members.

JURISDICTION

MAINTENANCE

Jurisdiction—trial court—essentials.

Summary: Plaintiff instituted a common law action against Defendant in the Court of the Bantu Affairs Commissioner, Durban, for maintenance for her two illegitimate children: It was common cause that the children were conceived and born outside the Durban area that Defendant did not reside on carry on business or engage in employment within the Durban area and that there was no agreement in writing to the Durban Court's jurisdiction.

Held: That the Court of the Bantu Affairs Commissioner, Durban did not have jurisdiction to hear the case.

Cases referred to:

Qunta vs Qunta 1940 N.A.C. (C. & O.) 131; *McKenzie vs Farmers' Co-operative Meat Industries* 1922 A.D. 16.

Riversdale D.C. vs Pienaar 3 S.C. 252.

Laws referred to:

Bantu Administration Act, No. 38 of 1927 Sec. 10.

Appeal from the Court of the Bantu Affairs Commissioner, Durban.

Cronjé, President:

Plaintiff (now Respondent) obtained a default judgment against Defendant (now Appellant) ordering him to pay R10 per month for the support of Plaintiff's two minor children of whom he is allegedly the father.

His application to have the default judgment rescinded was refused and he now appeals to this Court for relief on the following grounds:

"(1) The Court erred in dismissing Defendant's application for rescission of the default judgment.

(2) The Respondent failed to prove that Applicant was in wilful default and in any event the probabilities are in favour of the Applicant".

Mr Chadwick for Defendant argued mainly that the Court of the Bantu Affairs Commissioner, Durban, had no jurisdiction to hear the matter and, *a fortiori,* to grant a default judgment.

He admitted at the outset that this point was not specifically mentioned in the grounds of appeal but pointed out that it had been taken in the Court *a quo.* He submitted that it was covered by the first ground of appeal.

This Court is, in any event, entitled to take cognisance of omitted points of law—*vide Qunta v. Qunta* 1940 NAC (C. & O.) 131.

The facts relevant to the question of jurisdiction are the following: Plaintiff's summons, issued out of the Court of the Bantu Affairs Commissioner, Durban, alleges that Defendant is the father of her two minor children born as a result of sexual intercourse between herself and Defendant during, respectively, 1959 at Hlobane (which would appear to be in the District of Vryheid) and during 1962 at Paulpietersburg.

A Bantu Affairs Commissioner's (Court, has, in terms of section 10 of the Bantu Administration Act, 1927 (No. 38 of 1927), jurisdiction in the area for which it is constituted. The proviso to section 10 (3) limits the jurisdiction of the Court in respect of persons as follows:

"Provided that a Court of Bantu Affairs Commissioner shall have no jurisdiction in any case unless—

(a) the Defendant or Respondent in that case resides or carries on business or is employed in the area of jurisdiction of that Court; or

(b) the cause of action in that case arose in that area; or

(c) the parties to the proceedings in that case have agreed in writing to the Court's jurisdiction".

It is common cause that the Defendant, a constable, was at the time of the issue of summons and at all relevant times thereafter, stationed— and therefore resident as well as employed—at Paulpietersburg.

It is also common cause that the parties have not agreed, in writing, to the jurisdiction of the Bantu Affairs Commissioner's Court, Durban.

In so far as the qualifications relating to residence and consent are concerned, that Court is accordingly deprived of jurisdiction by virtue of the provisions of paragraphs (a) and (c) of section 10 (3) of the Act.

It follows that the Court of the Bantu Affairs Commissioner, Durban, could only be seized of jurisdiction if the cause of action in the instant case arose in its area.

The Appellate Division in *McKenzie v. Farmers' Co-operative Meat Industries Ltd,* 1922 A.D. 16, accepted that "cause of action" means "every fact which is material to be proved to entitle the Plaintiff to succeed and every fact which the Defendant would have a right to traverse".

Put differently, before it can be said that the cause of action in the instant case arose within the area of the Court of the Bantu Affairs Commissioner, Durban, the Plaintiff should be in a position to show that all material facts which must be proved to enable her to succeed, arose within that area. Of these the most important is, naturally that the Defendant is the father of her minor children.

Her particulars of claim, however, aver that sexual intercourse between her and Defendant, which involves the question of paternity of her minor children, occurred not in the area of the Durban Court, but in the areas of the Courts at Paulpietersburg, and, so it would appear, also at Vryheid. It is evident, therefore, that the cause of action in the instant case did not arise in the area of the Court of the Bantu Affairs Commissioner, Durban.

In the result that court was also not on the grounds of cause of action possessed of jurisdiction to hear the matter and could not have made the default judgment. The appeal must, therefore, succeed.

A judgment is void *ab origine* when the Court has no jurisdiction *vide Riversdale D.C. v. Pienaar* 3 S.C. 252. It follows that the pleadings and proceedings in the Court of the Bantu Affairs Commissioner, Durban, were without force and effect.

The appeal was accordingly allowed with costs and the pleadings and proceedings in this case were set aside.

Craig and Addison, members, concurred.

For Appellant: Adv. A. I. J. Chadwick.

For Respondent: In default.

NORTH EASTERN BANTU APPEAL COURT

PIKA NGCOBO vs. GLADYS NOBONGO DHLAMINI

B.A.C. CASE 52 OF 1970

PIETERMARITZBURG: 9 December 1970, before Cronjé, President and Craig and Harvey, members.

MAINTENANCE

Claim under Act 23 of 1963—essentials—late noting of appeal—condonation—grounds—just cause.

Summary: An award was made arbitrarily without any evidence being led as to the illegitimate child's need of support or as to the financial standings of its mother and of its natural father.

Held: It must be established that a child is in need of the support of its father.

Held: It must be established that the natural father is in a position to support the child and to what extent he is capable of rendering support.

Cases Referred to:

Tshaka vs Siqolana & ano. 1957 N.A.C. 121 (S).

Mbhele vs Cele 1944 *n.a.c.* (N. & T.) 28.

Letlatsi vs Mokoteli 1956 N.A.C. 142 (N.E.).

Laws Referred to:

Maintenance Act. No. 23 of 1963.

Natal Law, No. 10 of 1896.

Rules Referred to:

Bantu Appeal Courts Rules 4, 16.

Works Referred to:

Warner: "A Digest of S.A. Native Civil Case Law" paras. 3772—3773.

Appeal from the Court of the Bantu Affairs Commissioner, Pietermaritzburg.

Cronjé, President:

The Respondent in this appeal, Gladys Dhlamini, was the Complainant in a claim for maintenace under Act 23 of 1963, against Pika Ngcobo, the present Appellant. As a matter of convenience and to obviate confusion they will be referred to hereinafter as Plaintiff and Defendant, respectively.

Shortly, Plaintiff's claim was for maintenance of her 11 year old illegitimate child of which she alleged Defendant was the father. According to the summons, the child, presumably a female, bore the same names as its mother viz. Gladys Nobongo and was of an age of 11 years, having been born in 1959.

The Bantu Affairs Commissioner found that Defendant was the father of the child and made an award of R8 per month "in lieu (sic) of maintenance" against Defendant, the payments "to commence from 5 June 1970."

An appeal to this Court was noted, out of time, by Defendant on the following grounds:

"The learned Presiding Officer erred in—

(a) accepting the uncorroborated evidence of the Complainant in preference to the evidence given by and for the Appellant; and

(b) ordering the Appellant to pay R8 per month "in lieu of maintenance without having heard any evidence as to the amount required by the Complainant or as to the Appellant's and Complainant's means."

The first matter for consideration is an application for condonation of the late noting of the appeal. Judgment was given on 1 May 1970, and appeal noted on 17 July 1970, i.e. some 43 days late, vide Bantu Appeal Court Rule 4. The affidavits supporting the application contain some remarkable statements. Defendant, in his affidavit set forth very clearly the nature of the proceedings and the judgment awarded, but the attorney's clerk, one C. T. Zulu, stated in his affidavit that on the occasion of his first interview with Defendant the latter "was quite vague of the nature of the case against him. When I interviewed him to explain to me whether this was a civil action or a criminal case, he was unable to explain". Diffidence in the acceptance of Zulu's statement is irresistible.

The tenuous and overworked excuse that an appeal could not be noted until a copy of the record had been received which was put forward by both deponents is unacceptable. No reason was advanced why an appeal could not have been noted forthwith on the general ground that the judgment was against the evidence and the weight of evidence. Leave may be sought at a later stage to add to the grounds of appeal vide Bantu Appeal Court Rule 16.

Furthermore the application gives no indication of "just cause" vide Bantu Appeal Court Rule 4; Defendant merely expressed the view that "I have a reasonable chance of success in this appeal".

Standing alone the application invited dismissal but as there were prospects of some success on appeal the application for condonation was granted with an order that Defendant pay the costs thereof.

According to Plaintiff she and Defendant first became intimate during 1955, and this intimacy continued for some 14 years. She said she fell pregnant to him in 1959 and the child concerned was born in December 1959, at the Edendale Hospital. Defendant, in turn, said he first met Plaintiff in 1951 but then corrected himself and said it was 1961. He denied paternity.

Plaintiff's evidence that her Edendale Hospital expenses were paid by Defendant and that he had supported the child since its birth and until 18 November 1969, when he fell in love with another woman stood unrefuted by Defendant. This

evidence was consistent with her testimony and inconsistent with his innocence *Tshaka vs Siqolana & ano.* 1957 NAC 121 (S), and provides the necessary corroboration of her indication of Defendant as the father of her illegitimate child Hilda.

The appeal on the ground of lack of corroboration fails and the Commissioner cannot be faulted for finding that Defendant is, indeed, the father of Plaintiff's child.

The award of R8 per month, however, cannot be permitted to stand in the circumstances disclosed. There is no doubt that it was arbitrary and though the Commissioner's submission (sic) that "R8 per month is not unreasonable for a child of 11 years" may be sound, there is nothing on record to establish that Defendant is capable of paying it. Furthermore, there is nothing on record to establish that the child is in need of support. In this connection I draw attention to the cases of *Mbhele vs Cele* 1944 N.A.C. (N. & T.) 28 and *Letlatsi vs Mokoteli* 1956 N.A.C. 142 (N.E.), the judgments of which cases are summarised by Warner in his "A Digest of S.A. Native Civil Case Law" at paras. 3772 and 3773. Although those judgments were given while Natal Law, No. 10 of 1896, was in force, the principles enunciated are apt in the instant case.

No evidence was tendered by either party as to her/his financial standing as it was incumbent upon them to do nor did the Court canvass those points as it should have done. This despite the allegation in the summons that Defendant had failed to maintain despite "being in a position to do so" and the injunction on Defendant "to obtain a statement giving full particulars of your earnings duly signed by your employer." Presuming that that injunction is permissible I suggest that the following words be added to it viz. "and produce it to this Court". Furthermore, as pointed out by Mr Menge, the summons should indicate the dates from which and to which maintenance is sought.

It is clear that these vital requirements were overlooked by the Court *a quo* and all concerned and the case will have to be sent back for further hearing.

The appeal in regard to the award succeeds but in view of the injunction that defendant obtain a statement regarding his earnings and his failure to do so it is my view that an award of appeal costs in his favour would be unjustified.

In the result the appeal is dismissed in part and allowed in part with no order as to costs. The Commissioner's finding that Defendant is the father of Plaintiff's illegitimate child Hilda is confirmed.

The maintenance award is set aside and the case is remitted back to the Court *a quo* in order that the child's need of support by Defendant, and the financial standings of both Plaintiff and Defendant may be full canvassed and, thereafter, a fresh judgment may be give in respect of the claim for a maintenance award.

Craig and Harvey, members, concurred.

For Appellant: Adv. W. O. H. Menge i.b. Leslie Simon & Co.

For Respondent: In default.