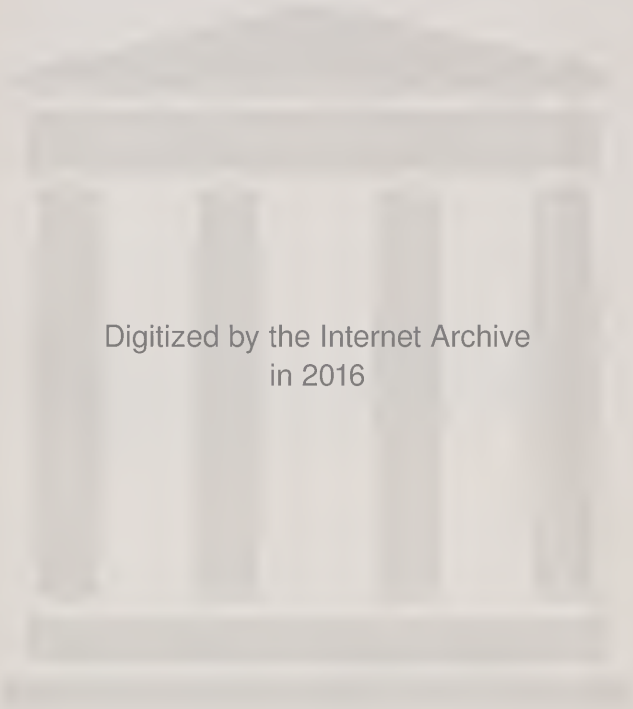

VERSLAE

VAN DIE

NATURELLE-APPÈLHOWE

1952 (1)

REPORTS

OF THE

NATIVE APPEAL COURTS

DIE STAATSDRUKKER ◆ PRETORIA ◆ THE GOVERNMENT PRINTER
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NORTH EASTERN NATIVE APPEAL COURT.
N.A.C. CASE No. 72 OF 1951.

NGWEKULU *v.* MANO.

PRETORIA: 11th September, 1951. Before Steenkamp, President; Balk and Smithers, Members of the Court.

BAVENDA CUSTOM.

Native customary union—Widow, past child-bearing age, electing to return to her people after her husband's death—Whether lobolo refundable.

Summary: A widow, past child-bearing age, after the death of her husband, whom she had borne children, elected to return to the kraal of her own people, whereupon her late husband's heir sued for the return of lobolo paid for her.

Held: That there is no obligation, under Venda custom, on the father of a widow or on such other person as would have been her guardian if she had not contracted a customary union, to restore the lobolo paid for her by her late husband, on her return to her father or such other person if she is past child-bearing age, and she has borne her late husband children.

Held further: That the above opinion expressed by the majority of the Native Assessors, and accepted by the Court as correctly setting out the custom of the tribe to which the parties belong, as practised at present, is not opposed to the principles of public policy and natural justice.

Appeal from the Court of the Native Commissioner, Sibasa.

Balk (Permanent Member), delivering the judgment of the Court:—

This is an appeal by the defendant against an Assistant Native Commissioner's judgment for plaintiff "for the return of woman Nyatshikalanga failing which return of lobolo paid, viz.: 8 head of cattle and 6 sheep or their value, and payment of £62 received by defendant as lobolo for Mirianne, and costs".

Defendant is the person who would be the guardian of Nyatshikalanga, the widow of the late Ngwekulu, if her customary union with the latter were dissolved; Mirianne is the daughter of the late Ngwekulu by Nyatshikalanga, and plaintiff is the son and heir of the late Ngwekulu.

There is no substance in the appeal in so far as the portion of the judgment awarding plaintiff £62 is concerned, as defendant, both in his plea and evidence, admitted liability for this sum, being the amount received by him as lobolo for Mirianne, and there is no question of set-off since defendant's counterclaim for the balance of Nyatshikalanga's lobolo fails as is apparent from what follows.

The Assistant Native Commissioner was justified in his finding that eight head of cattle and six sheep had been paid by the late Ngwekulu as full lobolo for Nyatshikalanga on the evidence of plaintiff's witnesses, coupled with—

(*a*) defendant's unconvincing reasons for his failure to claim over a period of many years dating back to Ngwekulu's death in April, 1936, the balance of the lobolo alleged by him to be still outstanding for Nyatshikalanga in respect of her customary union to the late Ngwekulu;

(*b*) defendant's admission that he claimed the balance of Nyatshikalanga's lobolo from plaintiff for the first time after he (defendant) had received the £62 referred to above as lobolo for Mirianne; and

(*c*) the weakness of the evidence of defendant's witnesses.

It is also clear from the evidence that Nyatshikalanga has left the plaintiff's kraal and is residing at the defendant's kraal.

According to the opinion of the majority of the Bavenda Assessors in this case, there is, under their custom, no obligation on the father of a widow or on such other person as would have been her guardian if she had not contracted a customary union, to restore the lobolo paid for her by her late husband on her return to her father or to such other person if she is past child-bearing age and she has borne her late husband children.

This Court accepts this expression of opinion as correctly setting out the relevant custom of the tribe to which the parties in this action belong, as practised at present, and, considers that it is not opposed to the principles of public policy and natural justice.

It follows that the plaintiff is not entitled to have the lobolo paid for Nyatshikalanga by her late husband restored to him if she prefers to remain with her own people rather than return to him, and the appeal against the judgment on the plaintiff's second claim must therefore succeed.

Whilst it is implicit in the Assistant Native Commissioner's judgment that he found for the defendant-in-reconvention on the counterclaim, this inference does not suffice, and that finding should be specifically set out in his judgment.

In the result the appeal is allowed with costs and the Assistant Native Commissioner's judgment is altered to read as follows:—

> "On the first claim in convention, for plaintiff in the sum of £62 with costs.
>
> On the second claim in convention, for defendant with costs.
>
> On the counterclaim, for defendant-in-reconvention with costs."

Steenkamp (President):—

Two of the three Bavenda Assessors are emphatic that when a widow past child-bearing age goes to live at her people's kraal, the heir of her late husband will ask her to return, but if she refuses, nothing further will be done and the return of the lobolo paid for her will not be demanded.

The other Assessor seems to hold the view that she must spend her whole life at the kraal of her late husband and if she refuses to do so the lobolo must be returned to the heir of her late husband.

The opinion given by the majority would appear to conform to what can be termed "natural justice" as any other view would be tantamount to placing an undue hardship on widows who have served their late husbands well by bearing children. I also think that natural justice demands that no unqualified restrictions should be placed on any old widow to have the right to choose the place where she wants to spend the declining years without penalising her people to return the lobolo paid for her. If we accept the opinion of the minority, then the life of a widow could be compared to something bordering on serfdom, and so long as she does not act in an unreasonable manner, I do not see why she should not be treated as a free human being.

Native Assessors.

1. Chief Adolf Mhinga, Sibasa, Shangaan.
2. Chief Johannes Shigalo, Sibasa, Shangaan.
3. Jacob Mabulela, Louis Trichardt, Shangaan.
4. Headman Matsila, Louis Trichardt, Bavenda.
5. Robert Nethengwe, Sibasa, Bavenda.
6. Petros Mogeri, Louis Trichardt, Bavenda.

Question: When a man who is married to a woman by Native law, and custom dies, and she decides, after his death, to go and live with her people, may she do so? I mean, if the woman is past child-bearing age.

Answer:
Chief Adolf Mhinga: According to the Shangaan custom, if this woman whose husband has died, wants to go to her home, she may do so, provided there are no brothers of the deceased husband. If she is past child-bearing age, she may not return to her people, because she will have her own children to look after her.

Chief Johannes Shigalo and Jacob Mabulela agree.

Headman Matsila: According to Bavenda custom, it is not so. She must remain where she was married until she dies, i.e. at her husband's kraal.

Robert Nethengwe and Petros Mogeri: Agree, i.e. she must stay at her late husband's kraal.

Question: If she, of her own choice, goes and stays with her people, what happens about the lobolo?

Answer:
Chief Mhinga, Shingalo and Mabulela: If she chooses of her own, she must agree with her people to return the lobolo.

Matsila and Nethengwe: If she should go home of her own choice to her father, he will not say "Go back to where you were married" but he will wait for those people who had married her to come and report why she had returned to her people. If she has had children the lobolo is not returned to the husband's people, but if she has had no children, then the lobolo is returned.

Mogeri: After she has gone to her people, we then go to the woman's father and ask him for her to be replaced by another girl. If he does not agree to this, then we ask for the return of the lobolo. If she goes back to her people on her own accord we first report to them, but if she does not satisfy us we ask for the return of the lobolo.

Question: You don't agree with the last two Assessors who say the lobolo is not returned to the husband's people?

Answer: Mogeri: No, I don't agree with them. Even if she had children the lobolo is returned.

Question: I want to ask the Shangaan Assessors: You say the lobolo is returned. Is the full lobolo returned or is a deduction made for children born of the union?

Answer:
Mhinga, Shigalo and Mabulela: There are deductions made for children. A beast remains if she has one child. There is a difference, based on whether the child is a boy or girl. If the child is a girl, 2 head of cattle are retained, and if a boy, only one beast.

Mogeri: We take everything, i.e. the children and the lobolo. There is nothing deducted.

Question: Do I understand you to mean that the late husband's people must get back all the lobolo and retain the children as well?

Mogeri: The children and the lobolo must be returned because the woman should come back to her late husband's people. If she refuses to come back, then everything belongs to the late husband's people.

Matsila and Nethengwe *questioned:* You two say that when a woman is old and she returns to her people, then her late husband's people cannot get the lobolo, if she has had children?

Answer: They don't ask for the lobolo, because the children remain at the husband's kraal.

Question: Do any of you know Chief Kinge Rasagane?

Answer: Most of us do.

Question: Can you tell us what practice obtains in his area? If a widow, having had children, after her husband's death, returns to her own people, which law is followed in Chief Kinge's territory?

Answer: The Venda practice is followed there and also in Headman Ngwekulu's country.

Question: I want to ask the Shangaan Assessors another question. If a widow who has borne children and would like to go and live with her own people and her late husband's heir gives her consent to go and live there, does that make any difference?

Answer:

Mhinga: If there has been an agreement with the heir that this widow can go to her people's home, then there is no quarrel, and we shall keep on going to see her.

Mabulela: That is so, but the only trouble will be when she begins to have friends when she is at her people's home; I mean men friends.

Adv. van der Spuy to Bavendas: If a woman is married into another kraal for 32 years and stayed there all her life and borne children, and then leaves, is it usual for one of the sons of this kraal to claim the return of this old woman?

Answer: Matsila: The woman has no right whatsoever to leave the kraal and go back to her home, so that once she leaves the kraal and goes back to her people, they have the right to go to her people's home and ask for her return, but if she refuses, they cannot claim return of lobolo.

For Appellant: Adv. van der Spuy, instructed by Messrs. Metelerkamp, Ritson & Keet, Pretoria.

Respondent in default.

NORTH EASTERN NATIVE APPEAL COURT.

N.A.C. CASE No. 46/51.

DHLAMINI *v.* MAHLABA.

DURBAN: 31st October, 1951. Before Steenkamp, President; Balk and Lawrence, Members of the Court.

COMMON LAW.

Practice and Procedure—Appeal to Appellate Division—No reasonable prospect of success. In pari delicto *rule.*

Summary: Plaintiff had authorised defendant to collect certain rents from tenants to recoup himself to the extent of £90. 6s. 9d. lent by defendant to plaintiff.

Defendant collected in all £250 from those tenants and plaintiff claimed the amount collected in excess of £90. 6s. 9d. The Native Commissioner's judgment in favour of defendant was reversed on appeal by the Native Appeal Court.

Defendant now applies for consent to apply for leave to appeal to the Appellate Division of the Supreme Court.

Held: That as it is clear that the defendant took improper advantage of the mandate given to him by the plaintiff to recoup himself to the extent of the loan by means of the rentals in question, to misappropriate further of those rentals, there can be no doubt that public policy in this instance demands a relaxation of the *in pari delicto* rule in the plaintiff's favour.

Held further: That in view of the above the applicant cannot be said to have a reasonable prospect of success on further appeal on the merits of the case and that the application for the consent of this Court to apply for leave to appeal to the Appellate Division should be refused.

Cases referred to:

Estate Kaluza *v.* Braeuer, 1926, A.D., 243.
Haine *v.* Podlashuc & Nicholson, 1933, A.D., 104.
De Wet *v.* Union Government, 1933, A.D., 200.
Jajbhay *v.* Cassim, 1939, A.D., 540.
Kramer *v.* Coloured Vigilance Committee, Grassy Park, 1948 (1) S.A. 1233 (A.D.).
Kriegler *v.* Minitzer & Anr., 1949 (4) S.A. 821 (A.D.).
Padayachey *v.* Lebese, 1942, T.P.D. 10.

Statutes referred to:

Section 18 of Act No. 38 of 1927.
Sections 1, 9 (5) and 46 (2) of Act No. 25 of 1945.
Proclamation No. 29 of 1937.

Application for consent to apply for leave to appeal to the Appellate Division of the Supreme Court against the reversal on appeal of a judgment of the Court of Native Commissioner, Durban.

Balk (Permanent Member).

This is an application for the consent of this Court, in terms of section *eighteen* of the Native Administration Act, 1927, to apply for leave to appeal to the Appellate Division of the Supreme Court in consequence of the reversal by this Court of the judgment given in a certain action by a Native Commissioner's Court in favour of the defendant (present applicant) after the hearing of an appeal brought by the plaintiff (present respondent).

The pleadings in that action and the findings thereupon by the Court *a quo* and this Court, as well as the respective reasons for those findings, are set out in the judgment of this Court delivered on the 25th July, 1951.

The money and cottage in issue in the action in question are obviously so substantial in relation to the costs of the contemplated appeal as to constitute an amount of real or substantial importance between the parties, so that all that remains is to ascertain whether or not the applicant has a reasonable prospect of success on further appeal on the merits of the case, *vide* De Wet *v.* Union Government, 1933, A.D., 200.

The points which the applicant desires should be stated by this Court for consideration by the Appellate Division of the Supreme Court, are—

" (*a*) whether, having regard to the findings of fact which were arrived at by the Native Commissioner, this Honourable Court did not misdirect itself in reversing those findings of fact;

(*b*) whether this Honourable Court misdirected itself in its finding with regard to the onus of proof in the proceedings between respondent and me;

(*c*) wheter this Honouroble Court was correct in its finding with regard to the Plea of illegality which had been set up by me in the said Court of the Native Commissioner—

(i) that there was uncertainty that there had been an infringement of the Natives (Urban Areas) Act, 1945; or

(ii) that respondent was entitled to claim and recover from me the amount claimed by him on the grounds stated in the judgment of this Honourable Court delivered by His Honour Balk, Permanent Member."

Counsel for the applicant intimated that he did not press point (*a*) unless it was found by this Court that there was substance in point (*b*), in which event the reversal by this Court on appeal of the findings of fact by the Court *a quo* would fall to be reconsidered on further appeal in the light of the altered incidence of the onus of proof as regards the alleged sale of the cottage in question; in other words, the question whether the plaintiff had discharged that onus if it rested on him instead of on the defendant, would then have to be considered.

It was contended by Counsel for the applicant that this Court was wrong in its conclusion that the onus of proof regarding that sale rested on the defendant in that on the pleadings it was incumbent on the plaintiff to prove that he was the owner of the cottage in issue at all material times even though this involved his proving a negative. Kriegler *v.* Minitzer and Another, 1949 (4), S.A. 821 (A.D.) was the authority relied upon in furtherance of this contention.

In that action the plaintiff, in claiming in a Magistrate's Court, the balance of the purchase price of a certain building, alleged that he had performed his part of the agreement—a verbal one which had been entered into whilst that building was in the course of construction—and that the defendants were consequently bound to pay the full purchase price therefor. The defendants pleaded that a certain representation, which they alleged was an express term of the agreement in question, had been made by the plaintiff as to the subject matter of the sale, viz., that the plaintiff had bound himself to deliver to the defendants a building which contained a balcony and a staircase, that he had subsequently refused to provide the balcony and staircase and that, not having performed his obligations, he was not entitled to performance by the defendants of their reciprocal obligations. No reply was filed to this plea. On appeal to the Appellate Division of the Supreme Court it was held that the onus rested on the plaintiff to prove that what he had sold was a building without a balcony and staircase. It is important to note for the purposes of the present application that it was held in Kriegler's case that that case was distinguishable from the decision in Estate Kaluza *v.* Braeuer, 1926, A.D., 243, because—

"(*a*) from the record (of the last-mentioned case) it appears that the appellant alleged, without any qualification, a sale by auction on the 22nd April of cattle by him to the respondent which the respondent without qualification admitted, but in a later paragraph he alleged a prior agreement on the 6th April between the parties to the effect that the purchase price of any cattle bought by him at the auction sale should be set off against a debt due by the deceased to the respondent;

(*b*) apart from any question of pleading, the respondent was relying on a prior agreement which modified the liability that would otherwise have rested on him under the contract of the 22nd April and, as in the case of a condition precedent, the onus rested on him to prove it."

(See the report of Kriegler's case at pages 826 and 827.)

In the present instance the plaintiff's case is that he is the owner of a certain cottage situate at 231 Booth Road, Durban (hereinafter referred to as " the cottage "), that he had authorised the defendant to collect rentals as from the 1st December, 1948, from the tenants thereof to recoup himself to the extent of £90. 6s. 9d. lent by the defendant to the plaintiff, that the defendant collected rentals from those tenants in the sum of £250 and that his (plaintiff's) claim is in respect of the excess of such rentals collected by the defendant over and above the amount of the said loan, i.e. the difference between £250 and £90. 6s. 9d. and for an order restraining the defendant from further collecting rents from the tenants concerned. The defendant in the relevant portion of his plea denied both that the plaintiff was the owner of the cottage and that he (defendant) had been authorised by the plaintiff to collect any rent from the tenants concerned and averred that he (defendant) was the owner of the cottage as he had purchased it from the plaintiff.

It is common cause that the cottage stands on land owned by third persons, i.e. the Shahs. The evidence does not disclose the manner in which the cottage is affixed to the soil and it is therefore not clear whether in law it constitutes movable or immovable property. It is obvious, however, from the pleadings and the relevant findings by the Court *a quo,* that the cottage was regarded as a movable. However that may be, the matter to be determined

is the right to the cottage as between the parties and from the nature of the case, as disclosed by the pleadings and evidence, it seems immaterial whether the cottage constitutes movable or immovable property.

It is clear from the pleadings that the sale of the cottage alleged by the defendant was not a term of the agreement relied upon by the plaintiff. Moreover it emerges from the evidence for the defendant that his case is that the alleged sale was concluded before the loan of £90. 6s. 9d. was effected, this loan being common cause. In this connection it must be mentioned that under the rules of Native Commissioners' Courts applicable in this case (now superseded by new Rules) pleadings were not always precise, there being no provision for exceptions or objections thereto, no doubt so that illiterate Natives appearing in those Courts without legal assistance should not be hampered by technicalities in bringing or defending their actions. Consequently it is frequently necessary to have recourse to the evidence to ascertain precisely what the parties' cases are.

Reverting to the present case, it is obvious that, if the alleged sale was concluded before the loan was effected, as averred in the evidence for the defendant, the agreement relied upon by the plaintiff, viz., that the loan was to be repaid by means of the rentals derived from the cottage, and the agreement of sale relied upon by the defendant are mutually exclusive. It follows that if the plaintiff proves the agreement relied upon by him he thereby disproves the agreement of sale relied upon by the defendant, and *vice versa*. It is manifest that since the alleged sale in the present case was not a term of the agreement relied upon by the plaintiff, the decision in Kriegler's case (supra) regarding the onus of proof is distinguishable from the present case in the same way as the decision in Kaluza's case (supra) is distinguishable from Kriegler's case as is clear from the relevant portion of the judgment in the last-mentioned case set out above. It follows that the conclusion reached by this Court that the onus of proof as regards the sale alleged by the defendant rested on him cannot be regarded as wrong. In any event, as pointed out above, the agreement relied upon by the plaintiff and that relied upon by the defendant are mutually exclusive so that if the plaintiff was properly held to have discharged the onus of proof resting on him, viz., if it were properly found that the agreement regarding the repayment of the loan by means of the rentals had been proved by him, he thereby disproved the alleged sale. In this connection it is necessary to consider point (*a*) set out above.

As pointed out in the judgment of this Court referred to above, the presiding judicial officer in the Court *a quo* did not in his reasons for judgment comment on the demeanour of the witnesses but arrived at his findings solely on the probabilities. It is also clear from this Court's judgment that no good reason was given or suggested itself for his rejection of the evidence of the plaintiff's witnesses, Mqwebu and Gumede, and that his reasoning otherwise was also at fault; further that the probabilities as were disclosed by the evidence to have been material, were overwhelmingly in favour of the plaintiff's version and opposed to that of the defendant, with the result that the conclusion reached by this Court that the Court *a quo* was wrong in its findings, was inescapable.

Counsel for the applicant intimated that he had been instructed to point out that the finding against the defendant's version postulated a conspiracy on the latter's part which was against the probabilities. But then a finding against the plaintiff's version would have the same effect in so far as he (plaintiff) is concerned, as it is obvious that in that event he must have entered into a conspiracy with his witnesses, Mqwebu and Gumede; and for the reasons given at page 15 of this Court's judgment and as conceded by Counsel, the contention advanced on behalf of the defendant that it was improbable that he had entered into a conspiracy was a two-edged sword in that it was arguable with equal force on behalf of the plaintiff that it was just as improbable that he had entered into a conspiracy.

In my view, therefore, points (*a*) and (*b*) are without substance.

Coming to point (*c*), Counsel for the applicant produced and referred to Proclamation No. 29 of 1937, which had not been done previously. It seems clear from this Proclamation read with the provisions of sections *nine* (5) and *forty-six* (2) of the Natives (Urban Areas) Consolidation Act, 1945, and the definition of "Native hostel" in section *one* of that Act, that the letting of the cottage to the Native tenants concerned constituted an illegal transaction. Counsel contended that in those circumstances there was no duty on the defendant to account for the rentals claimed by the plaintiff, referring to The Law of Agency in South Africa by De Villiers and Macintosh at page 10 in support of this contention. But the statement of the law in that publication obviously only holds good where the relationship between the parties is one of agency. In the present instance the question of agency between the parties does not arise, as it is no part of the plaintiff's case that he had given the defendant a mandate to collect the rentals claimed. On the contrary the plaintiff's case is that the defendant had no authority whatsoever to appropriate those rentals, i.e. any rentals paid by the tenants concerned once the loan of £90. 6s. 9d. had been satisfied. It follows that in his claim for the rentals the plaintiff does not rely on any agreement between him and the defendant but seeks to recover money payable to him by the tenants concerned which the defendant had appropriated without any authority from him. Assuming, however, that this court was wrong in applying the principle that the plaintiff did not have to rely on any illegality to recover the rentals claimed by him, in that he averred their source both in his claim and evidence, i.e. the letting of the cottage to the Native tenants concerned, and thus may be said to have relied on that letting which was an illegal transaction, the operaton of the *in pari delicto* rule still has to be consdered as between the plaintiff and the defendant. In other words, the Court has to consider whether or not, despite the illegal transaction under which the rentals accrued to the plaintiff and in respect of which the defendant was equally guilty in that in collecting those rentals he made himself a party to the illegal transaction, public policy, which gives due regard to the necessity of doing justice between man and man, demanded a relaxation of the rule in the plaintiff's favour in this instance. In this connection the following extract from the judgment in Padayachey *v.* Lebese, 1942, T.P.D., 10, is in point:—

> "The question is, as I see it, whether a purchaser of stolen property should be permitted to enforce the seller's subsequent agreement to refund the purchase price of such property sold but not delivered, the original unlawful transaction having been treated as at an end in consequence of such non-delivery. The decision in Jajbhay *v.* Cassim, 1939, A.D., 540, makes this question one of public policy to be determined judicially but without precise definition of the limits of public policy. The judgments in that case, in overruling the decision in Brandt *v.* Bergstedt, 1917, C.P.D., 344, indicate, as a consideration of public policy, that an injustice would be perpetrated if the owner of an animal who parts with possession thereof in carrying out a sale thereof in contravention of certain statutory provisions, should not only be prohibited from suing for the purchase price, but be debarred from claiming the return of his animal. On the same basis I think that it is against ordinary justice that persons in the position of the respondent and Ismail Suliman should be enriched by permitting them to retain, as against the appellant, moneys for which they have in fact given no value; and in fact it would be in accordance with public policy, as I see it, to hold them to any specific subsequent agreement made by them to refund such moneys. I therefore consider the first ground of defence fails."

In the present case it is clear that the defendant took improper advantage of the mandate given to him by the plaintiff to recoup himself to the extent of the loan by means of the rentals in question, to misappropriate further of those rentals, viz., those

claimed and due to the plaintiff. Applying the principles enunciated in Jajbhay's and Padayachey's cases (supra), there can, to to my mind, be no doubt that public policy in this instance demands a relaxation of the *in pari delicto* rule in the plaintiff's favour.

I am therefore of opinion that there is also no substance in point (*c*). That being so, the applicant cannot be said to have a reasonable prospect of success on further appeal on the merits of the case and in my view therefore the application should be refused with costs.

Lawrence (Member) (Dissentiente):—

1. This is an application in terms of section *eighteen* of Act No. 38 of 1927 for leave to appeal to the Appellate Division against a decision of this Court delivered on the 25th July, 1951, reversing a judgment given by the Native Commissioner of Durban in an action in which the abovenamed parties were the defendant and plaintiff respectively (hereinafter for convenience referred to as such).

2. The history of the matter is that the plaintiff sued the defendant for £159. 13s. 3d. being the amount alleged to be due to him in respect of rents collected by the defendant from plaintiff's property in excess of the amount which, in terms of an agreement between them, he was entitled to collect.

3. Defendant pleaded that the agreement on which the action was founded was illegal as it was in conflict with the Natives (Urban Areas) Act, 1945. Alternatively, he pleaded that the plaintiff had no title to sue for the rent of the property as the defendant had become the owner of the property by purchase and was "not bound to account to plaintiff in any way". Defendant further counterclaimed for an amount of £90. 6s. 9d. stated to be due to him on an acknowledgment of debt.

4. The Native Commissioner gave judgment in favour of the defendant on both the main and the counterclaim, holding that the defendant had established his purchase of the property in terms of the agreement of purchase and sale put in (Exhibit "B" in the case) and that plaintiff's indebtedness to defendant for the amount of the counterclaim was proved by the acknowledgment of debt produced (Exhibit "A" in the case).

5. On appeal to this Court it was held in a unanimous judgment that the Native Commissioner's finding that the defendant had sufficiently established his purchase of the property could not be sustained and that the probabilities were strongly in favour of plaintiff's contention that no such sale had in fact taken place. It was further held that whether or not the leasing of rooms in the property in question to Natives constituted an infringement of the Natives (Urban Areas) Act, No. 25 of 1945, plaintiff was not relying on an illegal transaction for his claim and in terms of the authorities quoted in the judgment, was consequently not debarred on that ground from suing.

6. This Court thereupon reversed the judgment of the Native Commissioner which was altered to read:—

> "On the claim in convention for plaintiff as prayed with costs. On the counterclaim for defendant in reconvention with costs."

7. Leave is now sought by the defendant to appeal to the Appellate Division on the points as set out in his affidavit annexed to the application.

8. The principles which a Court should apply in deciding a question of this nature have been laid down by the Appellate Division in Haine *v.* Podlashuc & Nicolson, 1933, A.D., 104, and in numerous subsequent decisions, as follows:—

(i) Whether there is an arguable point in the case which has a reasonable prospect of success;
(ii) whether the matter is of general importance or of real or substantial importance to the parties; and
(iii) whether the amount involved is not trivial in relation to the probable costs of the contemplated appeal.

9. As regards the first principle enunciated above, the following aspects of the present case must be taken into account:—

(*a*) This Court differed from the Native Commissioner on a question of fact;

(*b*) this Court accepted the evidence of witnesses which had been rejected by the Native Commissioner, and rejected the evidence of others which he accepted;

(*c*) the decision of this Court in giving judgment in favour of the plaintiff is tantamount to a rejection, as fraudulent or at least as of doubtful validity, of a document (i.e. the deed of sale put in) which, on the face of it, is very strong evidence of the matters it purports to record.

10. The reasons for this Court differing from the Native Commissioner in these respects will be seen from the full and meticulous judgment of my brother Balk (Permanent Member) to be exceedingly cogent, but the possibility of another Court taking a different view of the facts in issue cannot be denied. The first principle must therefore be said to apply.

11. As regards the second and third principles, there can be no question that the matter is of very substantial importance to the parties and that the amount involved is far from trivial if one considers that a property bringing in a rental of £120 per annum is in dispute.

12. For these reasons, I am of opinion that the application for leave to appeal to the Appellate Division should be granted.

Steenkamp (P):—

This is an application for leave to appeal to the Appellate Division of the Supreme Court and by virtue of section *eighteen* of the Native Administration Act, No. 38 of 1927, consent of this Court is sought.

I am loath to refuse consent especially in a case of this nature wherein this Court had reversed the judgment of the Native Commissioner, but at the same time I must not overlook the fact that the Native Commissioner had not approached the issues in the correct manner in as much as he had not attached sufficient importance to the question of preponderance of probabilities.

There is also a principle of law involved but this is a question which has already been decided by the Appellate Division as pointed out by my brother Balk and, to my mind that decision is so much in point that there is no necessity to approach the highest tribunal of the land to deal with the matter again.

This Court is placed in somewhat of an invidious position having to state whether or not the judgment given by it is open to attack [*vide* remarks by Ogilvie Thomson (J.) in Kramer *v.* Coloured Vigilance Committee, Grassy Park, 1948 (1) S.A., 1233, C.P.D.] but as the legislature has imposed that obligation and responsibility upon this Court, which has to consider both parties, I feel that the costs which would be involved would most probably impoverish at least the respondent, concerning whom there is evidence that he is or was in financial difficulties.

After careful consideration I am of opinion that consent by this Court should be refused.

For Applicant: Adv. D. J. Shaw, i/b Mr. A. H. Mulla of Durban.

For Respondent: Mr. R. I. Arenstein of Durban.

NORTH EASTERN NATIVE APPEAL COURT.

N.A.C. CASE No. 111/51.

NDHLOVU *v.* MBATA.

VRYHEID: 7th January, 1952. Before Steenkamp, President; Balk and Thompson, Members of the Court.

ZULU CUSTOM.

Customary Unions—Contracted in Northern Districts of Natal after 1903—*Public declaration to official witness.*

Summary: In an alleged customary union entered into after 1903 in the Northern Districts of Natal no public declaration by the intended wife to the Official Witness was made. The question as to whether such "union" can be regarded as a valid customary union is now in issue.

Held: That as the Northern Districts were ennexed to Natal in 1903, the old Natal Code of Native Law contained in the Schedule to Law 19 of 1891 (Natal) obtained there as from that year.

Held further: That as the public declaration by the intended wife to the Official Witness on the wedding day to the effect that the proposed customary union was being entered into with her own free will and consent was not made, the "union" in this case cannot be regarded as a valid customary union.

Cases referred to:—

Mfanombana *v.* Fana, 1922, N.H.C., 26.
Mdhlalose *v.* Kuba, 1938, N.A.C. (T & N), 43.
Ngema *v.* Ndhlela, 1938, N.A.C. (T & N), 210.

Statutes referred to:—

Sections 148 and 151 of the Old Natal Code of Native Law contained in the schedule to Law No. 19 of 1891 (Natal).

Appeal from the Court of the Native Commissioner, Utrecht.

Balk (Permanent Member), delivering the judgment of the Court:—

The plaintiff (present respondent) sued the defendant (present appellant) in a Chief's Court for the custody of a certain minor female child named Monkey Nut.

The plaintiff is the eldest son of the late Geelbooi Mbata who was the eldest son of the late Thunzane Mbata. The latter had a daughter, Kelina, who was a full sister of the late Geelbooi. One Maphelu paid lobolo for Kelina. It is disputed whether all or only portion of that lobolo was paid, but this aspect seems immaterial as will be clear from what follows. Maphelu and Kelina lived together as man and wife for some considerable time. Six children were born of that union, of whom those that survived are a son, viz., the defendant, and two daughters, Nomasonto and Martha. Monkey Nut is the illegitimate daughter of Nomasonto.

The Chief gave judgment for the plaintiff.

An appeal by the defendant against this judgment to the Native Commissioner's Court was dismissed with costs.

The matter was then brought in appeal to this Court which set aside the judgment of the Native Commissioner's Court and returned the record of proceedings to it for a fresh judgment after evidence had been lead to determine whether the union between Maphelu and Kelina had been entered into before or after the year 1903, as the record did not disclose the position in this respect and a finding thereon was essential for a proper determination of the case as will be apparent from what follows.

The parties and their relatives concerned in this action belong to the Utrecht District which forms part of the territory in Natal known as the Northern Districts. This territory was annexed to Natal during the year 1903 and the old Natal Code of Native Law contained in the Schedule to Law No. 19 of 1891 of Natal therefore obtained there as from that year. Section 148 of that Code laid down the essentials of a customary union in Natal which differed materially from those obtaining in the other provinces, particularly as regards the provision in paragraph (*c*) of that section which required a declaration in public by the intended wife to the Official Witness on the wedding day that the proposed customary union was being entered into with her own free will and consent.

In the instant case the rights of the parties to the custody of Monkey Nut turn on the question of whether the "union" between Maphelu and Kelina was a valid cutomary union, since the plaintiff's claim is founded on his avernment that Monkey Nut's mother, Nomasonto, and the defendant are the illegitimate children of Kelina, whereas the success of the defendant's case is contingent upon a finding that he and his sister, Nomasonto, are the legitimate children of Maphelu and Kelina; in other words, that a valid customary union had been contracted by them. Here it may be mentioned that Maphelu is still alive, and according to his evidence Monkey Nut is living with the defendant apparently with his (Maphelu's) consent. The plaintiff's version is that the defendant took Monkey Nut from the plaintiff's kraal and has kept her at his (defendant's) kraal.

At the conclusion of the further hearing of this case in pursuance of the directions of this Court mentioned above, the Native Commissioner's Court found that the "union" between Maphelu and Kelina had been entered into after the year 1903 and again dismissed, with costs, the appeal by the defendant against the Chief's judgment.

The present appeal by the defendant is against this judgment of the Native Commissioner's Court, on the ground that it is against the weight of the evidence.

In her evidence for the plaintiff at the further hearing, his mother, Rosalina, stated that she had been married two years after the conclusion of the last Anglo-Boer War and that at that time Kelina was "a little girl at home"; further that Maphelu and Kelina entered upon their "union" after her (Rosalina's) marriage.

Maphelu was the only witness called by the defendant at the further hearing.

The presiding Native Commissioner concerned accepted Rosalina's evidence and rejected that of Maphelu, finding that the latter was an unreliable witness and referring to certain contradictions in his evidence.

Maphelu in his testimony at the further hearing, stated:—

> "I matured during the Rinderpest (1896)—that is when I reached puberty. I married at the end of the Boer War—during the winter. The war ended just when winter started but I cannot say what year it was. I married just when war ended—the same winter it ended. I then married Kelina, the daughter of Tunzana . . . Rosalina married first and shortly thereafter I married Kelina. She did not marry two years after the Boer War. I married about six months after Rosalina. Kelina's lobolo was used for Rosalina. When Rosalina married the Boer War had ended, but had not yet ended a long time . . . I cannot say how long after the Boer War Rosalina married."

It is obvious from these extracts from Maphelu's evidence that it is unconvincing on the face of it. In addition there are the contradictions referred to by the Native Commissioner in his judgment.

In my view, therefore, the Native Commissioner was justified in rejecting Maphelu's evidence on the ground that he was an unreliable witness, and in accepting the testimony of Rosalina at the further hearing. Consequently the Native Commissioner properly found that the "union" between Maphelu and Kelina had been entered into after the year 1903. That being so, the provisions of Section 148 of the Old Code referred to above, apply to that "union" and as it is manifest from the evidence that the declaration in public required in terms of paragraph (*c*) of that section was not made by Kelina, her "union" with Maphelu cannot be regarded as a valid customary union, see Mfanombana *v.* Fana, 1922, N.H.C., 26; Mdhlalose *v.* Kaba, 1938, N.A.C. (T & N), 43 and Ngema *v.* Ndhlela, 1938, N.A.C. (T & N), 210.

That this was the position appears to have been accepted by both the defendant and Maphelu, as the former stated in his evidence: "My mother and father were not married. That is why I cannot say that Maphelu is the child's (Monkey Nut's) guardian"; and he undertook in the Chief's Court to return Monkey Nut to the plaintiff; and Maphelu, in the course of his evidence, stated: "I was not married to Kelina".

Counsel for appellant contended that the onus of proof that official witnesses had already been appointed in the Utrecht District at the time when Maphelu and Kelina entered into their "union" rested on the plaintiff and that the latter had not discharged that onus.

In my view that contention is without substance since, although Maphelu stated in his evidence at the further hearing:— "There were no official witnesses (at the time in question)", it is clear from Maphelu's evidence at the initial hearing that that was not in fact the position, as he then stated that Geelbooi had refused to register the said "union", which postulates that customary unions could be registered in the Utrecht District at the time in question and that official witnesses had then already been appointed, *vide* the provisions of Section 151 of the Old Code referred to above.

I therefore come to the conclusion that Nomasonto is an illegitimate daughter of Kelina, the full sister of the plaintiff's father, and that in Native Law the plaintiff, being his father's eldest son—plurality of wives is not involved in this case—became, on his father's death, the guardian of Nomasonto and is therefore also the guardian of the latter's illegitimate daughter, Monkey Nut, and, as such, entitled to her custody.

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

Steenkamp (President): I concur.

Thompson (Member): I concur.

For appellant: Mr. J. F. du Toit, i/b. H. T. W. Tromp, Esq., Utrecht.

For respondent: Mr. H. L. Myburgh, i/b. D. R. Smith, Esq., Dundee.

NORTH EASTERN NATIVE APPEAL COURT.

N.A.C. CASE No. 120/51.

MAGWAZA *v.* NTOMBELA.

VRYHEID: 8th January, 1952. Before Steenkamp, President; Balk and Thompson, Members of the Court.

ZULU CUSTOM.

Native Law—Damages for assault—liability of guardian—assessment of damages.

Practice and Procedure: Citing of defendant—not clear whether defendant's guardian joined as a second defendant or merely as assisting defendant.

Summary: Plaintiff sued defendant duly assisted by his father for damages for assault. From the relative record of proceedings, however, it is not clear from which of the two persons the plaintiff intended to recover the damages, nor against which of those persons the judgment under appeal was given.

Held: That the judgment is ambiguous in that it is not clear from the record which of the two persons is liable thereunder, and moreover, it is not clear from the relative summons from which of the two persons the plaintiff intended to recover the damages, nor is that ambiguity clarified by the evidence.

Held further: That it was not competent for the Court below to have given judgment against Qolobana, the guardian, even if he were a party to the action, in the absence of any evidence or an admission that Magomana had committed the said assault whilst he was in residence at Qolobana's kraal.

Held further: That the aspect of the circumstances under which the assault was committed, i.e. whether there had been any provocation, was not only material in the assessment of the damages claimed, but was one that should have been enquired into by the Native Commissioner concerned, as the parties were not represented by legal practitioners in that Court and the defence was that the plaintiff had suffered no damages.

Cases referred to:—

Kuzwayo and Others *v.* Zwane, 1948, N.A.C. (T & N), 11.
Pambaniso *v.* Willem, 1939, N.A.C. (C & O), 94.

Statutes referred to:—

Section 141 (2) (*a*) of Natal Code of Native Law published under Proclamation No. 168 of 1932.

Appeal from the Court of the Native Commissioner, Babanango.

Balk (Permanent Member), delivering the judgment of the Court:—

The plaintiff instituted an action in a Native Commissioner's Court in Natal, claiming the sum of £100 damages for an assault committed on him during April, 1950.

The presiding Native Commissioner entered judgment for the plaintiff in the sum of £25 with costs.

The parties were not represented by legal practitioners in the Court *a quo*, and the present appeal is brought by Magomana and Qolobana on the grounds that the said judgment is against the weight of evidence and contrary to law.

It is not clear from the relative record of the proceedings in this action in the Court below from which of the two persons named by the plaintiff in his summons, he intended to recover the damages in question, nor against which of those persons the judgment under appeal was given. That this is the position is manifest from what follows.

On the face of the cover, which is the portion of the record in question on which the said judgment is entered, the parties are shown as—

" Mhlanganyelwa Ntombela ... ... Plaintiff

versus

Magomana Magwaza ... ... Defendant "

In the relative summons they are denoted as follows:—

" Mhlanganyelwa Ntombela ... ... Plaintiff

versus

(1) Magomana Magwaza d.a. by

(2) Qolobana Magwaza ... ... Defendant (singular) ".

That summons is directed " to the abovenamed defendant (singular) " and requires him to appear before the Court concerned on a certain date and at a certain time, together with his witnesses, " to answer the claim of the above-named plaintiff, as follows:—

Plaintiff claims from defendant the sum of £100, being for damages suffered by the plaintiff by an assault during April 1950.

Plaintiff suffered great pain and was admitted to the Eshowe Hospital where he was operated on for a depressed fracture of the skull.

Notwithstanding several demands the defendant refuses or neglects to pay, wherefore plaintiff prays for judgment in his favour and costs."

The plea as recorded by the Native Commissioner concerned reads:—

" Defendant's plea:—

(1) Admits that he assaulted plaintiff.
(2) Denies that the damages suffered amounted to £100 and states that he suffered no damages."

According to the certificate of record, this case was between Mhlanganyelwa Ntombela *versus* Magomana Magwaza d.a. by Qolobana Magwaza.

Again, as is evident from the foregoing extract from the summons, it does not disclose the grounds on which it was sought to hold Qolobana and/or Magomana liable for the damages claimed in that it does not specify who committed the assault in question.

According to the evidence for the plaintiff, Magomana alone committed that assault; Qolobana, in his evidence, admitted that he was Magomana's father; but there is nothing in the evidence as a whole, nor any admission indicating that Magomana committed the said assault whilst he was in residence at the same kraal as his father, Qolobana. This is a fatal defect in so far as Qolobana's liability for damages for the assault in question is concerned, see Section 141 (2) (*a*) of the Natal Code of Native Law published under Proclamation No. 168 of 1932 and Kuzwayo and Others *v.* Zwane, 1948, N.A.C. (T & N), 11.

Moreover, the circumstances under which the said assault was committed, i.e. whether there had been any provocation, etc., was not canvassed in the Court below. This aspect was not only material in the assessment of the damages claimed, but was one that should have been enquired into by the Native Commissioner concerned, as the parties were not represented by legal practitioners in that Court and the defence was that the plaintiff had suffered no damages.

It would appear from the reasons given by the Native Commissioner concerned in support of the judgment under appeal that he intended that judgment to bind both Magomana and Qolobana, jointly and severally, but, as is evident from what has been stated above, that judgment is ambiguous in that it is not clear from the relative record which of those persons is liable thereunder, i.e. Magomana only, or both he and Qolobana. Moreover, as is also obvious from what has been stated above, it is not clear from the relative summons from which of those persons the plaintiff intended to recover damages for the assault in question; nor is that ambiguity clarified by the evidence. It follows that the judgment under appeal is bad in law on those grounds, see Pambaniso *v.* Willem, 1939, N.A.C. (C & O), 94. In any event, as pointed out above, it was not competent for the Court below to have given judgment against Qolobana, even if he were a party to the action, in the absence of any evidence or an admission that Magomana had committed the said assault whilst he was in residence at Qolobana's kraal.

I feel constrained to add that it is a matter for regret that the Native Commissioner concerned should have dealt with this case so ineptly and should have lent himself to so much confusion in such simple issues as were involved.

It is observed that the certified copies of the record in question differ materially from the original. The gravity of failure to ensure that the certified copies of such a record correspond in all respects with the original cannot be sufficiently strongly stressed as obviously such a failure may well result in this Court dealing with the case on appeal on incorrect premises and thereby causing a miscarriage of justice. The Native Commissioner concerned is directed to bring this matter home to the officer responsible in no uncertain terms with a view to ensuring that defects of the nature in question do not recur in the future.

In the result, I am of opinion that the appeal should be allowed with costs and that the judgment of the Court *a quo* should be altered to read: "Absolution from the instance with costs."

Steenkamp (President): I concur.

Thompson (Member): I concur.

For appellant: Mr. F. J. du Toit, i/b. Messrs. Bestall & Uys, Kranskop.

Respondent in person.

NORTH EASTERN NATIVE APPEAL COURT.

N.A.C. CASE No. 110/51.

MBATA *v.* MDHLALOSE.

VRYHEID: 7th January, 1952. Before Steenkamp, President; Balk and Thompson, Members of the Court.

COMMON LAW.

Practice and Procedure—Appeal from Chief's Court—Application for extension of time in which to note—particulars required to be lodged by the Chief concerned not furnished—fatal defect —Rule 14 of new rules for Chiefs' Civil Courts.

Summary: Plaintiff applied to a Native Commissioner's Court for an extention of time within which to note an appeal against the judgment of a Chief's Court, but did not at the same time or timeously thereafter note an appeal against such Chief's judgment. The application having been refused plaintiff appealed to the Native Appeal Court.

Held:

(1) That the procedure to be followed in applications for extension of time in which to note an appeal against a Chief's judgment is that an appeal must be noted and that either at the time of such noting or timeously thereafter application must be made for the necessary extension of time to validate such late noting.

(2) Further, that as such procedure was not followed and the particulars required to be lodged by the Chief concerned in terms of Rule 7 of the Rules for Chiefs' Civil Courts, published under Government Notice No. 2255 of 1928, as amended, have not been furnished, the Native Commissioner's Court was precluded from considering the merits of the applicant's case in the Chief's Court, and consequently it could not determine whether or not those particulars disclosed a manifest miscarriage of justice.

(3) Further, that the new Rules for Chief's Civil Courts will now apply to this case by virtue of the provisions of Rule 14 thereof.

Cases referred to:

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

Gezane *v.* Gabuza, 1946, N.A.C. (T. & N.), 100.

Mbhele *v.* Mbanjwa, 1947, N.A.C. (T. & N.), 89.

Statutes referred to:

Rule 7 of Government Notice No. 2255 of 1928.

Rule 14 of Government Notice No. 2885 of 1951.

Appeal from the Court of the Native Commissioner, Nqutu.

Balk (Permanent Member), delivering the judgment of the Court:—

Good cause having been shown, the late noting of the appeal to this Court is condoned.

This appeal is against a Native Commissioner's refusal to entertain an application for extension of time within which to note an appeal against a judgment of a Chief's Court.

The reasons given by the applicant (present appellant) in the Native Commissioner's Court for the delay in noting the appeal against the Chief's judgment are twofold, viz., lack of funds and illness. It has repeatedly been held by this Court that lack of funds does not constitute good cause for the condonation of the late noting of an appeal and it is manifest from the evidence that in this instance the remaining ground, i.e. illness, has not been substantiated.

I therefore agree with the Native Commissioner that the applicant cannot succeed on those grounds. But this does not dispose of the matter since the merits of the applicant's case in the Chief's Court also fall to be considered, see Lekthetha *v.* Toane, 1946, N.A.C. (C. & O.), 22 and Qina's case referred to therein.

The procedure to be followed in applications of the nature in question was laid down by this Court in Mbhele *v.* Mbanjwa, 1947, N.A.C. (T. & N.), 89, viz., that an appeal must be noted against the Chief's judgment and that either at the time of such noting or timeously thereafter application must be made for the necessary extentsion of time to validate the late noting.

This procedure was not followed in the instant application and the particulars required to be lodged by the Chief concerned in terms of Rule 7 of the Rules for Chiefs' Civil Courts, published under Government Notice No. 2255 of 1928, as amended, have not been furnished. This is a fatal defect in that the absence of those particulars precluded the Native Commissioner's Court from considering the merits of the applicant's case in the Chief's Court, so that it could not determine whether or not those particulars disclosed a manifest miscarriage of justice, see Gezane *v.* Gabuza, 1946, N.A.C. (T. & N.), 100.

In my view therefore the appeal should be allowed with costs, the Native Commissioner's judgment should be set aside and the record of proceedings returned to him for further hearing and a fresh judgment after the proper procedure has been followed, i.e. after the appeal has been noted against the Chief's judgment under the new Rules for Chiefs' Civil Courts published under Government Notice No. 2885 of 1951, which, by virtue of Rule 14 thereof, now apply in the instant case, and after the relevant Rules in that Government Notice have been complied with. Costs already incurred in the Native Commissioner's Court to be borne by the applicant.

Steenkamp (President): I concur.

Thompson (Member): I concur.

NORTH EASTERN NATIVE APPEAL COURT.

N.A.C. CASE No. 117/51.

NXUMALO *v.* NXUMALO.

VRYHEID: 8th January, 1952. Before Steenkamp, President, Balk and Thompson, Members of the Court.

ZULU CUSTOM.

Practice and Procedure—Action on behalf of minor against guardian.

The facts appear from the judgment.

Held: That a minor need not be assisted in an action against his guardian unless the Court considers it necessary that a *curator ad litem* should be appointed, and so directs, and it is not competent, when a dispute arises between such ward and his guardian for another member of the family to inter vene and take action in his own name or even to sue on behalf of the minor unless, in terms of Section 50 (2) of the Code, the Court has so directed.

Statutes referred to:
Section 50 (2) of the Natal Code of Native Law.

Appeal from the Court of the Native Commissioner, Utrecht.

Steenkamp (P), delivering the judgment of the Court:—

Just cause having been shown, the late lodging of the security is condoned.

In the Chief's Court the plaintiff (now appellant) sued the defendant (now respondent) for five head of cattle on behalf of his brother's son, Muntu. The Chief gave judgment in favour of plaintiff and in his reasons for judgment he states he did this because it was proved that the cattle in question belonged to Muntu. The defendant appealed to the Native Commissioner who allowed the appeal from the Chief's Court and altered the judgment to one for defendant with costs.

Plaintiff has now noted an appeal to this Court on the grounds (1) that the Native Commissioner erred in giving judgment against him contrary to the decision of the Native Chief whose judgment was in conformity with the law and custom; (2) that the judgment was against the weight of evidence. After the Native Commissioner had filed his reasons for judgment, additional grounds of appeal were filed. These additional grounds are headed: "Rebutting Native Commissioner's Reasons for Judgment" and will be dealt with at a later stage in this judgment.

From the evidence it is clear, and not seriously disputed, that—

(1) Defendant is the eldest son and heir of the late Willie, who was the younger brother of the plaintiff;

(2) Willie had two wives, viz., Rhoda and Lesiah. The defendant is the eldest son by the first wife, Rhoda. During Willie's lifetime Lesiah bore him a daughter by the name of Mantshakazana and after Willie's death his widow, Lesiah, was "ngenaed" by Willie's brother, Piet; as the result of this "ukungena" union, Muntu was born, who then became the heir of that house.

The plaintiff and his late brother, Willie, all lived at the kraal of their late father, but after Willie's death the plaintiff established his own kraal and the defendant and Muntu remained at the kraal where they had previously lived. Defendant then became the head of that kraal where Muntu continued to live with him. The cattle which were paid as lobolo for the girl Mantshakazana also remained at this kraal. Subsequently the defendant removed his kraal and took the lobolo cattle in question with him. Muntu later went and lived with his mother's people.

It also emerges from the evidence that Muntu and his half-brother, the defendant, quarrelled. From what can be gathered from the evidence, the quarrel was due to the fact that defendant took three of the lobolo cattle he had received for the girl Mantshakazana and used them for his own purposes. The defendant admits this and states that he knows he is liable to refund those cattle to Muntu when the latter comes of age, but his defence is that plaintiff is not entitled to have the cattle in his possession.

The additional grounds of appeal filed by the plaintiff are to the effect that after the death of the defendant's father, the plaintiff became the guardian of the defendant and Muntu until the defendant married; he (plaintiff) then remained and still is the guardian of Muntu and the defendant used all the lobolo cattle received for the girl, Mantshakazana, which belong to the kraal of Muntu; plaintiff only instituted the proceedings at the request of Muntu and he did so for the purpose of protecting his interests, Muntu being his ward.

Muntu, at the time of this action, was actually living at the kraal of his late mother's people and it is not correct for the plaintiff to allege that he is the guardian of Muntu. During the minority of Muntu, there can be no doubt that the defendant is his guardian and if there is a dispute between them, then it is not competent for another member of the family to sue the guardian in his own name or even to sue on behalf of the minor, unless, in terms of Section 50 (2) of the Code, the Court has so directed. Section 50 (2) reads as follows:—

> "Any person who is a subject of guardianship in respect of either his person or his property may bring an action against his guardian without the assistance of a *curator ad litem* unless the Court otherwise directs."

I interpret this section to mean that the minor need not be assisted in an action of this nature unless the Court considers it necessary that a *curator ad litem* should be appointed, and so directs.

While Muntu may have a good claim against the defendant, I do not see how the plaintiff, who is an uncle of the defendant and of Muntu, could intervene and take action in his own name. It is true, in the body of his claim, he states he is suing on behalf of Muntu, yet if we read the judgment of the Chief, this judgment was in favour of the plaintiff personally, and this would certainly not be correct. In any event there is nothing to indicate that the plaintiff was, at the direction of the Court, appointed as *curator ad litem* in this action. Muntu is still at liberty to sue his half-broher, the defendant, as the judgment given by the Native Commissioner cannot be pleaded as *res judicata* in case the defendant refuses or neglects to hand the cattle over to Muntu.

In my opinion the appeal should be dismissed with costs.

I wish to draw the Native Commissioner's attention to the fact that it has been held by this Court on numerous occasions that when the Court below hears an appeal from the Chief's Court the use of the words "Appellant" and "Respondent" should be avoided. These terms only lead to confusion when the case eventually comes before this Court on appeal. The present case is a good indication of how confusing these terms are. The person who was the appellant from the Chief's Court is actually the respondent in this Court, and *vice versa*, and I personally found it very difficult, when reading the record and the Native Commissioner's reasons, to follow the matter intelligently, and it was only after I made the necessary alterations that I was able to follow the evidence.

Balk and Thompson concurred.

Appellant in person.

For Respondent: Mr. J. F. du Toit, i/b H. T. W. Tromp, Esq., Utrecht.

NORTH EASTERN NATIVE APPEAL COURT.

N.A.C. CASE No. 136 OF 1951.

BUTELEZI *v.* **MTETWA.**

VRYHEID: 8th January, 1952: Before Steenkamp, President; Balk and Thompson, Members of the Court.

ZULU CUSTOM.

Native Law and Custom—Mbeko beast.

Practice and Procedure: Available witness not called by party in Court *a quo*—in public interest that finality in litigation should be reached.

The facts appear from the judgment.

Held: That there is no doubt that it is a well-established custom for a father of a girl to gift an "mbeko" beast to the bridegroom's kraal, which beast then becomes the property of the house established.

Held further: That this Court, not being a Court of record, may not hear any evidence and though it is empowered to return a record for further evidence if it considers such a course desirable. it is in the public interest to reach finality in litigation, and in view of the fact that appellant was legally represented in the Court below, and his case having been closed, this Court was not prepared to return the record for further evidence as suggested by appellant.

Cases referred to:—

Ntamane *v.* Nkosi, 1935, N.A.C. (T & N) 20.
Masikane *v.* Masikane, 1936, N.A.C. (T & N) 63.
Vilakazi *v.* Nkambule, 1944, N.A.C. (T & N) 57.
Mtshali *v.* Mhlongo, 1944, N.A.C. (T & N) 71.
Ngcobo *v.* Ngcobo, 1928 N.H.C. 8.

Appeal from the Court of the Native Commissioner, Vryheid.

Steenkamp (President), delivering the judgment of the Court:—

In the Native Commissioner's Court the plaintiff sued the defendant for the return of twenty head of cattle or their value £200. In his summons he avers that the twenty cattle are the progeny of a certain cow and calf belonging to the house of his mother and "sisaed" to defendant by plaintiff's late father. Defendant's plea is a denial that plaintiff's late father "sisaed" any cattle to him and puts plaintiff to the proof thereof.

The Native Commissioner gave judgment for defendant with costs and against that judgment an appeal has been noted by the plaintiff on the following grounds:—

"1. The general heir of my late father was present outside the court to-day but my attorney did not call him.

2. He, the general heir, drove the 'mbeko' beast, the 'sisa' beast, to defendant's kraal.

3. I note an appeal against the judgment of the Court because the Court gave a wrong decision on the facts before it."

Defendant also filed, within the period prescribed for noting an appeal, the following statement:—

"I say what Mpaseni Mtetwa said in front of the Native Commissioner is not true. It is not what we spoke at his kraal, at the Chief's Court and finally at the dipping tank. Even his witnesses, it is not the truth that a person can 'bekela' his daughter before she gets married, and further that he 'bekas' with a heifer or a cow. One 'bekas' with an ox and that ox is slaughtered and the wives of that man do not eat the meat of this ox. A goat is slaughtered for the wives.

Mpaseni said to Mr. Moolman, cattle in dispute belonged to my father and why at this stage deny these cattle belong to me?

Finally I like to stress that these cattle are the progeny of a black heifer which was placed on 'sisa' by my father to my sister Bapetile for milking purposes."

It is common cause that the defendant, about 25 years ago, entered into a customary union with one Bapetile, sister of the plaintiff in another house. Their father was then still alive and it is common cause that he died about 1939. It is also common cause that at the time when Bapetile and defendant got married, or soon threafter a cow was delivered to his kraal. The plaintiff states that the cow was "sisaed" to the defendant whereas defendant states that it was an "mbeko" gift.

Recently Bapetile and defendant were divorced and the plaintiff is now claiming the return to him of the progeny of the cow in question.

The case resolves itself to a question of fact as to whether the cow was a gift or whether it was "sisaed".

The Native Commissioner in his facts found proved found that the cow was an "mbeko" beast and with this finding I am entirely in agreement, as the evidence abundantly supports this.

An "mbeko" beast is defined in the case of Mtshali *v.* Mhlongo, 1944, N.A.C. (T & N) 71, as being "an out and out unconditional gift sent by the bride's father to the bridegroom's kraal. It goes with the bride." In that case the "sigodo" beast is also mentioned. Braatvedt (P.) is reported to have stated that as far as he knows this is a beast to be slaughtered, and the "mbeko" is to provide the woman with sustenance.

I consulted the following cases:—

Ntamane *v.* Nkosi, 1935, N.A.C. (T & N), page 20;
Masikane *v.* Masikane, 1936, N.A.C. (T & N), 63; and
Vilakazi *v.* Nkambule, 1944, N.A.C. (T & N), 57.

In all these cases and also in the case of Mtshali *v.* Mhlongo, (supra), there is no doubt that it is a well-established custom for a father of a girl to gift an "mbeko" beast, which becomes the property of the house established.

In the case of Ngcobo *v.* Ngcobo, 1928, N.H.C., 8, quoted in the case of Ntamane *v.* Nkosi (supra), Mr. Justice Leslie referring to gifts of cattle to a woman on her marriage, stated:—

> "This custom is so universally followed that there is a strong presumption in favour of the appellant's case that the cow was a free gift made outright to appellant's mother's hut and it is for respondent to disprove that presumption with the clearest evidence; this he signally failed to do."

In the present appeal this beast was handed over to the defendant 25 years ago and with the exception, according to the plaintiff's evidence, that he went and looked at the cattle for the first time about eight years ago, there is no evidence that either the plaintiff or his late father ever exercised any ownership over the cattle. The presumption is strongly in favour of the defendant, and, as pointed out by the Native Commissioner in his reasons for judgment, the evidence adduced on behalf of the plaintiff was so unsatisfactory that he could not accept it as being the truth.

Appellant (plaintiff) has indicated in his grounds of appeal and also stressed it in this Court, that his eldest brother, the general heir of his late father, should have been called as a witness to testify that the beast had been "sisaed" and not gifted as an "mbeko" beast.

This Court, not being a Court of record, may not hear any evidence but is, of course, empowered to return a record for further evidence if it considers such a course desirable. The appellant was legally represented in the Court below and his case was closed. It is in the public interest that finality in litigation should be reached and I am not prepared to return the record for further evidence as suggested by the appellant. Such a course lends itself to a possibility of evidence being fabricated.

In my opinion the appeal should be dismissed with costs.
Balk (Permanent Member): I concur.
Thompson (Member): I concur.
Appellant in person.
For Respondent: Mr. H. L. Myburgh of Messrs. Bennett & Myburgh, Vryheid.

NORTH EASTERN NATIVE APPEAL COURT.
N.A.C. CASE No. 127 OF 1951.

DHLALISA *v.* **MDHLALOSE.**

VRYHEID: 9th January, 1952: Before Steenkamp, President, Balk and Thompson, Members of the Court.

ZULU CUSTOM.

Children—Paternity—Evidence of mother of child essential.

The facts emerge from the judgment.

Practice and Procedure: Person entitled to seduced girl's lobolo must sue for damages.

Held: That as the mother of the child was not called as a witness and the alleged father of the child having denied paternity on oath, the plaintiff could not succeed in her claim.

Held further: That in Native Law the proper person to sue for damages for seduction in a case such as the present one, is the person entitled to the seduced girl's lobolo.

Appeal from the Court of the Native Commissioner, Nqutu.

Balk (Permanent Member), delivering the judgment of the Court:—

This is an appeal against the judgment of a Native Commissioner's Court, dismissing with costs an appeal by the defendant against the judgment of a Chief's Court given in favour of the plaintiff for one beast and costs in an action in which one beast was claimed as damages from the defendant for having rendered the plaintiff's daughter, Qondeni, pregnant.

The defendant was not represented by a legal practitioner in the Native Commissioner's Court, and his appeal to this Court is based on the grounds "that the judgment is against the weight of the evidence and the law there arising".

To my mind the judgments of both the Courts below are wrong for the following reasons:—

In the first place it emerges from the plaintiff's evidence that Qondeni had already had a child by a previous lover during the year 1949, so that to succeed in her action, the plaintiff had to prove that the defendant was the father of Qondeni's second child born on the 2nd April, 1951.

The defendant in his evidence admitted having had sexual intercourse with Qondeni, but denied paternity of the child concerned. Qondeni was not called by the plaintiff as a witness, the only evidence for the plaintiff being that given by herself, which does not establish that the defendant is the father of the child; that being so and as the defendant denied paternity on oath, the plaintiff was not entitled to succeed in her claim.

Secondly the plaintiff is the mother of Qondeni, her (plaintiff's) husband is dead and she was assisted by her guardian in the present action, in which Native law was properly applied. As in Native law the proper person to sue for damages for seduction in a case such as the present one, is the person entitled to the seduced girl's lobolo and, as in the instant case, the person entitled to Qondeni's lobolo is obviously her male guardian and not her mother, the plaintiff, the latter has no *locus standi*.

I am therefore of opinion that the appeal should be allowed with costs and that the Native Commissioner's judgment should be altered to read as follows:—

"Appeal sustained with costs and the Chief's judgment altered to one dismissing the claim with costs."

Steenkamp (President): I concur.

Thompson (Member): I concur.

Appellant: In person.

Respondent: In person.

CENTRAL NATIVE APPEAL COURT.

N.A.C. CASE No. 23 OF 1951.

KHABANE *v.* KHABANE.

KROONSTAD: 10th January, 1952. Before Marsberg, President; Warner and Groenewald, Members of the Court.

ADMINISTRATION OF ESTATES.

Estate enquiry held in terms of Government Notice No. 1664 *of* 1929—*Act No.* 38 *of* 1927, *Section* 22 (7).

Summary: In an enquiry held in terms of Government Notice No. 1664 of 1929, the Native Commissioner appointed the widow of the deceased as executrix and sole heir to the estate. The appeal was brought against that judgment by a son of a customary union of the deceased.

Held: That the Native Commissioner did not have the provisions of Section 22 (7) of Act No. 38 of 1927, in contemplation when he gave his decision and the matter should be fully investigated. It is ordered that the certificate of appointment of the Native Commissioner of Kroonstad, dated 12th February, 1951, be set aside, that the inquiry should be re-opened and that all interested parties be afforded an opportunity to be heard.

Cases referred to:—

Domane v. Domane, 1944 (C. & O.), page 84.

Statute referred to:—

Government Notice No. 1664 of 1929, Section 22 (7) of Act No. 38 of 1927.

Appeal from the Court of Native Commissioner, Kroonstad.

Warner (Permanent Member), delivering the judgment of the Court:—

This is an application for the condonation of the late noting of an appeal against the finding of the Native Commissioner, Kroonstad, in an estate enquiry held in terms of Government Notice No. 1664 of 1929.

A native named Sello Khabana died on the 28th December, 1950. On the 1st February, 1951, the matter was reported to the Native Commissioner, Kroonstad, by the Manager, Native Administration Department, Kroonstad Municipality, who reported that deceased was married by customary union and later contracted another marriage by civil rites, that two children had been born as a result of the customary union but there had been no issue of the civil marriage.

On the 12th February, 1951, the Native Commissioner, Kroonstad, held an enquiry which was attended by Mpuleng Khabane, widow of the civil marriage. After taking her statement, the Native Commissioner gave the following finding:—

> "Mpuleng Khabane appointed executrix to administer the estate and she is also declared to be the sole heir to the estate."

Applicant is Ent Khabane who claims to be the guardian of Klaas Khabane, a Native male minor, who is stated to be the eldest son of deceased Sello Khabane by his customary union with Mina Khabane and to be the heir in the estate.

Applicant states that he was not notified of the holding of the enquiry and it was held in his absence. He appears to have become aware of it immediately afterwards, however, for on the 15th February, 1951, he issued summons in the Native Commissioner's Court, Kroonstad, against Mpuleng Khabane, claiming the property in the estate and the setting aside of the order appointing her as executrix and heir in the estate. He did not, however, appeal against the order.

On the 20th March, 1951, the Native Commissioner dismissed the summons holding that, as Government Notice No. 1664 of 1929, provides for the noting of an appeal against a finding of a Native Commissioner in an estate enquiry, a Native Commissioner's Court has no jurisdictiion to set aside such a finding. Applicant has accepted this ruling and desires to note an appeal against the finding given on the 12th February, 1951, and applies for condonation of the late noting.

From the application, it would seem that the delay was due to applicant's action in adopting the wrong procedure and, in the ordinary course, we could not be disposed to grant him indulgence but as we consider that the Native Commissioner gave a wrong finding, the application is granted in view of the provisions of Section 15 of Act No. 38 of 1927, and the reasons embodied in the judgment of the President which follow.

Marsberg (President):—

Following the directions given in our judgment of 24th April, 1951, the Native Commissioner of Kroonstad has now forwarded the missing record of the inquiry with the distribution of the estate of the late Sello Khabane. The facts of the dispute between the parties were detailed in our judgment of 24th April, 1951, and we will not repeat them.

In regard to the first ground of appeal the Native Commissioner in his reasons for judgment states:—

> "It will be noticed that the matter was referred to me by the Manager of the Location in his letter of the 1st February, 1951. I have a recollection that between that date and the 12th February the alleged guardian was given an opportunity to produce the son and that on the 12th only one person appeared and that being the wife of deceased."

On this ground the appellant has attacked the Native Commissioner with having acted irregularly and in breach of his duties as Commissioner with gross unreasonableness and in breach of the principles of natural justice failed to call appellant or hear him.

It would be unwise to assume that the Native Commissioner acted or would have acted in this grossly improper manner. It is unnecessary to pursue this aspect of the case because on the view which we shall take the matter can be disposed of under the second ground of appeal, viz.:—

> "2. That the said Klaas Khabane, a minor, is by Native Law and custom the heir at law of the said Sello Khabane and is entitled to the estate of the said Sello Khabane and that his rights as such are specifically preserved to him by Section 22 (7) of the Native Administration Act, No. 38 of 1927."

It is common cause that the late Sello Khabane first married by Native custom a woman *Mina* and that Klaas Khabane is the son of that union. Thereafter Sello married by civil rites on 16th November, 1935, one Mapuling Lephuthing with community of property *excluded*. Appellant alleges that Sello married Mpaleng during the subsistence of his customary union with Mina. That is an allegation which requires to be proved, because the solution of this dispute turns on the question whether or not the union between Sello and Mina was subsisting when he entered into the civil marriage with Mpaleng. If the customary union was subsisting at the time of the civil marriage then the Native Commissioner could not lawfully have declared Mpaleng to be the sole heiress. If the customary union had been dissolved as alleged by Mpaleng then the Native Commissioner may have had to take other factors into consideration. In his reasons for judgment the Native Commissioner remarks on this matter:—

> "The wife (Mpaleng) produced a marriage certificate as proof that her marriage to deceased was according to civil rites. This fact, in my opinion brings this estate to be dealt with according to Civil Law and consequently I decided that wife was sole heir."

Section 2 (*c*) of Government Notice No. 1664 of 1929 prescribes that the estate of a deceased Native who was married in community of property or by ante-nuptial contract shall devolve as if he were an European. But we have seen that the civil marriage was *not* in community of property and Section 2 (*c*) of Government Notice No. 1664 of 1929 cannot be invoked. The Native Commissioner could not therefore have applied Common Law.

Section 2 (*d*) ibid. has been relied on by Mr. Dreyer for respondent but this section must be read in relation to Section 22 (7) of Act No. 38 of 1927. At this stage it would be well to refer to the Native Administration Act, No. 38 of 1927. There will be found Section 22 (6) and (7) which reads:—

> "(6) A marriage between Natives, contracted after the commencement of this Act, shall not produce the legal consequences of marriage in community of property between the spouses: Provided that in the case of a marriage contracted *otherwise than during the subsistence of a customary union between the husband and any woman other than the wife* it shall be competent for the intending spouses at any time within one month previous to the celebration of such marriage to declare jointly before any magistrate, Native Commissioner or marriage officer (who is hereby authorised to attest such declaration) that it is their intention and desire that community of property and of profit and loss shall result from their marriage, and thereupon such community shall result from their marriage except as regards any land in a location held under quitrent tenure such land shall be excluded from such community. (This section does not apply to this case.)
>
> (7) *No marriage contracted* after the commencement of this Act *during the subsistence of any customary union between the husband and any woman other than the wife* shall in any way affect the material rights of any partner of such union or any issue thereof, and the widow of any such marriage and any issue thereof shall have no greater rights in respect of the estate of the deceased spouse than she or they would have had if the said marriage had been a customary union."

Community of property can be contracted lawfully only between—

(*a*) the husband and wife of a customary union who intend to enter into a "marriage" and desire community to ensue;

(*b*) a man *not being a partner to a subsisting customary union* and a woman who intend to enter into a "marriage" and desire community to ensue.

There is *prima facie* proof that the late Sello was married by Native custom to Mina and subsequently by civil rites to Mpaleng. There is an allegation that the Native customary union was subsisting at the time of the civil marriage. Now, certain questions would have to be answered before the Native Commissioner could arrive at a decision.

Was the customary union *in fact* subsisting at the time the civil marriage between Sello and Mpaleng was contracted? If it was, then, the provisions of Section 22 (7) apply, and from them we see that Mpaleng had no greater rights than would arise from a customary union. She could not be declared sole heiress.

Was the customary union between Sello and Mina dissolved (as alleged by Mpaleng) before the civil marriage was contracted?

This is a question for proof. If it was in fact dissolved, then Klaas would have no claim on his father's estate merely as heir but the Native Commissioner would have to consider the equities and the provisions of Section 2 (*d*) of Government Notice No. 1664 of 1929, might apply.

Klaas and Mpaleng would require to show why both or one or other of them, on grounds of equity, should succeed to the estate.

If the customary union between Sello and Mina had not been dissolved, Mpaleng could not succeed because her rights are those prescribed by Section 22 (7), being no greater than would flow from a customary union.

We are of opinion that the Native Commissioner did not have the provisions of Section 22 (7) of Act No. 38 of 1927, in contemplation when he gave his decision and we are of opinion that the matter should be fully investigated. We order therefore that the certificate of appointment of the Native Commissioner of Kroonstad, dated 12th February, 1951, be set aside in which Mpaleng Khabane was appointed executrix to administer the estate and in which she was declared to be the sole heir to the estate. The Native Commissioner should re-open the inquiry and should afford all interested parties an opportunity to be heard and state their case.

The appeal is allowed. Applicant is ordered to pay the costs of appeal.

For Appellant: Mr. J. L. D. van Reenen, P.O. Box 24, Kroonstad.

For Respondent: Mr. J. N. Dreyer, Hill Street, Kroonstad.

SOUTHERN NATIVE APPEAL COURT.
N.A.C. CASE No. 1/52.

MNYATAZA *v.* MACASA.

BUTTERWORTH: 14th January, 1952. Before Sleigh, President, Cornell and Potgieter, Members of the Court.

COMMON LAW.

Native Appeal Case—Adultery—Proof of—Specific acts must be proved—Catch—*Not justifying inference that adultery had taken place—Serves only as corroborative evidence of woman's story.*

Summary: Defendant was caught hiding in a hut at plaintiff's kraal during the latter's absence at work, by plaintiff's brother, who had left plaintiff's wife at a beerdrink.

Plaintiff sued defendant for damages for adultery under Common Law.

Held:

(1) That there must be proof of specific acts of adultery.

(2) That a "catch" which does not justify an inference that adultery had been committed is only evidence *aliunde* in support of the woman's testimony.

(3) That on the evidence there is no proof of specific acts of adultery for defendant to deny.

Cases referred to:

Bekizulu Ka Tshingitshana *v.* Mkonywana, 4, N.A.C., 11.
Mayibade *v.* Mclongwana, 1, N.A.C., 150.
Velebayi *v.* Menziwa, 5, N.A.C., 10.
Raji *v.* Silongalonga, 4, N.A.C., 12.
Dumalisile *v.* Mqananango, 1931, N.A.C. (C. & O.), 8.

Appeal from the Court of Native Commissioner, Tsomo.

Cornell (Member), delivering the judgment of the Court:—

Plaintiff sued defendant for £40 damages for adultery, committed by defendant with plaintiff's wife, and costs. He avers in his summons that he was married by Christian Rites to his wife Sarah Jane and that this marriage still subsists. He continues that "From about the month of August, 1950, until April, 1951, and at plaintiff's kraal in Pukwana's ward, defendant on divers occasions committed adultery with plaintiff's said wife Sarah Jane".

Defendant, while admitting the subsistence of the marriage between plaintiff and Sarah Jane, denies, in his plea, that he committed adultery with her.

The Assistant Native Commissioner gave judgment in favour of plaintiff for £24 damages and costs and it is against this judgment that defendant has appealed on the grounds that the judgment is against the weight of evidence and the probabilities of the case.

The claim is based on, and the damages have been awarded according to, Common Law, and with this there can be no quarrel, but Mr. Mahoud (for plaintiff) rightly declined to support the judgment in view of the decision of this Court in Bekizulu Ka Tshingitshana *v.* Mkonywana, 4, N.A.C., 11, Raji *v.* Silongalonga, 4, N.A.C., 12, Velebayi *v.* Menziwa, 5, N.A.C. 10, and Noko Mayibade *v.* Ngcangotshana Mcolongwana, 1, N.A.C. (S), 150. This Court is, for the following reasons, fully in accord with this attitude.

The facts, briefly, are that plaintiff returned unexpectedly from work in May, 1951, and on receiving certain information, issued a demand on 22nd idem for £20 damages for trespass, which was replaced by a demand, dated 29th idem, for £40 damages for adultery. Plaintiff himself knows nothing of the alleged adultery, but his brother, Transkei Macasa, who was in charge of plaintiff's kraal during his absence at work, relates how, during the evening of 25th April, 1951, he went to plaintiff's kraal from a wedding beerdrink, at which he left plaintiff's wife, and found in a hut at plaintiff's kraal, a person hiding therein and who only disclosed himself to be defendant when other men and plaintiff's wife had been called, the latter from the beerdrink. Transkei and these men took defendant's blanket and overalls from him, allowing him to leave the kraal naked. Defendant's explanation was that he had gone to that kraal to look for beer, and that he had sent plaintiff's two younger children to call plaintiff's wife. He stated that he was drunk. Before plaintiff's wife arrived he was discovered by Transkei. There is no doubt that in Native Custom a "catch" of defendant had taken place. It need hardly be added that defendant's explanation does not ring true and is not believed by this Court, to whom there is no doubt that his purpose in going there was immoral.

Plaintiff's wife in her evidence says, "He proposed love to me last year . . . . . I accepted him and he visited me at my home. My husband was away at work". She then continues to state that he came at night, that he slept in the hut with her and her three children and that he had intercourse with her. Her only reference to a date was when he proposed love and that date "last year" was indefinite enough to be of no value. Her testimony does not reveal how often he visited her, when the first or the last visit took place and is generally in vague and unspecific terms. The evidence of her son, Berrington, a youth of ten years, goes no further towards attaching to any act of adultery a fixed time or place. Apart from the allegation in the summons when the period August, 1950, to April, 1951, is mentioned, and Sarah Jane's statement that defendant proposed love to her last year, the only other act, fixed in point of time in the whole case is the "catch" on 25th April, 1951.

Now, in Velebayi *v.* Menziwa *supra*, quoted with approbation in Mayibade *v.* Mcolonkwana *supra*, the Court followed Bekizulu Ka Tshingitshana *v.* Mkonywana *supra* that there must be evidence of specific acts of adultery. A "catch" which does not justify an inference that adultery has been committed, as is the case in this matter, is only evidence *aliunde* in support of the woman's testimony [Dumalisile *v.* Mqanango, 1931, N.A.C. (C. & O.), 8].

The wife's testimony being vague and unspecified, is only corroborated by the "catch" as to suspicion and the defendant is left with nothing specific to deny. The Assistant Native Commissioner erred in giving judgment for plaintiff. The appeal is therefore allowed with costs and the judgment of the Court below is altered to absolution from the instance with costs.

For Appellant: Mr. Dold, Willowvale.

For Respondent: Mr. Mahoud, Butterworth.

NORTH EASTERN NATIVE APPEAL COURT.
N.A.C. CASE No. 109/51.

NXUMALO *v.* GASA.

PIETERMARITZBURG: 21st January, 1952: Before Steenkamp, President; Balk and Wessels, Members of the Court.

COMMON LAW.

Practice and Procedure—Calling of witnesses by Court—Rule 53 (13) *of Native Commissioners' Courts Rules, published under Government Notice No.* 2886 *of* 1951—*Procedure whereby defendant is called on to give evidence immediately after plaintiff, before the latter has closed his case, must be discontinued—Rule* 53 (7) *to* (9) *of Native Commissioners' Courts Rules published under Government Notice No.* 2886 *of* 1951.

Held:

(1) That under the "Old Rules" for Native Commissioners' Courts it was not competent for the Court to call witnesses for either plaintiff or defendant without the consent of both parties.

(2) Further, that under Rule 53 (13) of the "New Rules" published under Government Notice No. 2886 of 1951, it will be competent for the Court *suo motu* to call a witness not called by either party if it thinks his evidence is necessary in order to elucidate the truth or the solution of the question before it.

(3) Further, that under Rules 53 (7) to (9) of the "New Rules" published under Government Notice No. 2886 of 1951, the party on whom the burden of proof rests must first adduce his evidence, and that the procedure followed in some cases in Natal, whereby the plaintiff first gives his evidence, and the defendant is thereupon called to give his evidence, and on the conclusion of the latter's evidence, plaintiff calls his witnesses and then closes his case, must cease.

Cases referred to:

Mdhlalose *v.* Xaba, 1940, N.A.C. (T. & N.), 46.

Statutes, etc., referred to:

Rules 53 (7) to (9) and (13) of the Rules for Native Commissioners' Courts, published under Government Notice No. 2886 of 1951.

Appeal from the Court of the Native Commissioner, New Hanover.

Wessels (Member), delivering the judgment of the Court:—

In passing I would like to say that it is observed from the record that plaintiff closed his case after he and his daughter, Jeanette, had given evidence, but the Court *suo motu* called Pontshana Gasa, son of plaintiff, as a witness on behalf of plaintiff, and one Nduma Sikakane on behalf of defendant. There is no indication that both plaintiff and defendant consented to these two witnesses being called by the Court. While this procedure of the Court is in order under the new rules which are now in force, *vide* Section 53 (13) of Government Notice No. 2886 of 1951, it definitely was not competent for the Court to have done so at the time the case was tried. However, as neither of these witnesses was able to testify as to what had happened outside and neither party appeared to have suffered any substantial prejudice by this procedure, this Court does not wish to pursue the matter further.

It is also noted from the record that plaintiff first gave his evidence; defendant then gave his evidence, and on the conclusion of his evidence, plaintiff called his witness and then closed his case. While this Court is aware that this procedure of doubtful propriety has been followed in Natal in some cases in the past, and while this Court is also not unaware of the dictum of Braadtvedt (P) in Mdhlalose v. Xaba, 1940, N.A.C. (T. & N.), 46, this type of procedure will, in the future, have to be discontinued as, according to Section 53 (7) to (9) of the Native Commissioners' Courts Rules published under Government Notice No. 2886 of 1951, the party on whom the burden of proof rests must first call his evidence.

For Appellant: Mr. Manning of Messrs. McGibbon & Brokensha, Pietermaritzburg.

For Respondent: Adv. J. H. Niehaus, i/b Messrs. Stewart, Smith & Howard, New Hanover.

NORTH EASTERN NATIVE APPEAL COURT.

N.A.C. CASE No. 98/51.

PUTINI AND ANOTHER *v.* CELE.

PIETERMARITZBURG: 22nd January, 1952. Before Steenkamp, President, Balk and Wessels, Members of the Court.

COMMON LAW.

Land—Sale of—Purchaser's right to obtain transfer of land purchased by him from former purchaser, who has not yet obtained transfer in his own name—Agreement, executed subsequent to attachment of former purchaser's rights to the land, purporting to cancel such former sale, invalid.

Practice and Procedure: Attachment by Messenger of the Court in terms of Section 67 (3) of Act No. 32 of 1944 of rights of execution debtor in immovable property, which was sold subject to suspensive condition.

The facts are extensively quoted in the judgment.

Held: That as the first defendant had disposed of his rights to the property to the second defendant, any person who has acquired those rights, either direct from the first defendant or from any other person who had acquired them, assuming that there had been a proper cession in the latter event, is entitled to obtain transfer and it is not necessary that there should be any other contract between them.

Held further: That as second defendant's rights to the land had already been attached by the Messenger of the Court when the cancellation of the sale between first and second defendants was signed, the second defendant was not in a position, nor had he the right, to agree to the cancellation of the sale.

Held further: That the sale by the first defendant to second defendant was subject to a suspensive condition and therefore second defendant's rights therein were attachable under the authority of Section 67 (3) of Act No. 32 of 1944, read with rule 35 of the Native Commissioners' Courts Rules.

Cases referred to:

Zeiler *v.* Rosseau, 1879, K. 35.
Ex parte Roberts, 3. S.C., 208.
Andrew *v.* Muscott, 1923, E.D.L., 434.
Kathrada Brothers *v.* Findlay & Sullivan, 1938, N.P.D. 321.
Estate Guruvadu *v.* Thasary, 1938, N.P.D., 513.
Blaikie & Co. *v.* Lancashire, N.O. 1951 (4), S.A. 571 (N.P.D.).
Parsons *v.* Modern Publicity, Ltd., 1951 (2), P.H.—A. 59.

Statutes, etc. referred to:

Native Commissioners' Courts Rules Nos. 10 and 35.
Magistrates' Courts Rule No. 39 (2).
Section 13 (1) of Act No. 5 of 1910.
Section 57, Chapter VIII of Act No. 32 of 1917.
Sections 67 and 68 of Act No. 32 of 1944.

Appeal from the Court of the Native Commissioner, Ixopo.

Steenkamp (P):—

The facts of this case are that on the 30th August, 1947, the plaintiff and the second defendant (who has not appealed, the first defendant being the only appellant), entered into a written agreement of sale (hereinafter referred to as Agreement "A") whereby the plaintiff, for the sum of £250, purchased from the second defendant "50 acres 3,074 square feet of subdivision A of South Slopes No. 5664, in the County of Pietermaritzburg, being a portion nearest figures A and B of the diagram prepared of the said subdivision A by R. C. Wilson, Land Surveyor, in September, 1929". The full extent of that subdivision was 100 acres 6,148 square feet, so that the plaintiff purchased half of it from the second defendant under Agreement "A". At the time Agreement "A" was entered into, the second defendant was not the owner of the 100 acres 6,148 square feet of land in question (hereinafter referred to as "the land", in that, although the second defendant had then already purchased it, he had not received transfer thereof. The position then obtaining, and which still obtained at the time of the trial of the present action, was that the second defendant had purchased the land from the first defendant under a written agreement of sale (hereinafter referred to as Agreement "B"), which was concluded on the 30th January, 1947; the first defendant was also not the owner of the land as it had not been transferred to him from his late father's estate to which he was heir; nor had the land been transferred to that estate; the first defendant's late father had purchased the land but had not received transfer thereof from his nephew, Mandata, who had inherited it from his paternal grandfather.

Hamu, who was also the paternal grandfather of the first defendant. The latter admitted in his evidence, under cross-examination, that he could obtain transfer of the land if he made available sufficient funds to cover the costs of the transfers involved.

The plaintiff paid the second defendant £150 on the 30th August, 1947, in terms of Agreement "A"; the balance of the purchase price had, in terms of Agreement "A" to be paid in two equal instalments of £50 each, the first such instalment being due on or before the 31st August, 1948, and the final one on or before the 31st August, 1949. On the 4th February, 1949, the present second defendant sued the present plaintiff in the Native Commissioner's Court at Ixopo, *inter alia,* for the cancellation of Agreement "A", averring in his claim that the £50 due to him thereunder on the 31st August, 1948, had not been paid. The present plaintiff defended that action (Case No. 13/49) and counterclaimed £268 in respect of damages he had suffered as a result of second defendant's interference with his rights of occupation. In his plea in that action the present plaintiff averred that by agreement between him and the present second defendant £75 of £150 damages awarded to the latter against the first defendant in a prior action, concluded on the 27th April, 1948, had been set off against the £100 balance of the purchase price due under Agreement "A", and that on the 17th July, 1948, he (present plaintiff) had paid the present second defendant's attorneys the sum of £24, and on the 26th July, 1948, the sum of £1, thus timeously liquidating the whole of the balance of £100 due under Agreement "A". The Court in Case No. 13/49 entered judgment on the 12th August, 1949, for the present plaintiff (then defendant) with costs on the claim in convention and for him in the sum of £76 (damages), with costs, on the counterclaim. It follows that when the present action was instituted on the 30th November, 1950, the plaintiff had already discharged his liability to the second defendant under Agreement "A" in full and was entitled to have the latter's reciprocal obligations thereunder performed by him, i.e. to have half of the land transferred to him by the second defendant.

In the present action the plaintiff sued the first and second defendants for an order of Court compelling them to transfer the land (i.e. the whole 100 acres 6,148 square feet) to him.

It has already been mentioned that the second defendant purchased the land, i.e. the whole 100 acres 6,148 square feet, from the first defendant, but it is necessary to go into this transaction in detail.

On the 30th January, 1947, when the first defendant and the second defendant entered into Agreement "B", whereby the second defendant purchased subdivision A of South Slopes No. 5664 in the County of Pietermaritzburg in extent 100 acres 6,148 square feet from the first defendant for £500, the conditions of payment were that £300 had to be deposited on or before the 31st August, 1947, and the balance was to be paid in two instalments—one of £100 on or before 31st August, 1948, and the other of £100 on or before 31st August, 1949. The £300 was duly paid as agreed upon, and according to the pre-trial admissions by the first defendant £150 was set off by virtue of the said judgment given on the 27th April, 1948, in favour of the second defendant against him (first defendant), and that on the 26th August, 1949, the plaintiff on behalf of and at the request of the second defendant tendered the balance of £50 which the first defendant refused to accept. When plaintiff issued summons in the present action on the 30th November, 1950, he paid into Court the amount of £50 which the first defendant had previously refused to accept.

We have now reached the stage where the second defendant had acquired the right, as against the first defendant, to have the whole of the land of 100 acres 6,148 square feet described above, transferred to him, seeing that the full purchase price of £500 had been paid in cash and by means of set-off and tender.

The whole of the second defendant's interest in his remaining portion of the land, i.e. the portion not sold by him to the plaintiff, was attached by the Messenger of the Native Commissioner's Court at Ixopo in a case (No. 16/1950) between one Ben Dhlamini and the second defendant, and was sold by him (the Messenger) in execution on the 13th May, 1950, to the plaintiff for £270. On the 27th March, 1951, the Messenger of Court ceded and assigned to the plaintiff all the second defendant's right, title and interest in and to the said portion of the land in question in pursuance of the said sale in execution.

Plaintiff took steps by way of the present claim to have the land registered into his name. The first defendant defended the action but the second defendant was in default.

The first defendant tendered a verbal plea which reads as follows:—

1. Plaintiff is not entitled to transfer from the first defendant.
2. First defendant had cancelled the sale to the second defendant (Agreement "B").
3. First defendant had no contract with plaintiff.
4. First defendant resists plaintiff's claim.

The Native Commissioner entered the following judgment:—

"For plaintiff with costs and the Court orders that—

(1) first defendant or a person on his behalf do all such acts as are necessary to effect transfer of the property known as subdivision A of South Slopes No. 5664 from him to second defendant; and

(2) that second defendant or a person on his behalf do in turn effect transfer to plaintiff;

(3) in so far as the half sold by the Messenger in execution is concerned transfer may be effected according to law.

The judgment against second defendant is by default and the order as to costs is joint and several, the one paying, the other to be absolved."

The appeal noted by the first defendant to this Court is on the following grounds:—

"(1) The learned Additional Native Commissioner erred in holding that the plaintiff (respondent) acquired the right to one half of the property in question by virtue of the sale in execution at Ixopo on the 13th May, 1950. It is respectfully submitted that plaintiff (respondent) bought only a 'spes' and that as at the 13th May, 1950, the evidence shows that the 'spes' was *not* the right to one half of the property but something considerably less, which was subject to determination in Case No. 10/1950 in the Durban Native Commissioner's Court.

(2) The Messenger's sale at Ixopo on the 13th May, 1950, was irregular in that no notice of attachment and a copy of a Writ of Execution were served upon first defendant (appellant) in terms of Rule 35 of the Native Commissioners' Courts Rules. The Agreement of Sale, Annexure 'C' of the summons shows —

(*a*) the property was leased;

(*b*) that there was a suspensive condition in that there could be no transfer to plaintiff (respondent) till the purchase price had been paid in full and the agreement, let alone transfer, could be cancelled if plaintiff defaulted.

(3) The learned Native Commissioner erred in holding that the Messenger's Sale at Ixopo divested second defendant (Johannes Magoso) of his rights because the sale was irregular.

(4) On the evidence the position between first defendant (appellant) and second defendant as at 31st August, 1949, was that second defendant owed first defendant £50 plus the damages to his mealies (fixed later at £146) and the tender by second defendant (through plaintiff) was not adequate.

(5) It is respectfully submitted that the judgment of the learned Additional Native Commissioner is incomplete in that—

(*a*) it does not mention the £50 tender rejected by first defendant and paid into Court by plaintiff (respondent) which must go to first defendant (appellant);

(*b*) it does not mention the provision by plaintiff (respondent) of the cost of transfer into his name as a pre-requisite to the signing of the necessary documents to effect such transfer."

In so far as ground (5) is concerned, I agree that the judgment is not complete, but as the omissions concerned are of a minor nature and do not appear to have prejudiced the appellant as will be apparent from the reasons given later in this judgment, they cannot be said to affect the appeal on the merits and I am therefore of opinion that ground (5) of the appeal fails.

Dealing with paragraphs (1) and (3) of the plea, once the Court is satisfied that the first defendant had disposed of his rights to the property to the second defendant, as is apparent from Agreement "B", then any person who has acquired those rights, either direct from the first defendant or from any other person who had acquired them, assuming that there had been a proper cession in the latter event, is entitled to obtain transfer, and it is not necessary that there should be any other contract between them.

In so far as concerns the cancellation of the sale (Agreement "B") between the first and second defendants, mentioned in paragraph 2 of the plea, it is averred that as a result of an action instituted by the first defendant against the second defendant during January, 1950, the parties, on the 1st June, 1950, signed a document entitled "Terms of Settlement". In this document the second defendant, who was defendant in that case, consented to cancellation of the Deed of Sale and Purchase dated the 30th January, 1947 (Agreement "B"), and undertook to vacate the property on the 30th June, 1950. When this cancellation of sale was signed, the Messenger of the Court had already attached and sold in execution the second defendant's rights to the said half of the land, and it follows that the second defendant was not in a position, nor had he the right to agree to the cancellation of the sale (Agreement "B") on the 1st June, 1950. The first defendant knew that the right to the property had been attached by the Messenger of the Court, who gave evidence on behalf of plaintiff. The Messenger states:—

"A few days before the sale took place he (meaning first defendant) asked me when the sale was to take place. I told him."

There was no question that the second defendant did not know of the attachment as he was served with a proper notice of attachment.

The Native Commissioner found proved, and this is borne out by the evidence, that the first defendant became aware of the plaintiff's interest before the 31st August, 1949, and at the latest by the 13th May, 1950, and that he did not intervene in the sale in execution on the latter date. It is therefore to be taken that he acquiesced in the sale, and if a person stands by while his property is being sold, he cannot be heard to complain afterwards.

The agreement to cancel the Agreement "B" would appear to have been done with the object of depriving the plaintiff of certain rights he had already acquired, to the knowledge of both defendants. There could have been no other object.

The first defendant has made an attempt to show that at the time £150 was set off he had a claim against the second defendant for damages, but he cannot be heard where he tenders such evidence as, according to the pre-trial admissions made by him in the present case, the amount of £150 was set off against the £200 still owing under Agreement "B" by the judgment given in favour of second defendant for the £150 in question in the case between them. An unliquidated claim cannot be used as a set off.

Dealing with paragraph (1) of the notice of appeal, I fail to see how the first defendant can term rights to specific immovable property a "spes" when defendants by the two respective Deeds of Sale (Agreements "A" and "B") had sold the land in question. There was no such condition attached to the sale and while both sellers did not have title to the property, they are nevertheless not prevented by law from selling property of which they are not yet the owners; only a person other than the two defendants may impeach their contracts of sale.

Grounds (2) and (3) deal with the same aspect, viz., that as the first defendant was not given notice of attachment, the attachment is not valid. The first defendant was not the owner of the property and I do not think it was ever the intention that notice, if such notice were necessary, should be given to a person who might have an incorporeal right in the property. How can a Messenger possibly know that there are persons other than the registered owners sufficiently interestetd in the property to expect notice of attacthment. There might be numerous such persons whose names are not apparent from information available to the Messenger.

Ground (4) is without substance as the second defendant made a pre-trial admission in the present action in the Court *a quo* that an amount of £150 was set off against the amount still owing on the purchase price due under Agreement "B". He cannot be heard afterwards to say that at that time he also had a claim in a Court of law against the second defendant. The set-off was automatic and while I concede the payment of the £150 was not yet due on the purchase price of the property at the time the first defendant incurred the judgment debt, he has nevertheless accepted the position that there had been a set off. It would be more correct to state that of the £150 judgment of a competent Court, an amount of £100 thereof was used on the 31st August, 1948, to pay the instalment due on that date and £50 towards the instalment due on 31st August, 1949.

Reverting to ground (5) of the appeal: As pointed out by the Presiding Officer in the Court *a quo* in his judgment, the appellant (first defendant) is obviously entitled to the £50 tendered, i.e. against transfer by him of the land to the second defendant, and the omission to make mention thereof in his judgment cannot therefore be said to prejudice the first defendant in any way. First defendant must pay the costs of the transfer of the land to him, as provided by clause 4 of Agreement "B". The costs of the subsequent transfers involved, i.e. from first defendant to second defendant and from the latter to the plaintiff are, in the absence of any provision thereanent in Agreements "A" and "B", in law, payable by the respective sellers, see "Principles of South African Law", Wille (Third Edition), at page 372; so that there also cannot be said to be any prejudice to the first defendant from the omissions in this respect.

In the result the appeal should, in my opinion, be dismissed with costs, but in order that the judgment of the Court *a quo* may be definite and complete in all respects, that judgment should be altered to read as follows:—

"For plaintiff with costs and it is ordered that—

(1) the following sales, relative to the immovable property described below, be and are hereby confirmed:—

(*a*) The sale by Mzingelwa Putini (first defendant) to Johannes Magoso (second defendant) of the whole of the said immovable property as per Deed of Sale dated the 30th January, 1947 (Exhibit 'A');

(*b*) the sale by Johannes Magoso (second defendant) to Prince Cele (plaintiff) of a certain half of the said immovable property as per Deed of Sale dated the 30th August, 1947 (Exhibit 'D');

(*c*) the sale on the 13th May, 1950, by the Messenger of the Native Commissioner's Court at Ixopo to Prince Cele (plaintiff) of all the interest held by Johannes Magoso (second defendant) in the remaining half of the said immovable property, in respect of which sale the said Messenger gave the cession dated the 27th March, 1951 (Exhibit 'E');

Description of Property: Subdivision A of South Slopes No. 5664, situate in the County of Pietermaritzburg, Natal, in extent 100 acres 6,148 square feet;

(2) within a period of twelve (12) months from the date of this judgment, Mzingelwa Putini (first defendant) shall, at his expense, as provided by clause 4 of the Deed of Sale dated the 30th January, 1947, referred to above, obtain transfer to his name of the whole of the said immovable property and shall also sign all the necessary documents required to give effect to the transfer of that immovable property from him to Johannes Magoso (second defendant), the cost of lastmentioned transfer to be paid by the said Mzingelwa Putini (first defendant);

(3) within the said period Johannes Magoso (second defendant) shall sign all the necessary documents to give effect to the transfer of the certain half of the said immovable property specified in sub-paragraph (1) (*b*) above from him to Prince Cele (plaintiff); the costs of this transfer to be paid by Johannes Magoso (second defendant);

(4) the remaining half of the said immovable property shall be transferred to Prince Cele (plaintiff) in terms of the said cession (Exhibit 'E');

(5) in the event of the first and second defendants failing to perform all the said acts as are required by them to have the transfers specified in sub-paragraphs (2) and (3) above effected within the period stipulated in those sub-paragraphs, the Clerk of the Native Commissioner's Court at Ixopo is hereby authorised to perform all such acts on their behalf and to sign all the necessary documents required to give effect to all the transfers involved, provided that the costs of such transfers are paid by Prince Cele (plaintiff) without prejudice to his rights to recover such costs from the defendants;

(6) the £50 tendered and paid into Court by Prince Cele (plaintiff) shall be paid to Mzingelwa Putini (first defendant) against the transfer of the whole of the said immovable property from him to Johannes Magoso (second defendant).

The judgment against the second defendant is by default and the order as to costs of this suit against the first and second defendants is joint and several, the one paying, the other to be absolved to the extent of such payment, but without prejudice to the former's right to recover from the latter any portion of the half share of the total costs payable by the latter.

Date of this (Additional Native Commissioner's) judgment: 25.7.1951."

Balk (Permanent Member):

The facts of this case emerge from the learned President's judgment which also sets out the grounds of appeal.

The first defendant was represented by a legal practitioner in the Court *a quo* and therefore in terms of Rule 10 of the Rules of this Court published under Government Notice No. 2254 of 1928, he is restricted to the grounds specified in his notice of appeal. Those grounds are confined to one aspect of the case, viz., the plaintiff's claim only in so far as it is based on his purchase of the second defendant's interest in the remaining half of the land at the sale in execution. It follows that it is unnecessary for this Court to consider questions arising out of the sale concluded under Agreement "A" in so far as these may affect the first defendant, i.e. whether there was privity of contract between him and the plaintiff as regards that transaction; whether that transaction amounted to a proper cession to the plaintiff of the right to half of the whole land acquired by the second defendant from the first defendant under Agreement "B", and, if so, whether such cession was effective against the first defendant in the absence of the latter's *prior* consent thereto, seeing that the second defendant had, under Agreement "A" disposed of only half of his right against the first defendant, see Blaikie & Co. Ltd. *v.* Lancashire, N.O. 1951 (4), S.A., 571 (N.P.D.); whether the absence of such prior consent had been cured by the first defendant's acquiescence in Agreement "A" in the circumstances disclosed in the plaintiff's evidence; in other words, whether the first defendant should be held in those circumstances to have ratified the cession in question; if not, whether the absence of such prior consent was cured by the subsequent attachment and sale in execution of the second defendant's interest in the remaining half of the land and the Messenger of the Court's cession of that interest to the plaintiff in pursuance of that sale

Coming to a consideration of the grounds of appeal: As pointed out by the learned President in his judgment, the Messenger of the Court attached and sold in execution on the 13th May, 1950, not a "spes" but a specific right already acquired at that time by the second defendant from the first defendant by virtue of Agreement "B", viz., the right to the transfer of the land once he (second defendant) had discharged his reciprocal obligations under that agreement, i.e. the payment of the stipulated purchase price within the period agreed upon, as in fact he did as is apparent from the learned President's judgment; the right so sold, in execution, assuming that that sale was valid, could obviously not be affected by another pending action between the defendants in connection with quite a different matter, i.e. for an unliquidated claim for damages, see Parsons *v.* Modern Publicity, Ltd., 1951 (2) P.H., A. 59; nor by the arrangement entered into between them, *without plaintiff's consent and subsequent to the attachment and sale in execution* in question whereby the cancellation of Agreement "B" formed part of the terms of settlement in such other action, *vide* Andrew *v.* Muscott, 1923, E.D.L. 434. This leads to a consideration of the second and third grounds of appeal.

If, as found by the presiding officer in the Court *a quo*, Agreement "B" was not a sale under a suspensive condition, then it seems to me that the sale in execution was invalid. This will be apparent from what follows.

Section 35 of the relevant regulations in respect of Courts of Native Commissioners, published under Government Notice No. 2253 of 1928, as amended, extended to those Courts the provisions of Chapter VIII of the Magistrats' Courts Act, 1917 (Act No. 32 of 1917), and any amendment thereof, together with the relative Orders dealing with the execution of civil judgments. Section 68 of the present Magistrates' Courts Act, 1944 (No.

32 of 1944), by which Section 57 in Chapter VIII of Act No. 32 of 1917 was superseded [see Section 13 (1) of Act No. 5 of 1910], authorises the attachment and sale in execution of the interests of an execution debtor in immovable property *only* if such property had been sold to him under a hire purchase contract or under a suspensive condition. It follows that if any immovable property was sold to a judgment debtor otherwise than under a hire purchase contract or a suspensive condition, the attachment of his interest therein is invalid since it is not one of the incorporeal movables expressly enumerated in the said Section 68, see Kathrada Brothers *v.* Findlay & Sullivan, 1938, N.P.D. 321, Estate Guruvadu *v.* Thasary, 1938, N.P.D., 513, and the authorities referred to therein.

To my mind the presiding officer in the Court *a quo* was wrong in his finding that the sale entered into between the defendants in terms of Agreement "B" was not subject to a suspensive condition in that the last clause of that agreement gave the seller the right to cancel the contract immediately should the purchaser fail to meet any of the instalments on account of the purchase price on due date, and further thereupon to eject the purchaser from the land and to claim from him any damages that may have been sustained. It seems to me that this clause clearly indicates that the intention of the parties was that transfer of the land was not to be given to the purchaser until such time as the seller had paid the whole of the purchase price within the period stipulated in the agreement; in other words, it seems clear that what was contemplated by the parties was that, although credit was given, the ownership in the land was not to be passed to the purchaser until he had paid the purchase price in full in terms of Agreement "B". That being so, the sale appears to be subject to a suspensive condition. In this connection it must be mentioned that the view advanced by the learned author in "The Law of Sale of Goods in South Africa" (Mackeurtan) (3rd Edition), at pages 59 and 60 has not been lost sight of, viz., his view that a clause in an agreement of the nature in question which altered the normal effect of delivery, did not have the effect of suspending the sale, but formed a *pactum adjectum.* As conceded by him, however, in Note 13 at the foot of the pages referred to above, the general trend of the decisions by our Supreme Courts has been to regard such a clause as a suspensive condition. It is therefor only reasonable to suppose that when the Legislature enacted Section 67 of Act No. 32 of 1944, it held the same view. In any event there is authority for the proposition that an agreement containing a clause of the nature in question is regarded as a hire purchase contract, see footnote 13 referred to above, and Wille & Millin's Mercantile Law of South Africa (11th Edition) at pages 134 *et seq.* It follows that the second defendant's rights under Agreement 'B" were attachable under the authority of Section 67 (3) of Act No. 32 of 1944, read with Section 35 of the Regulations referred to above.

The irregularity specified in the second ground of appeal now falls to be examined to ascertain whether or not its effect was to render the sale in execution invalid. In Zeiler *v.* Rosseau (1878) K. 35, it was held that owing to the irregularities in the execution, the sale was invalid, but in that case, apart from the fact that the execution creditor was wrongly named in the writ, there was no return of *nulla bona* as to the execution debtor's movables and the attachment of his immovable property under that writ was contingent upon there being insufficient movables to attach for the purpose of meeting the judgment debt. The lastmentioned irregularity was therefore a serious one as in the absence of a *nulla bona* return regarding the movables there was no authority under the writ to attach the immovable property. The circumstances in Zeiler's case are, however, quite different from those in the present case. Here the Messenger of the Court concerned, did not exceed his authority under the writ and he effected proper service of the notice of attachment on the judgment debtor (second defendant). What

he (the Messenger) failed to do was to serve the notice of attachment on the first defendant in the manner required by Rule of Court 39 (2) published under Government Notice No. 814 of 1945, which was corrected by Government Notice No. 1127 of 1945. It is clear from the evidence of the Messenger of the Court concerned that he advised the first defendant a few days before the sale in execution in question took place, when it would take place; so that in fact the first defendant was given informal notice of attachment and he could have applied to the Court for an order interdicting the Messenger of the Court from holding the sale if he considered that he had been prejudiced in not having received formal notice of attachment; or he could have attended the sale and bid for the property. He failed to adopt either of these courses and it therefore seems to me that the irregularity in question falls to be regarded as not being of sufficient importance to vitiate the sale in execution, see *Ex parte* Roberts, 3 S.C., 208, and Mackeurtan's publication referred to above at page 48.

Counsel for appellant contended that the attachment referred to above was affected by the lease of the land, but to my mind there is no substance in this contention, since the only lease concerned appears to be that referred to in paragraph 2 of Agreement "B" and according to that paragraph that lease expired long before the attachment in question was effected.

In my view therefore the sale in execution in question falls to be regarded as valid and accordingly the first three grounds of appeal fail.

I am also of opinion that there is no substance in the remaining two grounds of apeal for the reasons given by the learned President in his judgment.

I therefore agree that the appeal should be dismissed with costs; further that the judgment of the Court *a quo* should be altered as indicated in the learned President's judgment for the reasons given therein.

Wessels (Member): I concur.

For Appellants: Mr. H. R. Law of Messrs. Pullin & Law, Durban.

For Respondent: Adv. J. H. Niehaus, i/b Messrs. Raulstone & Co., Pietermaritzburg.

SOUTHERN NATIVE APPEAL COURT.

N.A.C. CASE No. 2/52.

MPANTSHA *v.* NGOLONKULU AND ANOTHER.

PORT ST. JOHNS: 22nd January, 1952. Before Sleigh, President, Wilbraham and Midgley, Members of the Court.

NATIVE CUSTOM.

Native Appeal Case—Marriage by Native Custom—Mother giving her daughter in marriage acts for gaurdian—Dowry—Fines merge in—Property acquired by wife belongs to her house and under control of her husband—Practice and Procedure—Actions in connection with union should be brought against guardian and not the mother of the wife.

Summary: Plaintiff married second defendant according to Native custom and paid 4 cattle and 10 sheep as dowry to her mother the first defendant; four children were born of the said union; second defendant deserted plaintiff's kraal talking with her the children, certain furniture and effects. Plaintiff now claims the return of his wife failing which restoration

of dowry; return of his children, return of furniture and effects. Defendants deny the alleged customary union. They plead that cattle and sheep were paid as fine for the seduction and pregnancy of second defendant. Second defendant admits removing the furniture but avers she purchased same with her own money which she earned. The Assistant Native Commissioner entered judgment for defendants. Plaintiff now appeals.

Held:

(1) That on the evidence the cattle were paid as dowry, but in any case the fine merged in dowry as soon as the union was consummated and a valid customary union consequently exists, between plaintiff and second defendant.

(2) That if the furniture was acquired by second defendant with her own earnings, it belongs to her house and is under the control of plaintiff.

(3) That if a woman gives her daughter into marriage according to Native custom she acts as agent for the guardian of the daughter who should be sued in any action in connection with the union and not the mother.

(4) That it is contrary to the decisions in this Court for a man to join his wife in an action claiming her return or restoration of dowry.

(5) That there should be no order as to costs.

Cases referred to:—

Ponya *v.* Sitate, 1944, N.A.C. (C. & O.), 13.
Kwezi *v.* Raji, 4 N.A.C., 65.
Sixakwe *v.* Nonjoli, 1, N.A.C., 11.

Appeal from the Court of the Native Commissioner, Bizana.

Sleigh (President), delivering the judgment of the Court:—

It is common cause that first defendant is the mother of second defendant. In the particulars of claim it is alleged that plaintiff married second defendant according to native custom and paid four cattle and 10 sheep as dowry to first defendant, that four children were born of the said union, that on 11th June, 1951, second defendant deserted plaintiff's kraal taking with her the three surviving children, certain furniture and effects to the value of £59. 14s. and £35 in cash. He claims—

(*a*) the return of his wife failing which restoration of one beast or payment of its value £8, and the return of the said three children;

(*b*) return of the cash and the furniture and effects or payment of their value;

(*c*) alternative relief.

Defendants in their plea deny the alleged customary union. They plead that the cattle and sheep were paid as fine for the seduction and pregnancy of second defendant, and that as plaintiff offered marriage, first defendant demanded two oxen, a horse and a saddle and bridle as lobola, but plaintiff failed to pay these and consequently no marriage took place. They admit that plaintiff and second defendant cohabited in Johannesburg for a number of years and that she bore him four children, but they maintain that as no fine was paid in respect of the three children they belong to defendant's people. In regard to claim (*b*) second defendant denies taking the £35 cash. She admits removing the furniture and effects, but she avers that she acquired these with her own earnings while working on the Rand. She alleges further that there are still in plaintiff's possession a wardrobe valued at £6. 10s., two chairs valued at £1 and a table valued at £3. She counterclaims for the delivery of these articles or payment of their value, and also for the sum of £48 which she alleges, she handed to plaintiff on the Rand for the purpose of purchasing property for her and which he failed to do.

The Assistant Native Commissioner, after hearing evidence from both sides entered judgment for defendants with costs on the claim in convention and dismissed the counterclaim with costs. Plaintiff now appeals against the judgment on the claim in convention.

The grounds of appeal are to a large extent a detailed review of the evidence and the attention of the appellant's attorneys is invited to the remarks in Molatu Ponya *v.* Kekitla Sitate [1944, N.A.C. (C & O), 13].

It is perfectly clear from the evidence of defendants themselves that plaintiff married second defendant according to native custom. They state that plaintiff *twalaed* second defendant, that the *twala* was reported to first defendant and marriage offered, that plaintiff paid four cattle and ten sheep, that first defendant demanded additional dowry and allowed second defendant to remain at plaintiff's kraal as his wife, and that she lived with him for nine years. Further, second defendant admits that she told the magistrate that she was plaintiff's wife. Moreover, there is evidence, which might well be true, that second defendant became pregnant after the elopement had been reported and marriage offered. In that case the cattle and sheep could not have been paid as fine for pregnancy. But even if she was pregnant at the time of the elopement, it is common cause that marriage was offered before plaintiff was charged with the pregnancy. In such circumstances it is not usual to demand a *bopa* beast before discussing the payment of dowry [see assessors' opinion in Sakkanka v. Totsholo, 1945, N.A.C. (C. & O.), 11]. But even if the cattle and sheep had been paid as fine, that fine merged in dowry as soon as the union was consummated, and there can be no doubt that it was consummated when first defendant accepted the stock and allowed second defendant to remain with plaintiff (see Kwezi *v.* Raji, 4, N.A.C., 65). The fact that plaintiff did not pay the additional dowry demanded does not affect the position. Payment could have been enforced by the *teleka* of second defendant. All the essentials of a customary union are present in this case and the Native Commissioner consequently erred in holding that plaintiff and second defendant were not legally married.

Having come to the conclusion that a valid union exists between plaintiff and second defendant, it is unnecessary to decide whether or not the articles in question were purchased with her earnings. They will, in any event, belong to her house and will be under the control of plaintiff (Sixakwe v. Nonjoli, 1, N.A.C. 11).

In so far as the claim for £35 is concerned, we agree with the Native Commissioner that plaintiff has not proved that second defendant took possession of the cash.

The appeal consequently succeeds, but it is clear that this action was brought and defended under Native custom. If a woman gives her daughter in marriage she acts as agent for the guardian of the daughter according to native custom, and in an action in connection with the union the husband must demand the return of his wife from her dowry holder. First defendant states that she has a son. He should have been sued. In any event it would be utterly futile to order her to restore the wife or dowry as the dowry holder would not be bound by whatever she did. Nor would she be liable for the restoration of the articles, which she says are in second defendant's control, as she is not the head of the kraal.

The result is that plaintiff is entitled under the claim for alternative relief to a declaratory order that a valid union exists between him and second defendant and that he is entitled to the custody of the three children. He is also entitled as against second defendant to the return of the articles claimed.

On the question of costs in the court below, Counsel agree that there should be no order. Although it is customary to pay dowry to the head of the kraal where the girl is found, and although the husband is entitled to demand restoration from the head of that kraal if the latter has not accounted for the dowry to the owner, the first defendant in this case is not the head of the kraal and should not have been sued. Moreover, she should have excepted to the summons. Plaintiff and first defendant are therefore equally to blame for the inconclusiveness of these proceedings. Further, it is contrary to the decisions of this Court for a man to join his wife in an action claiming her return or the restoration of dowry. And it is futile for plaintiff to pray for costs against second defendant, for he is himself liable to pay costs incurred by her. We consequently agree that there should be no order as to costs in the Court below.

The appeal is allowed with costs and the judgment on the claim in convention in the Court below is altered to read:—

> Second defendant is declared to be the customary wife of plaintiff and the latter is entitled to the custody of the three children, the issue of the union. Second defendant is ordered to restore the articles removed by her. Absolution from the instance in regard to the claim for £35. There will be no order as to costs.

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

For respondent: Mr. C. Stanford, Lusikisiki.

SOUTHERN NATIVE APPEAL COURT.

N.A.C. CASE No. 3/52.

NAMPETSHWA *v.* KAMBULA.

PORT ST. JOHNS: 22nd January, 1952. Before Sleigh, President, Wilbraham and Midgley, Members of the Court.

NATIVE LAW AND CUSTOM.

Native Appeal Case—Native custom—Dowry—Refund of engagement cattle—Misconduct on part of girl—Marriage of girl to another man—On principle a man cannot hold two dowries in respect of same woman.

Summary: At the beginning of 1936, M, the brother of appellant became engaged to N, the daughter of respondent, and paid five cattle, a horse and £3 in cash on account of dowry. In March, 1936, M was arrested for killing a man. He was released in April, 1936, and in July went to work on the mines. He has not been heard of and it is unknown if he is still alive. N gave birth to an illegitimate child by one Mpikwa between 1936 and 1940. In 1940 she married Nyeleswa who paid dowry for her. Appellant, in his capacity as representative of M, claims refund of the dowry paid on behalf of M or payment of their value £35. The Assistant Native Commissioner held that M had rejected N thereby forfeiting the dowry paid. Appellant appeals.

Held:

(1) That misconduct by an engaged girl is a ground for cancellation of the engagement and recovery of the engagement cattle. It does not automatically cancel the engagement.

(2) That an unsuccessful suitor is entitled to restoration of the dowry paid in respect of a proposed marriage, provided he was not responsible for breach of the agreement to marry.

(3) That since M did not renounce the engagement on account of N's misconduct and since he has absconded, it was he who was responsible for the failure of the contemplated marriage and consequently the dowry paid on his behalf became forfeited.

(4) That the principle that a man cannot hold two dowries in respect of the same woman is not applicable in this case as the dowry paid on behalf of M. became forfeited to respondent.

Cases referred to:

Nombombo *v.* Stofile, 1902, S.C., 253.

Mgadi *v.* Nogwaza, 1943, N.A.C. (C. & O.), 14.

Appeal from the Court of Native Commissioner, Bizana.

Sleigh (P), delivering the judgment of the Court:—

The facts in this case are as follows:— At the beginning of 1936 Macebo Mpetshwa, the brother of appellant, became engaged to Nobelungu, the daughter of respondent, and appellant paid five cattle, a horse and £3 in cash on account of dowry. The marriage was to be by Christian rites. In March, 1936, Macebo was arrested for killing a man. He was released in April, 1936, and in July went to work on the mines. He has not been heard of again and it is not known if he is still alive. Between 1936 and 1940 Nobelungu gave birth to an illegitimate child by one Mpikwa and in 1940 she married Nyelezwa who paid dowry for her.

In this action appellant, in his capacity as representative of Macebo, claims refund of the dowry paid on behalf of Macebo or payment of its value £53. The Assistant Native Commissioner held that Macebo had rejected Nobelungu thereby forfeiting the dowry already paid. He entered judgment for respondent and appellant now appeals on the ground that the judgment is bad in law and contrary to native custom and that appellant is entitled to a refund of the dowry either on the ground of Nobelungu's misconduct with Mpikwa, or on the ground of her marriage to Nyelezwa, or on the ground that respondent cannot hold two dowries for the same woman, or on all three of the said grounds.

It is correct that Macebo could have renounced the engagement and claimed refund of the dowry paid when Nobelungu became pregnant by another man, but the fact remains that he did not do so, and misconduct by an engaged girl is no bar to her marriage to the man to whom she is engaged. If the evidence of plaintiff's witness Nobelungu is to be believed, Macebo did not regard her misconduct as sufficient cause for repudiating the engagement, because he went to work to earn additional dowry after he had become aware of her misconduct.

There is more substance in the contention that appellant is entitled to a refund on the ground that respondent has given Nobelungu in marriage to another man. An unsuccessful suitor is entitled to the restoration of the dowry paid by him or on his behalf provided he was not responsible for the breach of the agreement to marry [see Nombombo *v.* Stofile, 1902, S.C., 353 and Mgadi *v.* Nogwaza, 1943, N.A.C. (C. & O.), 14].

The question for decision is therefore whether Macebo was responsible for the failure of the contemplated marriage between him and Nobelungu.

Appellant states that Macebo was recruited for the mines on a nine months' contract through a recruiting agent and that he went to work to earn the balance of the dowry. The Court must assume that he took up his employment because if he had failed to do so the agent would have been advised and the matter could have been brought to the notice of appellant. There are no grounds for believing that he had died. He did not communicate with appellant or Nobelungu as one would have expected him to

do, nor did he remit any part of his wages so that the balance of the dowry could be paid. Having regard to the reason why he went to work one would have expected him to return on the termination of his contract so that the proposed marriage could be entered into. His failure to do so supports appellant's own statement to the effect that he did not intend coming home again. It is clear therefore that he absconded. What his reasons were we do not know. Now according to the opinion of the Native Assessors in Mgadi's case *supra* if an engaged man absconds it is taken that he rejects the girl and the dowry paid by him becomes forfeited to the girl's father. This is the position here. It was he who was responsible for the failure of the contemplated marriage.

The contention that in Native Law a man cannot hold two dowries for the same woman is correct only if the engagement has been broken off or the union dissolved through the fault of the woman. The principle, if one can call it such, also applies where a widow has re-married. When, however, the engagement was broken off or the union dissolved through the fault of the man, as in this case, he forfeits the dowry paid by him or on his behalf. In that case the principle does not apply.

The appeal is dismissed with costs.

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

For respondent: Mr. C. Stanford, Lusikisiki.

NORTH EASTERN NATIVE APPEAL COURT.

N.A.C. CASE No. 128/51.

MAHLOBO *v.* **LUVUNO.**

PIETERMARITZBURG: 23rd January, 1952. Before Steenkamp, President; Balk and Wessels, Members of the Court.

(1) COMMON LAW. (2) ZULU CUSTOM.

Seduction—Parentage—Once intercourse is admitted, the girl's word as to who the father of her illegitimate child is, is to be accepted, subject to certain qualifications.

Maintenance—The father of an illegitimate Native child is not liable for its maintenance in Natal.

Summary: Plaintiff sued defendant for damages for seduction of plaintiff's daughter, Gladys. Defendant, whilst admitting that he has had intercourse with Gladys, denied that he was the father of the child in question.

Held: That it is trite law that if a man admits having had connection with a girl, but denies he is the father of the child, the girl will be believed as to the paternity, even though it is proved that other men have had connection with her, unless the man can show that from the date upon which he had connection with her and the other circumstances of the case, it is physically impossible for him to be the father, or unless the Court is of opinion that the woman is not worthy of belief.

Held: Further that the Courts are not prepared to accept any evidence as to whether or not a child resembles a particular person in cases of this nature.

Held: Further that in Native Law, as it obtains in Natal, the natural father of an illegitimate child is not liable for its maintenance.

Cases referred to:

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

Mauzi *v.* Mngomezulu, 1943, N.A.C. (T. & N.), 91.

Appeal from the Court of the Native Commissioner, Camperdown.

Steenkamp (President), delivering the judgment of the Court:—

In the Native Commissioner's Court at Camperdown, the plaintiff sued the defendant for £10 for damages he sustained as a result of defendant having seduced plaintiff's daughter, Gladys. He also claims £2 per month, being maintenance of the minor child. Defendant's plea was "denies parentage". The Native Commissioner entered judgment for defendant with costs and against this judgment an appeal has been noted by the plaintiff on the grounds—

"(1) that the judgment was against the weight of evidence and against law; and

(2) the defendant failed to discharge the onus of paternity."

According to the evidence, it is common cause that the defendant and Gladys had been lovers and that he had intercourse with her, but in his evidence he states that intercourse only took place in July, 1950, and therefore he could not have been the father of the child which was born on the 28th January, 1951. Gladys, on the other hand, states that she first got to know the defendant when she was still at school in 1948 and that they became intimate.

According to the summons the intercourse took place about May, 1950. It is trite law that if a man admits having had connection with a girl, but denies he is the father of the child, the girl will be believed as to the paternity, even though it be proved that other men have had connection with her, unless the man can show that from the date upon which he had connection with her and the other circumstances of the case, it is physically impossible for him to be the father, or unless the Court is of opinion that the woman is not worthy of belief. (Maasdorp, Vol. IV, 5th Edition, page 141.) There is the uncontroverted evidence of Gladys that defendant used to come to their home and brought gifts for the child.

The Native Commissioner found proved—

(1) that plaintiff's ward and the defendant had been lovers;

(2) that intimacy did take place;

(3) that a child was born to plaintiff's daughter on the 28th January, 1951;

(4) that defendant was not the father of this child.

Facts Nos. (1), (2) and (3) are common cause. In arriving at the fourth decision the Native Commissioner states that a fact which weighed heavily with him is that not only did the girl conceal her pregnancy from her people, but she even concealed it from her lover, i.e. the defendant, until she must have been in an advanced state of pregnancy. Also, when asked by her guardian, i.e. plaintiff, who the man was who had rendered her pregnant, she remained mute, and only signified that it was defendant after her guardian had thrashed her. It is true that the girl only told the defendant after she had been pregnant for five months, that she was in that condition. In certain cases the non-divulgence timeously by the woman of her pregnancy to her lover is fatal to her father's claim for damages, but it cannot be said that this concealment is fatal to plaintiff's case in this instance. In the present case the girl states in her evidence that the defendant had informed her not to mention the fact that she was pregnant, and I can quite understand that when the girl's father questioned her about her pregnancy, she was thinking more of the interests of her lover, whom she wished to protect, than those of her father.

Plaintiff and the defendant and his people met when the girl was about eight months pregnant and it is very important to mention what occurred at that meeting. It is observed that the defendant, after being told that the girl was eight months pregnant, did not there and then state that he could not possibly have been the father of the child to be born. What he was concerned with more than anything else is whether the child, when born, would resemble him. If he were not the father of the

child, as he wants the Court to believe, he would not have suggested that they should wait until the child was born, as he surely must have known, if his evidence is to be believed, that he could not possibly be its father, seeing that she told them at the meeting that she was then already eight months pregnant and according to his evidence he had first had sexual intercourse with her only six months prior to that meeting.

We have the evidence on behalf of the plaintiff that the child resembles the defendant. On the other hand there is the evidence of the defendant and his mother that the child does not resemble him. The Courts are not prepared to accept any evidence as to whether a child resembles a particular person or not in cases of this nature and this therefore cannot be taken into consideration at all. I am aware, as stated by the Native Commissioner, that Natives do attach considerable importance to this aspect, but that is only an opinion which the Courts cannot accept.

Whilst on the pleadings the onus is on the plaintiff to prove that defendant is the father of the child, we cannot get away from the law that once intercourse is admitted, then the girl's word is to be accepted with, of course, certain qualifications.

I cannot find anything in the evidence of the girl that she is to be disbelieved altogether, and to me it seems the determining factor in the whole case, is the defendant's admission that he had intercourse with the girl.

Two letters, written by the defendant, were handed in. The first letter is not dated, but I notice from the envelope in which the letter was enclosed, that it was posted on the 14th July, 1950. This letter, it appears, is one written by the defendant, making an appointment with Gladys to meet him at or near a certain kraal after dark, so they must already have been intimate with each other by that time. The second letter, written on the 11th January, 1951, by the defendant, is an enquiry as to whether Gladys had given birth to a child yet. In this letter defendant again commits himself, i.e. that he would make his decision after he had seen the child. Why should he do this if he was not, in fact, the father of the child, since, as stated by him, intercourse first took place in July, 1950, and she had told him and the others at the meeting in December, 1950, that she was then eight months pregnant.

In my opinion he has committed himself in this letter and also in the statement he made at the family gathering that he could have been the father of the child.

Then there is also the conflict between the evidence of the defendant and that of his mother, who was his only witness, as regards what was said by Gladys at the family meeting.

In my view the plaintiff should succeed in the action and is entitled to £10 damages. The other claim is for maintenance of the child, but as laid down by this Court in the case of Nzimande *v.* Phungula, 1951 N.A.C. (N.E.) 386 (not yet reported), the plaintiff cannot succeed. See also the case of Mauzi *v.* Mngomezulu, 1943, N.A.C. (T. & N.), 91.

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

> "For plaintiff for £10 with costs on the first claim. For defendant on the second claim."

Balk (Permanent member): I concur.

Wessels (Member): I concur.

For Appellant: Adv. R. W. Cowley, i/b Messrs. Cowley & Cowley, Durban.

Respondent in default.

NORTH EASTERN NATIVE APPEAL COURT.

CASE No. 133 OF 1951.

MABELE *v.* PUNGULA AND OTHERS.

PIETERMARITZBURG: 23rd January, 1952. Before Steenkamp, President; Balk and Wessels, Members of the Court.

COMMON LAW.

Land: Purchase of in Natal—Sections 1 *and* 2 *of Law* 12 *of* 1884 (*Natal*).

Ejectment: Where based on *dominium*.

Held: That in this case the receipts produced do not preclude a reasonable conclusion that the amount reflected thereon formed rentals and not the purchase price, and it consequently cannot be said that in this case there has been part performance by any party in such a way as is inconsistent with any other reasonable conclusion than the actual existence of such contract in the whole or in part.

Held further: That, as the plaintiff's claim for ejectment of the defendants is based on *dominium*, and the ground in question has as yet not been transferred to him, plaintiff cannot succeed in his action at this stage.

Cases referred to:

Ncume *v.* Kula. 19, E.D.C. 338.
Nicholas *v.* Wigglesworth, 1937, N.P.D. 376.
Rasool *v.* Pillay & Anr. 1947 (2) S.A. 563 (N.P.D.)
Chetty *v.* Bhajee, 1950 (1) S.A. 212 (T.P.D.)

Statutes referred to:

Sections 1 and 2 of Law 12 of 1884 (Natal).

Appeal from the Court of the Native Commissioner, Pietermaritzburg.

Steenkamp (President), delivering the judgment of the Court.

The plaintiff is suing the four defendants for an order for immediate ejectment from property known as Lot No. 9 of Lot No. 31 of Edendale in the District of Pietermaritzburg.

In his summons plaintiff states he is the owner of this plot of ground and that the four defendants are unlawfully residing thereon and that notwithstanding due demand they fail or refuse to vacate it.

Defendant No. 1 pleads that he is the owner of the property in dispute and that he bought the land from Eva Mavimbela.

Defendants Nos. 2, 3 and 4 plead that they are tenants of defendant No. 1.

The Native Commissioner gave judgment for defendants with costs and against this judgment an appeal has been noted to this Court by the plaintiff on the following grounds:—

" 1. That the judgment is contrary to law, *inter alia* contrary to the provisions of Law 12 of 1884 (Natal); and
2. That the judgment is against the weight of evidence in that upon all the evidence led, the trial Court should have given judgment for the plaintiff as prayed."

In his reasons for judgment the Native Commissioner found the following facts proved:—

" 1. That neither plaintiff nor any of the defendants is the owner of the property from which plaintiff seeks to eject defendants;
2. that first defendant purchased the property on which his house is built many years before plaintiff purported to purchase it;
3. that plaintiff is therefore not entitled to eject first defendant; nor is he entitled to eject any of the other defendants who are tenants of first defendant."

In giving evidence plaintiff handed in a deed of sale dated the 18th July, 1950 (Exhibit "A") signed by Eva Mavimbela as seller and by himself as purchaser, wherein it is agreed that the seller sells and the purchaser purchases certain property being a portion of Lot No. 9 of Lot No. 31 Edendale Settlement for £60. It is not necessary to set out the whole deed of sale and it is sufficient to state that in so far as plaintiff is concerned, he purchased this property by virtue of a written agreement. This agreement complies with the requirements of Section 1 of Act No. 12 of 1884 (Natal) and the first question to be decided is whether or not the defendant No. 1 was a prior purchaser.

The seller, Eva, gives evidence on behalf of plaintiff and she testifies to the effect that defendant No. 1 was a tenant of hers and that the other three defendants were never her tenants. She denies that defendant No. 1 ever purchased the property from her, but admits that he was a tenant of the ground and that he had erected a building thereon which she values at £1. 10s.

Defendant No. 1's evidence is to the effect that he purchased the ground for £30 and paid it off by instalments and that he also paid certain of the rates on the ground when there was jeopardy of its being sold to recover them.

Defendant No. 1 admits that there was no deed of sale but he relies for proof that he had purchased the ground on the assertion that he had occupied it for some time and was able to produce receipts for certain of the instalments alleged by him to have been paid on account of the purchase price of the ground and others for rates he had paid thereon.

He produced two receipts for £3 and £2 respectively issued to him by one Sitole on behalf of Eva (these receipts are marked "B" and "G"). He also produced receipt "C" for £1 issued by the Local Health Commission for rates; receipt "D" issued by a firm of Attorneys, C. C. C. Raulstone, for £3 for rates, Lot No. 31; receipt "E" by the same firm for £5 in respect of Edendale property; the lastmentioned receipt does not disclose on what account the payment acknowledged thereby was made; receipt "F" for £2 by the same firm of Attorneys. it not being indicated therein what this £2 was for.

On receipt "B" the words "Balance £2" appear. There is no other indication whether it was rent or purchase price. This receipt is dated 20.7.1946. Receipt "G" was issued on 11.9.1947 for £2 and the words "Instalment or balance in settlement" appear in the body thereof. Here too, there is no indication whether the instalment is in respect of rent or purchase price.

Defendant No. 1 states further that he had other receipts which are lost.

The Native Commissioner in commenting on these receipts, states:—

> "These receipts suggest very forcibly that they refer to something other than an annual rental of £2.

He has, however, given no finding as to the full extent of the payments made by Defendant No. 1 to Eva. Moreover he has not dealt with the requirements of Act No. 12 of 1884 (Natal), the preamble of which reads:—

> "Whereas litigation and inju tice are occasioned by alleged verbal promises in certain cases being regarded as constituting causes of action, and it is expedient to make better provisions in that behalf."

The appropriate provision in Section 1 of this Law reads to the effect that any contract for the sale, purchase, mortgage, charge or gift of or on any immovable property or any interest therein shall be in writing.

Section 2 of the same law deals with part performance and reads as follows:—

> "2. The foregoing section shall not apply to any contract in respect of which it shall appear to the Court in which the action shall be pending or to any Court of Appeal therefrom, that there has been part performance by any party or his representative in such a way as is inconsistent with any other reasonable conclusion than the actual existence of such a contract in the whole or in part. And in the latter case such part may be enforceable though the whole may not be."

Can it be said that in the present appeal there has been part performance by any party in such a way as is inconsistent with any other reasonable conclusion than the actual existence of such contract in the whole or in part?

Nowhere can it be deduced from the evidence given by either party that defendant No. 1's occupation of the property is inconsistent with a contract of lease.

The only act that is capable of construction as part performance in the present case is the payment by defendant No. 1 to plaintiff of the £30 averred by him, plus the rates, and whilst these payments may suggest instalments on account of the purchase price, they do not preclude a reasonable conclusion that this amount formed rentals and not the purchase price, particularly as it is averred by defendant No. 1 in his evidence that he has been living on the ground for over ten years, and that he bought the ground between the years 1937 and 1939 and paid for it an initial £5 and then £1 a month *regularly every month* and sometimes larger instalments, whereas the two receipts produced by him in respect of some of these instalments are dated the 20*th July*, 1946 ("B") and the 11*th September*, 1947 ("G"); the other receipts are, according to his evidence, for rates on the ground.

It is clear from the judgment in the case of Rasool *v.* Pillay & Anr., 1947 (2) S.A. 563 (N.P.D.) that where a person relies upon the occupation of premises as part performance, he must, to succeed, satisfy the Court that such occupation is inconsistent with any other reasonable conclusion than the existence of the contract averred by him, in this instance, the contract of purchase and sale, contended for by defendant No. 1; and the same would apply in so far as the payments made by the defendant are concerned. As pointed out above, neither the occupation nor the payments by defendant No. 1 are inconsistent with the existence of some contract other than that of the purchase and sale alleged by him and consequently he and the other defendants were not entitled to a judgment in their favour on their plea.

There remains the question as to whether plaintiff can succeed in his claim for ejectment, which is based upon ownership. He is, however, not the owner of the ground, as it is common cause that it has not been transferred to him. Defendants are in possession of the ground, and not the plaintiff. As the plaintiff's claim is based on *dominium*, and the ground in question has as yet to be transferred to him he cannot succeed in his action at this stage, see Ncume *v.* Kula, 19 E.D.C. 338; Nicholas *v.* Wigglesworth, 1937 (N.P.D.), 376, and Chetty *v.* Bhajee, 1950 (1) S.A. 212 (T.P.D.). Counsel for appellant has conceded this.

As the plaintiff may possibly succeed in an action for the ejectment of the defendants at a later stage, i.e. after the ground has been transferred to him, and particularly in view of defendant No. 1's plea that he is the owner of the ground, I consider that the proper judgment by the Court below should have been: "Absolution from the instance with costs." In the result I am of opinion that the appeal should be allowed with costs and that the Acting Additional Native Commissioner's judgment should be altered to one of absolution from the instance with costs.

Balk (Permanent Member): I concur.

Wessels (Member): I concur.

For Appellant: Adv. J. H. Niehaus, i/b Messrs. Raulstone & Co., Pietermaritzburg.

For Respondent: Mr. Manning of Messrs. McGibbon & Brokensha, Pietermaritzburg.

NORTH EASTERN NATIVE APPEAL COURT.

N.A.C. CASE No. 138/51.

NZUZA *v.* NENE.

PIETERMARITZBURG: 24th January, 1952. Before Steenkamp, President, Balk and Wessels, Members of the Court.

COMMON LAW.

Damages: Trespass—vindication of right—pecuniary loss.

Summary: Plaintiff sued defendant for £25 damages for trespass, being £5 for defendant having dug up the ground, £10 damage to the ground and £10 for defamation, which he avers he suffered as a result of defendant having constructed a road over his property and having used the said road regularly, notwithstanding plaintiff's continual objections to defendant's wilful and malicious action in so doing.

Held: That as the action was not brought to vindicate a right, and as no pecuniary loss was proved, plaintiff could not recover damages.

Appeal from the Court of the Native Commissioner, Pietermaritzburg.

Steenkamp (President):—

Plaintiff is the owner of Portion No. 30 of Lot Smeroe of Edendale No. 775 in the District of Pietermaritzburg. Defendant is the owner of Portion No. 29 of the same Lot.

Along the south-eastern and south-western boundary of the plaintiff's portion there is a road twenty feet wide, which continues along the western boundaries of the plaintiff's and the defendant's portions. On the south-western corner of the plaintiff's portion there is a beacon ("E") and it is apparent from the record that people travelling along the road usually cut the corner at beacon "E" to the extent of 28 feet along the south-western boundary and eight feet along the western boundary. This has evidently become a recognised deviation and when that road needed repair, the defendant actually, in repairing the road, during the year 1950, also repaired the small portion that extended into the plaintiff's ground. Beacon "E" which had been visible when the plaintiff acquired his land, was no longer visible when defendant effected the repairs in question, having become submerged in the interim, and after plaintiff and defendant had some altercation as to the situation of that beacon, the plaintiff obtained the services of a land surveyor to locate the beacon. Before that beacon was located by the surveyor and after the encroachment in question by the defendant, the plaintiff erected a pole adjacent to that beacon.

After the surveyor had located beacon "E", the plaintiff sued the defendant for £25 damages which he avers he suffered as a result of defendant having constructed a road over his property and having used the said road regularly, notwithstanding plaintiff's continual objection to defendant's wilful and malicious action in so doing.

Before the issue of summons plaintiff caused two letters to be written to defendant requesting him to close the road and replace the earth as it was before such construction was undertaken by the defendant. In giving evidence the plaintiff states that the £25 damages are made up as follows:—

£5 for defendant digging up the ground;
£10 for damage to the ground; and
£10 for defamation.

He bases the defamation on the altercation he and defendant had and when defendant called him names. This Court, however, is not concerned with defamation and we are only concerned with the £10 being the deterioration of the ground that had been dug up and the £5 for having dug up the ground to make the road.

The Assistant Native Commissioner gave judgment for plaintiff for 1d., and ordered plaintiff to pay defendant's costs. The presiding Assistant Native Commissioner found proved that defendant frequently used the footpath, about five paces in length, which traverses the corner of the plaintiff's property at beacon "E". The Assistant Native Commissioner has, however, excluded this from his assessment of the damages because plaintiff had made it clear in his evidence that he was not claiming damages for the use by the defendant of the footpath.

The only matter which concerns this Court is whether plaintiff's property has deteriorated to the extent of £10 and whether plaintiff is entitled to damages for defendant's action in repairing the road.

The plaintiff was not satisfied with the Assistant Native Commissioner's judgment and he has appealed to this Court on the following grounds:—

"1. In as much as the Court found that a trespass had actually been committed, it erred—

(*a*) in awarding as damages an amount of one penny;

(*b*) in failing to give judgment for the amount of two pounds ten shillings paid to the surveyor; and

(*c*) in ordering plaintiff to pay costs.

2. The Court should have found that plaintiff had brought the action to vindicate a right which the defendant sought to invade."

There can be no doubt that plaintiff himself was not certain as to the location of beacon "E", otherwise he would not have obtained the services of a land surveyor to point out the beacon, because the land surveyor actually found the peg at the correct spot. What this Court has to decide is whether the defendant, in repairing the road, intentionally or negligently encroached on the plaintiff's land, as, according to McKerron in his "Law of Delict" Third Edition, page 255, states:—

"No action will lie unless the trespass causes actual pecuniary loss or unless it is committed under a claim of right or in circumstances amounting to injuria."

It is also stated in the same work that for the same reason no action will lie unless the act complained of is either an intentional or a negligent act. So also, within limits, is an inevitable mistake a good defence.

Here we have a case in which a road, regularly used, passes over a very small corner of the plaintiff's property and can it be said that the person who regularly uses that road has trespassed intentionally in repairing that road? If, of course, pecuniary loss was sustained by the plaintiff, then there might be some substance in his claim, but he has not been able to prove to the satisfaction of the Court below that he suffered any pecuniary loss, and the presiding officer in assessing damages, came to the conclusion that only contemptuous damages were called for.

The plaintiff seems to have gone to considerable pains in asserting a right in a Court of Law. He could have asserted his right by fencing his property or by erecting a pole at the corner, as in fact he did prior to beacon "E" being pointed out to him by the surveyor and which served the desired purpose. It seems to me that this is one of those cases where neighbours are at loggerheads and to settle their petty differences, make abuse of the process of a Court. Such abuse is something that cannot be too strongly deprecated by Courts of Law.

According to the evidence of the land surveyor, the damage that might have been caused to the plaintiff's property is negligible.

The presiding officer held an inspection *in loco* and he found that the portion cut away is about 6 ft. long and no more than 6 inches wide and 9 inches deep. The only rubbish he could find on the spot and which plaintiff seems to have enlarged upon as calling for damages, are a few pieces of rusty tin and a few empty tins lying along the northern boundary.

At the inspection it was also found that there were at least six other dwellings in the vicinity, the occupiers of which obviously used the road in question. It was also found that the surface of the alleged excavation is largely covered with grass and a well-worn footpath traverses the corner in question. The passing of vehicular traffic is effectively prevented by the substantial pole which had been planted by the plaintiff at beacon "E". There is only this footpath, which evidently goes round the pole and which is being used by other people, as well as by the defendant. It certainly would call for damages payable by the defendant if he insisted on using that footpath against the plaintiff's wishes, but, as mentioned before, it is clear from his evidence that the plaintiff does not claim damages on this ground. The conclusion therefore is that the road constructed by the defendant has not caused any damage, as this portion is fully grown over with grass.

In my opinion no damages having been proved, the plaintiff is not entitled to any, but there being no cross-appeal, there is no justification for disturbing the judgment of the Court below. The award of costs is entirely in the discretion of the Court and in this particular case I am not at all satisfied that the Assistant Native Commissioner has not used that discretion in a judicial manner. This Court also feels that this is a case that should never have been brought before the Court.

In my opinion the appeal should be dismissed with costs.

Balk (Permanent Member): —

To my mind it is clear from the plaintiff's evidence, that he confined his claim in this action to the encroachment on his land by the defendant when the latter repaired the road adjoining that land during the year 1950.

It is also manifest from the evidence for the plaintiff, that at the time that the defendant effected those repairs, there was nothing to indicate where the boundaries of the plaintiff's land ran at the points concerned, since beacon "E" was then not visible, having become submerged, and the plaintiff had then not yet erected the pole adjacent to that beacon with the strands of wire running from it to beacons "D" and "F".

The plaintiff admitted in his evidence that after he had spoken and pointed out to the defendant, whilst the latter was effecting the repairs to the road, that he was encroaching on his (plaintiff's) land, the defendant had permanently ceased doing so. It is true that the plaintiff stated that he had spoken to the defendant twice in this connection before the latter stopped encroaching on the plaintiff's land, but then it is obvious from the plaintiff's evidence that the defendant was working at a different point in the same locality when the plaintiff spoke to him on the second occasion and there is nothing in the evidence to indicate that the plaintiff at any time pointed out the boundary of his land to the defendant.

It follows that there was no necessity whatsoever for the plaintiff to have instituted the instant action to vindicate any right; nor can it be said that in the circumstances the defendant committed the trespass in question intentionally; at most he did so negligently and I rather incline to the view that this trespass is excusable as it appears to have been due to a bona fide mistake on the defendant's part. But even assuming that the trespass in question was due to the defendant's negligence, the plaintiff is still not entitled to succeed in his claim as he has failed to prove actual pecuniary loss, see McKerron's "Law of Delict" (Third Edition) at page 255. Moreover, as is obvious from the record, the encroachment in question was so minute that the pecuniary loss resulting therefrom, if any, mu t necessarily be infinitesimal so that, in any event, the plaintiff was not, in my view, entitled to come to Court in connection therewith.

I therefore agree that the appeal should be dismissed with costs.

Wessels (Member): I concur.

For Appellant: Adv. J. J. Boshoff, instructed by Messrs. Hershensohnn, Pietermaritzburg.

For Respondent: Adv. J. H. Niehaus, instructed by Messrs. Raulstone & Co., Pietermaritzburg.

NORTH EASTERN NATIVE APPEAL COURT.

N.A.C. CASE No. 114/51.

MBUYAZI *v.* MTHETHWA.

MTUBATUBA: 29th January, 1952. Before Balk, Acting President; Ashton and Oftebro, Members of the Court.

ZULU CUSTOM.

Native Law and Custom—Customary union—divorce at instance of wife—order for return of lobolo.

Practice and Procedure: Rescission of judgment which is *void ab origine.*

Summary: Defendant was sued by his Native customary wife for divorce. Judgment was given for the dissolution of the Native customary union, and that one head of cattle be returned to defendant by plaintiff's father, who had not been cited as a party in the action.

Held: That it is not competent in granting any decree of divorce under the Natal Code of Native Law at the instance of the wife, to embody therein any order regarding the number of lobolo cattle, if any, to be returned by such wife's father to her husband when such father has not been cited as a party to the divorce proceedings.

Held further: That as the order in question was void *ab origine,* the appellant could have obtained the relief sought by him by making application to the Native Commissioner's Court to have the said order rescinded.

Cases referred to:

Xulu *v.* Mtetwa, 1947, N.A.C. (T & N) 32.

Zulu *v.* Nkozi, 1, N.A.C. (N.E.) 227.

Masoka *v.* Mcunu, 1, N.A.C. (N.E.) 327.

Ex parte Minister of Native Affairs *in re* Yako *v.* Beyi, 1948 (1) S.A. 388 (A.D.).

Statutes referred to:

Rule 30 (2) of "Old Rules" for Native Commissioners' Courts published under Government Notice 2253 of 1928. Section 15 of Act No. 38 of 1927.

Appeal from the Court of Natve Commissioner, Empangeni.

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

The Plaintiff, duly assisted by her father, instituted an action in the Native Commissioner's Court at Empangeni, claiming a divorce from her husband, the defendant, in respect of the customary union entered into between them during the year 1949 on several grounds which are immaterial in so far as the present appeal is concerned.

At the concluson of the hearing, the Court *a quo* entered the following judgment:—

> "1. It is ordered that the customary union be disolved with costs.
>
> 2. That plaintiff be placed under the guardianship of her father.
>
> 3. That the balance of lobolo owing be written off and that plaintiff's father return one head of cattle to defendant."

An appeal has been noted against that judgment by the defendant, who was not represented in the Court *a quo;* this appeal is confined to paragraph 3 of that judgment, i.e. it is solely against the order "that the balance of lobolo owing be written off and that plaintiff's father return one head of cattle to defendant."

As the plaintiff's father was not a party to this action, but only appeared therein for the purpose of assisting his daughter (plaintiff), it was not competent for the Court *a quo* to make the order against which the appeal has been brought, see Xulu *v.* Mtetwa, 1947, N.A.C. (T & N) 32; Zulu *v.* Nkosi, 1, N.A.C. (N.E.) 227 and Masoka *v.* Mcunu, 1, N.A.C. (N.E.) 327.

It is manifest from the decisions in those cases that the order in question was wholly ineffectual and had no legal force from its inception; in other words, it was void *ab origine.* That being so, there was no necessity for the defendant to have brought the matter in appeal to this Court to have that order set aside since he could have obtained the relief sought by him by making application to the Native Commissioner's Court to have the said order rescinded under Rule 30 (2) of the Rules for those Courts published under Government Notice No. 2253 of 1928, as amended, and it is still open to him to do so.

In my view, therefore, the appeal should be dismissed with costs, but I am of opinion that in order to save further costs in this unfortunate matter, this Court should amend the Native Commissioner's judgment, under the wide powers vested in it by Section *fifteen* of the Native Administration Act, 1927, by deleting from that judgment the final paragraph thereof, reading

> "3. That the balance of lobolo owing be written off and that plaintiff's father return one head of cattle to defendant."

I feel constrained to add that not only would the time of this Court not be taken up unnecessarily, but in particular that litigants would not be mulcted in unnecessary costs if Native Commissioners followed the decisions of this Court. Disregard of those dicisions postulates that the Native Commissioners concerned do not realise the importance of the *stare decisis* rule. In this connection particular attention is invited to the remarks of the learned Judge of Appeal delivering the judgment of the Appellate Division of the Supreme Court in the case of *Ex parte* Minister of Native Affairs *in re* Yako *v.* Beyi, 1948 (1), S.A. 388 (A.D.) at page 400 of the relative report.

Ashton (Member): I concur.

Oftebro (Member): I concur.

For Appellant: Mr. W. E. White, instructed by J. Gerson, of Empangeni.

For Respondent: Mr. G. D. E. Davidson of Empangeni.

CENTRAL NATIVE APPEAL COURT.

N.A.C. CASE No. 2/52.

DIKOMA *v.* **KOLWANI.**

MAFEKING: 31st January, 1952. Before Marsberg, President; Warner and Doran, Members of the Court.

BECHUANA NATIVE LAW.

Appeal from a Chief's Court—Kraalhead responsibility in Bechuanaland—Rights between parties to a union not to be confused with the rights which third persons may have against either party.

Damages—Seduction—Kraalhead responsibility British Bechuanaland.

Summary: Appellant, having unsuccessfully appealed to the Court of Native Commissioner against a Chief's judgment in which damages for seduction, viz. six head of cattle, was awarded against him, brought a further appeal to the Native Appeal Court.

Held: Natural father, as kraalhead, is liable for torts of his son.

Cases referred to:

MacKenzie Mocumi *v.* Dekeledi Mocumi and another N.A.C. (C. & O.), 109.

Tswana Law and Custom—Schapera p. 126.

Appeal from the Court of Native Commissioner, Mafeking.

Marsberg (President), delivering judgment of the Court:—

Appellant, Mokgotsi Dikoma has noted an appeal against the judgment of the Native Commissioner of Mafeking, sitting in appeal, on a judgment of a Chief's Court in which appellant was held responsible as kraalhead for the tort of his natural son in an action for damages for seduction, on the following grounds: That the Native Commissioner erred in holding that:—

> "The marriage of the appellant in which there has been an agreement between the parties, cohabitation and payment of a betrothal beast, constitutes a valid marriage, rendering the appellant responsible for the delicts of his natural children by such marriage and specifically that the appellant is responsible for the delicts of his son Jarnie in the present case."

The notice of appeal against the Chief's judgment was lodged in the following form:—

> "The grounds of appeal are that the appellant is the natural father of the said Jarnie Dikoma but has at no time paid lobolo to the family of the mother of the said Jarnie and is therefore not liable by law or custom for any of the said Jarnie's delicts."
>
> "The judgment of the said Chief is appealed against in so far as it affects the appellant's liability for the delicts of the said Jarnie."

The appeal has been brought before us apparently to obtain an authoritative ruling on the question of the law relating to kraalhead re ponsibility in Bechuanaland. We state, therefore, that we fully agree with the judgment which has been given by the Native Commissioner. It is so clear and informative that we accept it as a statement of our views on the question. We incorporate his judgment in ours and quote it as follows:—

> "This is an appeal from Chief Jacob Seatlholo's Kgotla at Rietfontein in the Molopo Native Reserve in the Mafeking district. The parties to the action are members of the Rapulana Section of the Barolong Tribe.

The Chief's judgment in which he awarded six head of cattle under Tswana Law and Custom, against the appellant in respect of the seduction of Montle Modisakeng by Janie Dikoma, is appealed against. The seduction has been admitted in the Chief's Kgotla and was not denied in this Court when this case was being heard on appeal.

The grounds of appeal are that appellant is the natural father of the said Janie Dikoma, but that he has at no time paid bogadi to the family of the said Janie's mother and that he is therefore by Tswana Law and Custom not liable for the said Janie's delicts.

In evidence it was proved that the appellant was the natural father and kraalhead of Janie and the point to be decided on appeal was therefore whether or not he was in fact liable for the son's delict of seduction.

The appellant attempted to prove that Janie was his illegitimate son by a concubine viz. Thumela, a Ratshidi-Barolong woman with whom he had been cohabiting for a number of years and with whom he had 11 children.

In evidence it transpired that—

(1) appellant and Thumela agreed to be married (i.e. enter into a Native customary union);
(2) the family of appellant and of Thumela and Thumela agreed to their entering into a Native customary union;
(3) appellant paid an engagement sheep;
(4) appellant has been regarded all along as the husband of Thumela;
(5) appellant provided a house for Thumela and has lived with her as man and wife for many years, out of which cohabitation 11 children were born;
(6) bogadi was agreed upon but not paid;
(7) appellant a Rapulana had Janie registered as a Rapulana taxpayer, under Chief Jacob Seatlholo whereas Thumela's people are Ratshidi-Barolongs under Chief L. K. Montsioa.

Appellant averred that he has not paid bogadi because he had no means, and is therefore not Thumela's husband, and liable for Janie's delicts. He added 'If I had means I would have paid (bogadi) and I would have been responsible for Janie's seduction'.

Appellant's first witness Aaron Nyati under cross-examination said:—

'Mokgotsi paid an engagement sheep when he took my sister Thumela away. He has been living with her for many years. They agreed to get married and the family agreed. So the only thing missing is bogadi and *he can still pay the bogadi at any time'*.

In Mackenzie Mocumi *v.* Dekeledi Mocumi and Another, N.A.C., Cape and O.F.S., Case 48 (Page 109), it has been said:—

'The law on the subject is more or less clearly set out in the evidence, but the background must be understood to appreciate fully the true perspective. Tswana (Bechuana) Law as practised among the Barolong section of the nation recognises the following unions between a man and a woman:—

(1) Transitory unions, creating no rights to the woman or her offspring and subjecting the male to a fine. Schapera "A handbook of Tswana Law and Custom", p.126.

(2) Permanent unions—

(*a*) with an unmarried woman as a concubine; the parties are not bound to each other by any tie and the male acquires no rights in the children or the female in the property, etc., of the male; the male is not subject to a fine for cohabitation; Schapera p. 126;

(*b*) with an unmarried woman betrothed to the man before payment of dowry (bogadi); this is an incohate marriage which leaves the rights of the children in the woman's people; the woman has no right to property of the male partner;

the union is convertible into a full marriage by payment of bogadi which may be done even after the death of the male; rights in the children are then transferred to the husband's people with full legal rights; this Court rejects the submission that there can be a valid customary union without dowry; Schapera, 134/5, 143;

(*c*) with a woman as full wife—after payment of dowry (bogadi) being a full customary union; The children are full members of the husband's family. The woman is a wife. Schapera 134/5'.

It appears then that the union between appellant and Thumela is for all intents and purposes the permanent union referred to in paragraph (*b*) above and therefore that concubinage between appellant and Thumela does not exist, the more so as according to Tswana Law a concubine can only be a *Nyatsi* or a *lefetwa* (*vide* also page 126 of Schapera's 'A handbook of Tswana Law and Custom' where it is said:—

'It has also become very common for unmarried young men and even youths to have concubines, generally girls still eligible for marriage. These unions are seldom regarded with the same tolerance as those just described, and often the boys are punished if discovered with the girls. They may make them occasional small gifts but do not help them in the same way as married men do. Such unions are mostly transitory, and do not last very long, although occasionally the attachment between the young people deepens and they ultimately marry. *But until they are formally betrothed,* neither party has any legally enforceable rights and duties in regard to the other. Should the girl become pregnant, the boy is almost invariably made to pay damages.'

Appellant and Thumela were legally betrothed and therefore they have enforceable rights and duties in regard to the other and their child Janie is therefore according to Tswana Law because bogadi has not been paid, not illegitimate in the sense that we understand it in Roman Dutch Law. It is true that unless bogadi is paid in full the natural father has not full rights over his children as he would have if he has paid bogadi, yet non-payment of bogadi does not disturb his rights to his children *vide* the last paragraph on page 143 of Schapera's "A handbook of Tswana Law and Custom."

'Normally, where the marriage has taken place with the approval of both families, the father's claim to his children is not disturbed, even if he has not yet paid bogadi, and he can ultimately obtain full legal rights over them when his first daughter is married. The bogadi given for her cannot be taken by him, but goes to her mother's relatives'.

As the natural father has therefore certain rights, it follows he must have certain liabilities. *Vide* the following passage at the foot of page 125 and top of page 126 of Schapera's handbook where he says:—

'But both here and among the Ngwato, so long as the consent of both families has been formally obtained and expressed through the betrothal ceremonies, the cohabitation of the man and the woman constitutes a recognised form of union and establishes certain legal rights and duties on both sides.'

The fact that appellant had Janie registered as a Rapulana-Morolong for tax purposes whereas Janie's mother's people are Ratshidi-Barolong is *Prima facie* proof that appellant regarded Janie as his son in which he had certain very important rights from which it follows he also acknowledged important liabilities.

Further from the following passages from the evidence of Aaron Nyata and Chief J. Seatlholo, the preponderance of probability is that the appellant is Janie's kraalhead.

> 'Aaron Nyati: The respondent must assist me because the children are working for him. I mean the children are earning money and are paying the money over to him (respondent). The respondent is therefore the kraalhead. '. . . Mokgotsi will be regarded as the kraalhead although Janie is not living with him because Janie is working for the benefit of Mokgotsi.'
>
> 'Chief J. T. Seatlholo: Dikoma is accepted as Janie's kraalhead and according to our law the kraalhead is responsible for payment of damages. *The payment of bogadi has nothing to do with the liability to pay damages.*'

As appellant is therefore the natural father and the recognised kraalhead of Janie, he is *de facto* although not fully *de jure*, also the head of his family and according to the following passage on page 177 of Schapera's handbook, liable for damages for the seduction by Janie:—

> 'As head of the family, the father must keep order and maintain discipline over his children. In this direction he exercises considerable authority, and has the right to punish the children for any offences they commit. He acts also as their legal representative at the tribal courts, and they cannot sue or be sued except with his assistance and through his assistance, and through him. *He is, in matters affecting outsiders,* responsible for their conduct, and can he held liable for their misdeeds. If, e.g. a son allows livestock to enter a field and damages crops, *or seduces a girl,* the father must pay the necessary damages. His position in such cases is not that of a wrongdoer, but of a surety responsible for the good conduct of members of his family.'

For this reason then the appellant is held responsible for damages for the seduction by Janie and the Court therefore dismissed the appeal with costs".

The important point to distinguish in this case is that the rights between the parties to a union (or marriage) must not be confused with the rights which third persons or outsiders may have against either party. As the Chief said: "The payment of dowry (which is a matter between the parties themselves) has nothing to do with the liability to pay damages." This statement of the law is both sound and in accord with common sense. An outsider who has a claim against one of the parties to a union cannot be expected to concern himself with the progress of their bogadi payments or arrangements to ascertain in what quarter he may proceed with his action. In a case of this nature it suffices if he seeks out the ostensible kraalhead.

We are satisfied that the Native Commissioner's judgment upholding the judgment of the Chief's Court is correct.

The appeal is dismissed with costs.

For Appellant: Mr. S. P. Minchin of Messrs. Minchin & Kelly, Market Square, Mafeking.

For Respondent: Mr. A. A. Gericke of Messrs. Fraenkel and Gericke, Main Road, Mafeking.

NORTH EASTERN NATIVE APPEAL COURT.

N.A.C. CASE No. 124/51.

DHLAMINI *v.* **MATE.**

DURBAN: 4th February, 1952. Before Balk, Acting President; Cohen and Gillbanks, Members of the Court.

COMMON LAW.

Practice and Procedure—Onus on defendant.

Summary: Plaintiff sued defendant for repayment of £50 placed in the care and custody of the defendant by plaintiff at various times. Defendant alleged in his plea that he had only received £30 from plaintiff but alleged that it had been refunded.

The Native Commissioner held that the evidence tendered did not appear to justify judgment being given for either party and entered a judgment of absolution from the instance with costs.

Held: That where, on the pleadings, the onus is on defendant, and he does not discharge that onus, a judgment of absolution from the instance is not competent.

Cases referred to:
Schoeman *v.* Moller, 1949 (3), S.A. 949 (O.P.D.).
Appeal from the Court of Native Commissioner, Durban.

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

Just cause having been shown, the late noting by the plaintiff of the appeal to this Court is condoned.

The plaintiff (present appellant) instituted an action in a Native Commissioner's Court, claiming from the defendant (present respondent) the sum of £50, which the plaintiff, in the particulars of claim embodied in his summons, averred was the total amount that he had placed in the care and custody of the defendant on divers occasions during the year 1950, on the understanding that the latter would refund that sum to him on demand. The plaintiff further averred in those particulars that, notwithstanding demand, the defendant had failed to refund the said amount to him.

The defendant's plea as recorded by the presiding Additional Native Commissioner in the Court below reads:—

"Admits receiving £30 but states amount has been refunded. Denies receipt of £50."

At the conclusion of the hearing of this case in the Court *a quo*, the presiding Additional Native Commissioner entered judgment of absolution from the instance with costs.

The grounds of the present appeal are that that judgment is against the weight of the evidence and wrong in law for the following reasons:—

"1. The Native Commissioner erred in holding that defendant had discharged the onus upon him to prove that the money was repaid to plaintiff.

2. The Native Commissioner erred in beleiving defendant, whose evidence contained numerous discrepancies in preference to the evidence of plaintiff."

The only fact found proved by the Additional Native Commissioner concerned, according to his written judgment, is "that plaintiff gave defendant £30 for safe-keeping", as was admitted by the defendant, both in his plea and evidence. This officer's reasons for judgment, read as follows:—

> "This case rests entirely on a question of fact. Plaintiff alleges that he handed £50 in all to the defendant for safe-keeping, and that defendant has returned none of this sum. Defendant admits receiving £30 from plaintiff and alleges that this amount was returned. Defendant also mentions £1 in respect of change.
>
> The only evidence tendered is only that of the parties themselves, and it is remarkable that there was no "witness" present as is the custom amongst natives in money transactions.
>
> It was not held that defendant had discharged the onus upon him to prove payment of the money to plaintiff. Had this been so, judgment would have been entered for defendant.
>
> The discrepancies in defendant's evidence alleged in the notice of appeal, were not detected and there was nothing to show that defendant was any less worthy of credence than the plaintiff.
>
> The evidence tendered did not appear to me to justify judgment being given for either party, and absolution from the instance with costs was entered."

On a proper understanding of the defendant's evidence, the seeming discrepancies therein are, to my mind, reconcilable with his remaining evidence; and, as is evident from the Additional Native Commissioner's reasons quoted above, he did not accept the defendant's evidence in preference to that of the plaintiff; nor did he hold that the defendant had discharged the onus of proof resting on him in respect of the repayment of the £30; but he came to the conclusion that the evidence tendered by the parties did not justify judgment being given for either of them.

The parties themselves were the only persons who gave evidence and to my mind their evidence is such that it does not disclose a preponderence of probability in favour of either of them. That being so and as the Additional Native Commissioner cornerned came to the conclusion that neither party was less worthy of credence than the other, I consider that his judgment could not have been regarded as wrong if the onus of proof on the pleadings had rested on the plaintiff in respect of the whole sum of £50 claimed by him. But the defendant in his plea admitted the receipt of £30 from the plaintiff and on the pleadings therefore the onus of proof that the defendant had repaid this sum to the plaintiff, rested on the defendant who, both in his plea and evidence averred this repayment which was denied by the plaintiff in his testimony. It is manifest from what has been stated above that the defendant failed to discharge that onus and the plaintiff was therefore entitled, after the close by the parties of their respective cases, to judgment in the sum of £30, there being no room for absolution from the instance in such cases, see Schoeman *v.* Moller, 1949 (3), S.A. 949 (O.P.D.) and the authorities cited in that judgment.

I am therefore of opinion that the appeal should be allowed with costs and that the judgment of the Court *a quo* should be altered to read:—

> "For plaintiff in the sum of £30 with costs. Absolution from the instance as regards the balance of £20 claimed by plaintiff."

Cohen (Member): I concur.

Gillbanks (Member): I concur.

For Appellant: Adv. A. M. Torf, i/b Messrs. Cowley & Cowley, Durban.

For Respondent: Mr. R. I. Arenstein of Durban.

SOUTHERN NATIVE APPEAL COURT.

N.A.C. CASE No. 4/52.

NJOMBANI *v.* TSHALI.

KOKSTAD: 5th February, 1952. Before Sleigh, President, Cockcroft and Wilkins, Members of the Court.

NATIVE LAW AND CUSTOM.

Native Appeal Case—Marriage by Native custom—not a marriage as Section 35 of Act No. 38 of 1927 specially excludes any union under Native law and custom—Customary union is dissolved where one of the parties marries according to Christian rites—Adultery—No action for adultery lies when at time action taken union no longer existed.

Summary: Plaintiff married M according to Native custom and had two children by her. During his absence on the mines M deserted and in April 1944 married defendant according to Christian rites. Shortly after this she took her youngest child, N, to defendant's kraal where it has been living ever since. In the present action respondent claims 5 head of cattle or £25 as damages for adultery with M and custody of the child N, and appellant counterclaimed for one beast as *isondlo* in respect of the child. Judgment was entered for respondent and appellant appeals.

Held:

(1) That in the Cape Province a customary union is dissolved where one of the parties marries another according to Christian rites.

(2) That in Native law a male partner to a customary union cannot recover damages for adultery with his customary wife unless the union is still in existence at the time action is taken.

(3) That a customary union is not a marriage as defined in Section 35 of Act No. 38 of 1927.

(4) That at the time this action was taken the customary union no longer existed.

(5) That respondent is not entitled to damages.

Cases referred to:—

Mngqantsiyana *v.* Kyili, 1936, N.A.C. (C. & O.), 64.
Magqireni *v.* Benene, 1937, N.A.C. (C. & O.), 202.
Mtyelo *v.* Qotolo, 4, N.A.C., 39.
Zondi *v.* Gwane, 4, N.A.C., 195.
Nkambule *v.* Linda, 1951 (1), S.A. (A.D.), 377.
Ndlanya *v.* Mhashe, 1, N.A.C. 112.
Rolobole *v.* Matandela, 2, N.A.C., 126.
Sontshatsha *v.* Gqibeni, 4, N.A.C., 46.
Gqamse *v.* Stemele, 1, N.A.C., 113.

Appeal from the Court of Native Commissioner, Mount Frere.

Sleigh (President), delivering the judgment of the Court:—

The facts in this case are not seriously disputed. They are as follows: Respondent, who was the plaintiff in the Court below, married Manogada according to Native custom and apparently had two children by her. During his absence at the mines Manogada deserted and on 24th April, 1944, married appellant according to Christian rites. Shortly after this she took her younger child, Nomatshungu to appellant's kraal where it has been living ever since being supported by appellant. In 1948 respondent returned from the mines and claimed his wife and child in the chief's court but obtained no satisfaction. In 1950 Manogada died and respondent then claimed the child. Appellant was willing to hand over the child against payment of *isondlo* which respondent refused to pay.

In the present action respondent claims five head of cattle or their value £25 as damages for adultery with Manogada, and custody of the child Nomatshungu, and appellant counterclaimed for one beast as *isondlo* in respect of the child.

After hearing evidence the Assistant Native Commissioner entered judgment for respondent as prayed with costs less one beast or its value £5 as *isondlo*. Appellant now appeals against the judgment of the claim in convention.

The Native Commissioner relies for his decision on the cases Mngqantsiyana *v.* Kyibi, 1936, N.A.C. (C. & O.), 64 and Magqireni *v.* Benene [1937, N.A.C. (C. & O.), 202]. Neither of these cases are in point as in both, the alleged second marriages were by Native custom without the prior dissolution of the previous customary union and were therefore invalid. It is contended by Mr. Elliot for Respondent that bigamy is committed by any person who, during the subsistence of a valid marriage to which he or she was one of the parties, goes through the form of contracting a marriage with another person, and that if a customary union is a marriage then Manogada's marriage to appellant was bigamous and invalid. He referred us to the definition of Customary Union in Section 35 of Act No. 38 of 1927. But it is clear from the definition of "marriage" in that section that a customary union is not a marriage since this definition specially excludes any union contracted under Native Law and Custom.

In the Cape Province a woman who is married according to Native Custom can contract a valid civil or Christian marriage with another man and such marriage dissolves the pre-existing customary union (Mtyelo v. Qotole, 4, N.A.C. 39). Likewise a customary union is dissolved by the marriage of the male partner to another woman [Zondi *v.* Gwane, 4, N.A.C., 195, see also Nkambula *v.* Linda, 1951 (1) S.A. (A.D.), 377].

Now adultery is sexual intercourse by a lawfully married person with any person other that his or her spouse. It follows that in Native law the male partner to the union cannot recover damages for adultery with his customary wife unless the customary union is still in existence at the time the action is taken (see Ndlanya *v.* Mhashe, 1 N.A.C. 112; Rolobile *v.* Matandela, 2 N.A.C. 126; Sontshatsha *v.* Gqibeni, 4 N.A.C. 46; also *Whitfield's Native Law*, 1st Ed., p. 418). Gqamse *v.* Stemele (1 N.A.C. 113) is a case in which damages was awarded in respect of adulterous intercourse prior to the Christian marriage, but in view of the other decisions it is doubtful whether that case was correctly decided. However, in that case there was definite proof that Stemele lived in adultery with Gqamse's wife for fifteen years before he married her according to Christian rites. In the present case the evidence is that no sexual intercourse took place between appellant and Manogada before their marriage by Christian rites. For this reason and also for the reason that at the time the action was taken the customary union between respondent and Manogada no longer existed, respondent is not entitled to damages.

The appeal is allowed with costs and the judgment of the Court below is altered to read "On the claim in convention: for defendant on the claim for damages for adultery. Plaintiff is awarded the custody of Nomatshungu against payment of one beast or its value £5 as *isondlo*. Plaintiff is ordered to pay the costs. The counterclaim falls away."

For appellant: Mr. Eagle, Kokstad.

For respondent: Mr. Elliot, Kokstad.

SOUTHERN NATIVE APPEAL COURT.

N.A.C. CASE No. 5/52.

MAKHORO *v.* **MATEBESE.**

KOKSTAD: 5th February, 1952. Before Sleigh, President, Cockcroft and Wilkins, Members of the Court.

COMMON LAW.

Native Appeal Case—Interpleader—Goats declared executable—Ownership—Never passed to third party.

Summary: In an interpleader action certain goats were declared executable. Appellant appeals on the ground that the judgment was bad in law in that appellant acquired ownership of the goats by virtue of the fact that they were sold to him by one M who acquired ownership in her name in satisfaction of a judgment against a debtor after respondent's claim of ownership was rejected by Chief Scanlan Lahana.

Held:

(1) That by not pleading *res judicata* the defendants impliedly agreed to submit for retrial the issue decided by the Chief.
(2) That the defence *res judicata* must be specially pleaded.
(3) That respondent established that he was the owner and consequently ownership never passed to the other party and she could, therefore, not transfer ownership to appellant.

Cases referred to:—

Notanaza *v.* Madiyane, 1943, N.A.C. (C. & O.), 34.
Baumann *v.* Thomas, 1920, A.D., 434.
Union Government *v.* National Bank, 1921, A.D., 127.
Union Government *v.* Landau & Co., 1918, A.D., 388.
Lamb *v.* Colonial Secretary, 1902, T.S., 319.
Lubbe *v.* Colonial Government, 1905, B.A.C., 269.
Mha *v.* Pinkerton, 1916, E.D.L., 389.

Appeal from the Court of Native Commissioner, Mount Fletcher.

Sleigh (President), delivering the judgment of the Court:—

The facts leading up to this interpleader action are not seriously disputed. Mapaballong Jase obtained judgment in the duly constituted court of chief Scanlen Lehana against respondent's brother, Mohlahla (hereinafter referred to as the debtor), for balance of dowry, and in execution of this judgment certain stock, including 14 goats, were attached. The goats were claimed by respondent, but the chief, after investigation, held that they belonged to the debtor and handed them over to Mapaballong. Respondent then sued the latter and her son in the Native Commissioner's Court for delivery of the 14 goats or payment of their value at £1 each, and obtained judgment. Seventeen goats, being some of the original goats and their increase, were attached in the possession of appellant to whom Mapaballong had sold the original goats after issue of the summons but before judgment was delivered. There is nothing on record to indicate that appellant was aware of respondent's claim when he purchased the goats.

In the present interpleader action the goats were declared executable. From this judgment claimant (appellant) appeals. Paraphrased, the ground of appeal is that the judgment is bad in law in that Mapaballong acquired ownership of the goats by virtue of the fact that they were delivered to her in satisfaction of the judgment against the debtor after respondent's claim of ownership had been rejected, and respondent cannot therefore attach the goats in the hands of appellant to whom the goats were sold and delivered by Mapaballong.

The chief, in the execution of his judgment was entitled to attach the property of the debtor and hand it over to Mapaballong in satisfaction of her claim. The ownership in such property would thereupon vest in her and she could dispose of it and transfer ownership to a purchaser. But ownership would not vest in her nor could she transfer ownership to an innocent purchaser if the property did not in fact belong to the debtor, when therefore, respondent claimed the goats in the chief's court it was the duty of the chief to give a decision on respondent's claim. It was in fact a fresh action brought by respondent against Mapaballong to determine the ownership of the goats and when the chief's decision went against him respondent should have appealed to the Native Commissioner's Court. This was the view expressed in Notanaza *v.* Madiyane [1943, N.A.C. (C. & O.), 34].

It is clear that respondent did not acquiesce in the chief's finding that the goats belonged to the debtor. He was entitled to bring this finding under review in the Native Commissioner's Court by way of appeal. He, however, elected to sue Mapaballong in the Native Commissioner's Court for delivery of the animals to which action the latter's son was subsequently joined as co-defendant. Now the defendants in that action could have pleaded that the issue was *res judicata.* By not taking this objection the defendants in that action impliedly agreed to submit for retrial the issue decided by the chief, namely, the issue whether respondent or the debtor was the owner of the goats. At this stage this issue was still in dispute and ownership in the goats had not vested in Mapaballong. In the Native Commissioner's Court respondent established that he was the owner and consequently, ownership never passed to Mapaballong and she could, therefore, not transfer ownership to appellant.

The appeal is dismissed with costs.

Cockcroft (Member):—

I have had the advantage of reading the judgment of the learned President and I agree that the appeal should be dismissed with costs.

I wish, however, to amplify his statement that, " by not pleading *res judicata* the defendants in that action impliedly agreed to submit for retrial the issue decided by the Chief, namely, the issue whether respondent or the debtor was the owner of the goats ".

I am satisfied that before the chief, Seeku's claim to the goats that were attched in the case of Pabellong Jase and Mapaballong Jase *v.* Mohlahla Matebese was a civil dispute, and that the Chief rejected his claim and awarded the goats to Mapaballong. Seeku's more obvious remedy was to appeal against the Chief's decision to the Court of the Native Commissioner. As he has not done so, it is necessary to examine the rights and legal position of the parties.

It has broadly been laid down in various decisions that the law of estoppel in South Africa is the same as the law of estoppel in England, and that it is the practice to look to the English authorities for guidance on the subject of estoppel. (Baumann *v.* Thomas, 1920, A.D., at p. 434, and Union Government *v.* National Bank, 1921, A.D., at p. 127.)

In Union Government *v.* Landau & Co., 1918, A.D., 388 at p. 391, Innes, C. J. said: " There is no rule requiring the defence of estoppel to be in every instance specially pleaded. But it is often advisable and proper to do so; and the present case is one in which, if the respondents desired to rely upon estoppel, they should have raised the issue upon pleadings. The result of a failure to raise it was that some parts of the evidence had not been sufficiently investigated." An amendment of the pleadings was allowed by the Appellate Court in that case.

It seems that the learned Chief Justice in that case was referring to estoppel by conduct.

It is quite clear that *res judicata* must be specially pleaded, for it is a plea in bar or an objection and cannot be raised except on the pleadings (Lamb *v.* Colonial Secretary, 1902, T.S., 319; Lubbe *v.* Colonial Government, 1905, B.A.C., 269; Mha *v.* Pinkerton, 1916, E.D.L., 389).

Rule 1 of Order XII of Proclamation No. 145 of 1923, requires the defence of *res judicata* to be specially pleaded. But defendant in this case has not availed himself of this special defence. I have been unable to find a decision of our Courts on this point, and on the authority of Baumann *v.* Thomas and Union Government *v.* National Bank, *supra*, I look to the English authorities for guidance.

In the case of Vooght *v.* Winch, 2 B and Old., 662, an action for diverting water from a stream, the defendant gave in evidence a judgment in a former action between the same parties for the same cause of action, and insisted that it operated as an estoppel. The judge received it in evidence, but refused to non-suit the plaintiff, the defendant having pleaded only "not guilty", and the plaintiff obtained a verdict. On motion to the Court for a non-suit or new trial, a non-suit was refused, but a new trial was granted on other grounds (*Cockle's cases and statutes on evidence* by S. L. Phipson, 4th Edition, page 46).

In delivering judgment Abbot C. J. is reported to have said: "I am of opinion that the verdict and judgment obtained for the defendant in the former action was not conclusive evidence against the plaintiff upon the plea of not guilty. It could indeed have been conclusive if pleaded in bar to the action by way of estoppel. In that case the plaintiff would not be allowed to discuss the case with the defendant and for the second time to disturb and vex him by the agitation of the same question. But the defendant has pleaded not guilty, and has thereby elected to submit his case to a jury . . . It appears to me, however, that the party, by not pleading the former judgment in bar, consents that the whole matter shall go to the jury, and leaves it open to them to inquire into the same upon evidence, and they are to give their verdict upon the whole evidence then submitted to them."

In the same case Holroyd J. stated the law as follows: "There are two modes, by either of which the defendant might defend himself. There having been a former action in which he had succeeded, he might have alleged that he was not to be called upon to defend himself again for the same cause. If he chooses to adopt that mode of defence, he must plead it in bar; and say that the other party is not at liberty to call upon him to answer again that which he had before called upon him to do, when a verdict was given in his favour. If, however, he declines that mode of defence, and submits to answer for the cause of action alleged, and defends himself by saying that the plaintiff has no ground of action; he then leaves the question to the jury, and they are to try, not whether there was a former action for the same cause, but whether the plaintiff has such a ground of action as he alleges in his present declaration. A party may have matter which he may either give in evidence, or which, if pleaded, would be an estoppel; but when he puts it to the jury to find what the fact was, it is inconsistent with the issue which he has joined, for him to say that the jury are estopped from going into the enquiry. He may, however, use the former verdict as evidence, and pregnant evidence, to guide the jury who are to try the second case, to a conclusion in his favour. But if, notwithstanding the prior verdict and judgment, the jury think that the case is with plaintiff, they are not estopped from finding the verdict accordingly."

I can think of no reason why these principles of English law should not be accepted as being the same as our law on the subject, and I accept them without hesitation.

When the trial court becomes aware that the matter has already been adjudicated upon in another case there seems to be no reason why, in a suitable case, e.g. where the party is not legally represented, it should not suggest an amendment to the pleadings and to adjourn the hearing to enable defendant to raise the defence of *res judicata* on application after notice to the plaintiff in terms of Rule 1 (2) of Order No. XII if so advised. (Union Government *v.* Landau and Co., 1918, A.D., 108 and the same case at page 392.)

Applying the law to the facts in the present case, when Seeku Matebese sued Mapaballong Jase in the Native Commissioner's Court for delivery of the goats she could, in terms of Rule 1 (2) of Order No. XII, have pleaded the special defence of *res judicata*, in that Seeku's claim had already been adjudicated upon in the chief's court and rejected.

As he has declined this mode of defence, in terms of the judgment in Vooght *v.* Winch it must be taken that she has elected to submit the matter for decision by the Native Commissioner's Court. If a contrary decision to that in the chief's court is given against her in the Native Commissioner's Court, she cannot be heard to complain. She had the right and opportunity of stopping the proceedings in the latter court, of which she declined to avail herself. By so doing it may be taken that she has abandoned her judgment in the chief's court, and tacitly agreed to submit the matter for adjudication afresh by the Native Commissioner's Court.

Wilkins (Member): I concur.

For appellant: Mr. Gordon, Mount Fletcher.

For respondent: Mr. F. Zietsman, Kokstad.

SOUTHERN NATIVE APPEAL COURT.

N.A.C. CASE No. 6 OF 1952.

SINEKE *v.* NTUMBU.

KOKSTAD: 5th February, 1952. Before Sleigh, President; Cockroft and Wilkins, Members of the Court.

COMMON LAW.

Native Appeal Court—Defamation—Damages—Exception—Not taken—Words in their Xosa connotation are defamatory—

Quantum *of damages.*

Summary: Respondent sued appellant for £50 damages for defamation. Appellant admits he spoke the words complained of but denies that he did so maliciously. He pleads that the words were spoken in fair comment and not in a defamatory sense. He denies that the words were defamatory *per se* and that they are capable of a defamatory meaning. And that in any case the amount awarded is excessive.

Held (1): That since no exception was taken to the summons respondent was entitled to bring evidence to show that the words, in their Xosa connotation, are defamatory *per se.*

Held (2): That since appellant has persisted in his charge of theft respondent is entitled to something more than nominal damages.

Held (3): That the amount awarded is grossly excessive and is reduced.

Appeal from the Court of the Native Commissioner, Mount Frere.

Sleigh (President), delivering the judgment of the Court:—

In an action for £50 damages for defamation plaintiff (now respondent) alleges that on 27th February, 1950, defendant (now appellant) uttered in the presence of the headman and others the following false, scandalous, malicious and defamatory words in Xosa concerning him, viz: *Igusha yam idliwe ngu Piyose*, which words translated into English mean "my sheep has been eaten by Piyose".

Appellant in his plea admits that he spoke the words complained of, but denies that he did so maliciously. He pleads that the words were spoken in fair comment and not in a defamatory sense. He denies that the words are defamatory *per se* and that they are capable of a defamatory meaning. He further denies that respondent has suffered damages in the sum of £50 or in any other amount.

The Assistant Native Commissioner entered judgment for respondent for the amount claimed and appellant has appealed.

The first ground of appeal is that the words complained of are not defamatory *per se* and in the absence of an *innuendo* assigning a defamatory meaning the Court should have dismissed the summons without allowing evidence to show a meaning different from that alleged in the summons. Strictly speaking this contention is correct, but this is a point which should have been raised by way of exception and since no exception was taken at all, respondent was entitled to bring evidence to show that the words, in their Xosa connotation, are defamatory *per se*.

The word *idliwe* appears to come from the word *umdli*, a voracious eater, and means that the thing had been totally consumed (McLaren Xosa—English Dictionary). This does not assist us, but it is clear from the evidence before us, and especially from appellant's own evidence, that the word *idliwe* as used in the context in the present case means that the sheep had been stolen and eaten. The words complained of in the Xosa language are, therefore, defamatory *per se* and consequently malice is presumed.

The second ground of appeal is that respondent's evidence of the date the words were uttered does not agree with the date alleged in the summons. There is no substance in this ground as it is quite clear that he refers to the occasion when the men collected to enquire into the theft of the sheep.

The last ground of appeal is that the amount awarded is excessive. It lies at the discretion of the trial Court to award a sum as damages which would be fair and reasonable in all the circumstances of the case, and an appellate tribunal will not interfere with the amount so awarded unless it is "palpably excessive". In defamation cases where there is no proof of material loss, the object of making an award is not to compensate the plaintiff but to award him a *solatium* for wounded feelings or injured reputation.

Now it appears from the evidence that respondent missed a cooking pot from his hut. He reported the loss to the headman and after a search it was found in a donga where it had been used for cooking something. Some distance away the skin of a sheep belonging to appellant was discovered. It appears to have been taken for granted by all the people present that the person or persons who had used the pot had stolen appellant's sheep. When appellant arrived on the scene he identified the skin as being that of one of his sheep, he heard that respondent, his cousin, had claimed the pot. He then uttered the words complained of. It is clear that he was expressing an opinion which, in the circumstances, he had reasonable grounds for believing to be true. Moreover, the statement appears to have been addressed to the headman who was investigating the theft. The most that can be said against appellant is that his statement was unnecessary as respondent was presumably already under suspicion. Had the matter rested there respondent would have been entitled to nominal damages only. But apparently appellant has persisted in his charge against respondent for he said in

reply to the Court " I maintain that plaintiff stole my sheep and ate it. That is what I meant by those words and I still mean it now ". Respondent is therefore entitled to something more than nominal damages, but in our opinion the amount awarded is grossly excessive. There is nothing on the record to show that the parties are anything other than ordinary native peasants. In our opinion an award of £10 would be an adequate *solatium*.

The appeal is allowed with costs and the judgment of the Court below is altered to one for plaintiff for the sum of £10 and costs.

For Appellant: Mr. Eagle, Kokstad.

For Respondent: Mr. Elliot, Kokstad.

SOUTHERN NATIVE APPEAL COURT.

N.A.C. CASE No. 7 OF 1952.

RUBUSHE *v.* JIYANE.

KOKSTAD: 7th February, 1952. Before Sleigh, President; Cockcroft and Wilkins, Members of the Court.

HLANGWINI CUSTOM.

Native Appeal Case—Native custom—Dowry—Hlangwini custom —Father liable for the dowry of his son's first wife—Evidence— Pleadings in other actions admissibility of—Practice and Procedure—Law to be applied when defendant resides in tribal area.

Summary: Respondent obtained judgment against appellant for 10 head of cattle or their value £50 being the balance of a Hlangwini dowry due in respect of a customary union between appellant's son and respondent's daughter. Appellant appeals on the grounds (1) that there is no evidence that it is a custom amongst the Hlangwinis that a father is liable for the dowry of the first wives of his respective sons and (2) that no such custom exists, (3) that appellant does not belong to the Hlangwini tribe.

Held (1): That although appellant is a Zizi, he resides in the area of a Hlangwini Chief and therefore Hlangwini law must be applied in this case.

Held (2): That according to Hlangwini custom a father is liable for the dowry of his son's first wife.

Held (3): That the presiding officer was not entitled to rely on admissions made by appellant in another case when the record of that case has not been admitted as evidence in the present case; and that in any event pleadings in another case are of little weight as evidence unless signed, sworn to or otherwise adopted by the party.

Cases referred to:—

Mduka *v.* Simayile & Ano., 1940, N.A.C. (C. & O.), 94.
Mapaloba *v.* Gazi, 1945, N.A.C. (C. & O.), 71.
Jeliza *v.* Nyamende & Ano., 1945, N.A.C. (C. & O.), 34.
Khemane *v.* Ned. 1, N.A.C., 15.
Bungani v. Nongwadi, 1931, N.A.C. (C. & O.), 43.
Mkoko *v.* Mkoko, 1940, N.A.C. (C. & O.), 158.

Appeal from the Court of Native Commissioner, Umzimkulu.

Cockcroft (Member) delivering the judgment of the Court:—

Respondent obtained judgment against Dusani Mzala and his father Mzala Rubushe jointly and severally, the one paying the other to be absolved, for ten head of cattle of their value £50, being the balance of a Hlangweni dowry due in respect of customary union between Dusani and respondent's daughter.

From this judgment Mzala Rubushe (now appellant) has appealed on the grounds that (1) there is no evidence that it is the custom amongst the Hlangwini in the Umzimkulu District that a father is liable for the dowries of the first wives of the respective sons and (2) that even if there is such evidence, no such custom exists.

At the hearing of the appeal, by consent the following further grounds of appeal were allowed:—

(3) That there is no sufficient evidence on the record to justify the Court in coming to the conclusion that defendant No. 2 (the appellant) belongs to the Hlangweni tribe in which connection the Assistant Native Commissioner erred in treating the pleadings or evidence in the case of Ngoyane *v.* Mzala and Rubushe as being evidence of any fact in dispute in the present case.

(4) That there is no sufficient direct evidence on the record to justify the finding that defendants have lived long enough in a Hlangwini locality to impose Hlangwini customs on them in face of their sworn evidence that they belong to the Amazizi tribe.

(5). That there is no evidence on the record that defendant No. 2, the appellant, did at any stage voluntarily agree to be personally responsible for any balance of dowry that might be due by his son, defendant No. 1.

The first point in dispute is whether appellant is a Hlangwini or a Zizi. He says that while still a young boy he came with his father from Natal and resided on the farm Theekloof in the Umzimkulu District. They left the farm and lived about one year in the Hlangwini Location of Gugwini. Thereafter he went to Thorny Bush—an European owned farm—where he lived for a long time. Eventually he returned to Theekloof, which is a Trust farm, and he has resided there for the past 9 or 10 years.

He denies that he ever became a Hlangwini or observed Hlangwini customs. He says that his chief is Songiya, the Amazizi Chief, who lives in the Ixopo District, but he calls Tshayizandla (the Hlangwini chief) also his chief because he lives in his area. He does not dispute that, in another action in which he was also sued for the balance of a Hlangwini dowry, he admitted in his plea that he was a Hlangwini, but he says that he did not instruct his attorney to admit it.

Respondent says that he assumed that appellant is a Hlangwini because when he was born, appellant lived amongst the Hlangwini.

As the facts of his nationality and where he resided are matters peculiarly within the knowledge of appellant, we must accept his evidence that he is a Zizi.

The presiding officer did not make a specific finding that appellant was a Hlangwini, but he finds as a fact that defendant No. 2 (present appellant) admitted in a previous case that he was a Hlangwini.

Plaintiff's attorney, whilst addressing the Court below at the close of the present case, sought leave to hand in the record of that previous case. Defendant's attorney agreed to the handing in of the record, by consent, provided a note was made that this was done in the middle of argument. The record was admitted as Exhibit "B".

In his reasons for judgment, the presiding officer refers to the evidence in Exhibit "B", and contends that the evidence in that case and present appellant's admission in that plea are admissable as evidence in the present case and quotes as authority for this contention Mduka *v.* Simayile and Another, 1940, N.A.C. (C. & O.), p. 94.

In Mduka *v.* Simayile, *supra.* the record formally handed in by the Clerk of the Court, was of a case between the same parties. The parties in the present case, are not the same as those in the previous case, and the record was not admitted by consent, *as evidence.*

It is the duty of the Court to exclude all inadmissible evidence, even if no objection is taken [Mapoloba *v.* Gazi, 1945, N.A.C. (C. & O.), 71 at page 72].

The evidence in the first case becomes secondary evidence in the second case and the admission of such evidence infringes the "best evidence" rule. In that case the learned President remarked that, in the absence of any statutory provision, the "best evidence" rule is now contained in section 320 of Act No. 31 of 1917.

That section pertains to criminal proceedings, but in regard to civil proceedings in the Cape Province the "best evidence" rule is embodied in section 37 of Ordinance No. 72 of 1830 (Cape), which reads as follows:—

> "37. And be it further enacted and declared that every party on whom in any case it shall be incumbent to prove any fact, matter, or thing, shall be bound to give the best evidence of which from its nature such fact, matter, or thing shall be capable; and that no evidence as to any such fact, matter, or thing shall be admissible in any case in which it was in the power of the party who proposes to give such evidence to produce, or cause to be produced, better evidence as to such fact, matter, or thing, except by consent of the adverse party to the suit or when such adverse party shall by law be precluded from disputing any such fact, matter, or thing, by reason of any admission proved to have been made by such party."

As the adverse party, the defendant, has not consented to the admission of the record of the previous case as evidence, the presiding officer was not justified in referring to the evidence in that case as he has done in paragraph (1) of his reasons for judgment, and to base his judgment on facts disclosed in that record.

Failing the consent of the other party, if defendant's attorney desired the admission of the record in the previous case to enable the Court to refer to the pleadings therein, he should have called the proper custodian, the Clerk of the Court, to hand in the record before he closed his case, as was done in Mduka *v.* Simayile and Another (*supra*). Even when so admitted, pleadings in other actions are of but little weight as evidence against a party unless signed, sworn to or otherwise adopted by him. (Scoble's Law of Evidence in South Africa, Second Edition, at page 140.) In this case the plea in the former case does not disclose that it was signed, sworn to or otherwise adopted by defendant.

The Amazizi have no fixed dowry, and practice the custom of *ukuteleka.*

According to Hlubi custom a girl's guardian can maintain an action against the father of the girl's husband for the dowry payable by the latter, but the liability of the father or of his heir is limited to the dowry of the husband's first wife and then only if the father approved of the marriage [Jeliza *v.* Nyamende and Another, 1945, N.A.C. (C. & O.), 34]. The custom is the same amongst the Basuto [*Khemane* v. *Ned* 1, N.A.C. (S), 15]. Since we have been unable to find any direct authority on the question whether this custom is also observed by the Hlangwini tribe as a whole, we have submitted the matter to the Native assessors, four of whom are Hlangwinis.

As will be seen from their replies, which are annexed, they observe the same custom. Their opinion is in accordance with this general principle of Native law relating to the rights and obligations of a kraalhead. Under Native law he is theoretically in control of all property acquired by inmates of his kraal, and is under an obligation to use the family assets in the interest of all the inmates, and as long as the inmate resides in the kraal of the head of the family, Natives look to the latter for payment.

The assessors' opinion is also in accord with what Seymour says at page 30 of his work, Native Law and Custom, viz.:—

> "Amongst tribes which do not *teleka,* the father or guardian (of the husband) is, in some cases, also responsible (for the payment of the son's dowry). The fathers or guardians belonging to such Native tribes are always parties to the first marriages of their sons or wards; and, as such, contract to become liable for the dowries due on these marriages to the women's guardians."

The Hlangwini have a fixed dowry consisting of 24 cattle, 2 horses and a *Mqobo* beast, they do not practise *ukuteleka* and they can compel payment of dowry by legal action (see Bungani *v* Nongwadi, 1931, N.A.C. (C. & O.), 43].

The presiding officer found as a fact that both parties to this action reside in a Hlangwini area, and there has been no appeal against this finding.

The presiding officer held that even if defendants do not regard themselves as Hlangwinis, the law to be applied is that of the locality where the parties reside, quoting Mkoko v. Mkoko, 1940, N.A.C. (C. & O.), 158. That case was decided on the original wording of sub-section (2) of Section 11 of Act No. 38 of 1927, before its substitution by Section 5 of Act No. 21 of 1943.

In terms of this amendment, had it been proved that the farm Theekloof, on which defendant (appellant) resides, was outside a tribal area, and was occupied by people of different tribes, the Court would have been bound to apply the law of the tribe to which defendant belongs, namely Zizi law. But appellant is a Zizi according to his own evidence and resides in a Hlangwini tribal area. Hlangwini law must therefore be applied in the case.

The appeal is accordingly dismissed with costs.

Opinion of Native Assessors.

Names of Assessors: Mordecai Baleni, Matatiele, Hlangwini. Magwayi Mbambela, Matatiele, Hlangwini. Bishop Ntlabati, Umzimkulu, Hlangwini, Petros Jozana, Umzimkulu, Hlangwini, Khorong Lebenya, Mt. Fletcher, Basuto.

Question: Do the Hlangwinis in the Umzimkulu and Matatiele Districts observe the same customs?

Answer: Petros Jozana: Yes. All agree.

Question: Have the Hlangwini a fixed dowry?

Answer:

Petros Jozana: Yes.

Mordecai Baleni and Magwayi Mbambela agree.

Bishop Ntlabati: There is no fixed dowry amongst the Hlangwini.

Question: Do the Hlangwinis practise "teleka"?

Answer:

Bishop Ntlabati: Yes.

Mordecai Baleni: In the old days the Hlangwinis did "teleka" but these days we do not do so because the Europeans have stopped us.

Magway Mbambela and Petros Jozana agree with Mordecai Baleni.

Question: Under Hlangwini custom is a father liable for the dowries of his sons' first wives.

Answer: All Hlangwini assessors agree that a father is so liable.

Question: By Mr. Zietsman: Under Hlangwini custom is a father compelled to provide the dowries for his sons' first wives?

Answer: All Hlangwini assessors agree that a father is compelled to do so.

For Appellant: Mr. W. Zietsman, Kokstad.

For Respondent: Mr. Elliot, Kokstad.

SOUTHERN NATIVE APPEAL COURT.

N.A.C. CASE No. 8/52.

TSAUTSI *v.* NENE AND ANOTHER.

KOKSTAD: 8th February, 1952. Before Sleigh, President, Cockcroft and Wilkins, Members of the Court.

LAW OF PROCEDURE.

Native Appeal Case—Practice and Procedure—Jurisdiction—When Courts of Native Commissioner and of Chief have concurrent jurisdiction—Absolution judgment in Chief's Court—Plaintiff not bound to appeal to Native Commissioner's Court—Plea res judicata—*Court may raise* mero motu.

Summary: Appellant sued respondents in the Chief's Court for damages for seduction. The Chief gave what amounted to a judgment of absolution. Thereafter appellant brought a fresh action in the Native Commissioner's Court. At the close of the case the Native Commissioner entered the following judgment:—

"Summons dismissed with costs."

Held:

(1) That where a Chief exercises civil jurisdiction over a number of districts, the jurisdiction of the Native Commissioner of one of these districts is not necessarily concurrent with that of the Chief. But if the Chief and the Native Comissioner have concurrent jurisdiction and the Chief has decided a case, there is nothing in sub-section (4) of Section 12 of Act No. 38 of 1927 which ousts the original jurisdiction of the Native Commissioner in respect of that case.

(2) That where the judgment in the Chief's Court is in the nature of a judgment of absolution from the instance, the unsuccessful plaintiff in that Court is not bound to appeal to the Native Commissioner's Court. He is entitled to bring a fresh action either in the Chief's Court or in the Native Commissioner's Court.

(3) That where a Court finds that the matter before it is beyond its jurisdiction it must decline jurisdiction even if no objection is taken.

(4) That the Court's power to raise a defence *mero motu* is not confined to questions of jurisdiction. It may of its own motion raise any legal exception or objection *if it is in the public interest or in the interest of justice to do so.*

(5) That if in an action brought before a Native Commissioner it appears that a Chief's Court had given a final judgment in that action, the Native Commissioner may and should raise the plea of *res judicata mero motu* but should give the party affected by the plea an opportunity of meeting is.

Cases referred to:

Matole *v.* Xakekile, 1940, N.A.C. (C. & O.), 104.

Qunta *v.* Qunta, 1940, N.A.C. (C. & O.), 131.

Appeal from the Court of Native Commissioner, Matatiele.

Sleigh (President), delivering the judgment of the Court:—

Appellant, through his representative Lefadi Tsautsi, sued respondents for six head of cattle or their value £30 as damages for the seduction and pregnancy of appellant's daughter. Respondents in their plea denied the seduction.

Lefadi stated in his evidence that he reported the pregnancy to respondents and that first respondent denied the charge. He then goes on to say, "I then took matter before chief Jeremiah and his judgment was that my sister (the seduced girl) was rendered pregnant by the veld and then I decided to bring the matter in this Court". After hearing evidence from both sides the case was postponed for argument. After hearing argument, presumably on the merits of the case, judgment was reserved and on the resumed hearing the Native Commissioner dismissed the summons and added the rider "the Court having taken the point *mero motu* that having been heard before a Chief having civil jurisdiction, this Court has no jurisdiction to hear the action, and that it should have been brought by way of appeal".

From this judgment appellant appeals on the following grounds:—

(1) Section 12 of Act No. 38 of 1927, as amended, and Government Notice No. 2255 of 1928, as amended, do not contain any provision excluding the jurisdiction of Native Commissioner's Courts as Courts of first instance in districts where Chiefs' Civil Courts have been established and consequently in such districts the Native Commissioners' Courts and the Chiefs' Civil Courts have concurrent jurisdiction as Courts of first instance.

(2) This being so the Presiding Officer erred in holding that the Native Commissioner's Court had no jurisdiction in this matter and has confused the defences of jurisdiction and *res judicata*.

(3) Defendant in terms of Rule 1 of Order XII of Proclamation No. 145 of 1923 could have lodged an objection of *res judicata*, but not having done so is now precluded from doing so, and the Native Commissioner's Court has not the right to take this point *mero motu*.

It is not disputed that civil jurisdiction was conferred on Chief Jeremiah Moshesh in terms of Section 12 (1) of Act No. 38 of 1927, and that the action before the chief was between the same parties or their privies, related to the same subject matter and founded upon the same cause of action as in the present action.

The Native Commissioner, in his reasons, conceded that Courts of the Native Commissioner and the Chief have concurrent jurisdiction, but he goes on to say, "It is clear from the wording of sub-section (4) of Section 12 of Act No. 38 of 1927, as instanced by the words "which *would have had* jurisdiction had the proceedings *in the first instance* been instituted . . . .' that once an action has been taken before the Chief's Court, the original jurisdiction of the Native Commissioner's Court with regard to such action is ousted".

The Native Commissioner has misread the sub-section. There are Chiefs who exercise civil jurisdiction over a number of Magisterial Districts. For instance, Chief Botha Sigcawu exercises jurisdiction over four districts. The meaning of the words quoted by the Native Commissioner is that an appeal from the Chief's Court lies not necessarily to the Court of the Native Commissioner in whose district the Chief's Court is situated, but to the Native Commissioner's Court which would have had jurisdiction to hear the case if it had not been taken to the Chief's Court. It follows that if the area of jurisdiction of Chief Moshesh extends beyond the District of Matatiele, there may be cases in which the Courts of that Chief and of the Native Commissioner, Matatiele do not have concurrent jurisdiction. If, however, both Courts have jurisdiction to try the case, there is nothing in sub-section (4) which ousts the original jurisdiction of the Native Commissioner's Court, even by implication. The sub-section merely authorises appeals from the Chief's Court and prescribes the particular Court to which the appeal shall lie.

The Native Commissioner does not go so far as to say that the issue raised in this case was *res judicata,* but it appears from his judgment and also from his reasons that he held that the judgment of the Chief's Court must stand until it has been altered or reversed on appeal and that appellant was not entitled to institute a fresh action in a competent Court, but must bring the adverse judgment against him on review by way of appeal. In other words, he held that the issue raised in the pleadings before him was *res judicata.* Now it is contended that the objection of *res judicata* must be raised within the time prescribed by Rule 1 (1) Order No. XII of Proclamation No. 145 of 1923, and since respondents failed to do so they are precluded from raising it at all without leave of the Court.

This contention is well-founded. If a defendant fails to raise the objection within the prescribed time, he is deemed to have abandoned the existing judgment in his favour and to have agreed to submit the dispute for retrial. This was decided in Makhoro *v.* Matebese (heard on the 5th instant) where the point was fully discussed. But it must not be assumed that respondent's attorney overlooked the defence or deliberately refused to raise it. For a judgment to operate as an estoppel it is essential, *inter alia,* that it must be a final judgment and it may well be that respondents' attorney regarded the Chief's judgment as one dismissing appellant's claim, which would, in effect, have been an absolution judgment. Counsel contends that it was, and the evidence, in my opinion, supports this contention. According to Lefadi the Chief said that the girl had been rendered pregnant by the veld; second respondent says that the Chief said he found no fault with first respondent, and the Chief himself says "Simpe (appellant's witness) said he had never seen Dibe (Libe) lying down with the girl and the girl in evidence had said Simpe had seen them and *for this reason I rejected the complaint".* Nowhere in his evidence does he say that he believed first respondent's testimony. Against this there is the bare statement of the Native Commissioner that it was a judgment for defendant. He refers us to page 31 of the record which, however, closes on page 30. If it is correct that the Chief dismissed appellant's claim then it was not a final judgment. Appellant could have appealed to the Native Commissioner's Court but he was not bound to do so. It was open to him to bring a fresh action either in the Chief's Court or in the Native Commissioner's Court. The Native Commissioner therefore erred in not giving a judgment on the merits of the case, either because respondents waived their defence of estoppel or because the judgment was not final.

This disposes of the appeal, but appellant further contends that the Native Commissioner had no right to raise the objection of *res judicata* himself. As I have already stated the Native Commissioner did not raise this defence directly. He certainly made use of the principle involved in this plea in bar as an argument why he declined jurisdiction. But assuming that he did raise the objection *mero motu* it was not raised in the proper manner, that is, he did not give appellant an opportunity of meeting the defence. It was an irregularity in the proceedings which resulted in substantial prejudice as contemplated in Section 15 of Act No. 38 of 1927, and for this reason the appeal should also succeed. However, since it is one of the grounds of appeal and since the Native Commissioner's right to raise the objection *mero motu* is challenged, I feel that I must consider the contention.

There is no doubt that if a Court finds the matter before it to be beyond its jurisdiction it *must* refuse to proceed, even though neither party takes the objection. Matters which are beyond the jurisdiction of a Native Commissioner's Court are enumerated in Section 10 (1) of Act No. 38 of 1927. Further, the Court's power to raise a defence *mero motu* is not confined to questions of jurisdiction. A Court may of its own motion raise any legal exception or objection if it is in the public interest or in the interest of justice to do so. [See Matole *v.* Xakekile 1940 N.A.C. (C. & O.), 104; and Qunta *v.* Qunta, N.A.C. (C. & O), 131]

Since the Courts of the Native Commissioner and the Chief have concurrent jurisdiction, and since the Act provides for an inexpensive procedure for taking the Chief's judgment on appeal to the Native Commissioner's Court, we are of the opinion that the Native Commissioner has the power and should raise the plea of *res judicata* whenever the judgment appealed from is a final judgment. He should, however, give the party affected by the plea an opportunity of meeting this special defence. It is in the interest of justice that the cost of litigation should be minimised and there is no reason why the Native Commissioner should countenance a more expensive procedure. Moreover, public interest demands that a Native Commissioner's Court should not lend itself to reversing or even confirming the judgment of a Chief's Court, other than by way of appeal. If it did, it could not complain if a dissatisfied party in the Native Commissioner's Court took his case to the Chief's Court, which he could do, since the courts have concurrent jurisdiction.

For the reasons already given the appeal is allowed with costs, the judgment of the Court below is set aside and the proceedings are returned to that Court for a judgment on the merits of the case.

For Appellant: Mr. Walker, Kokstad.

Respondent: in default.

SOUTHERN NATIVE APPEAL COURT.
N.A.C. CASE No. 9/52.

MAKOBA *v.* **LANGA.**

KOKSTAD: 8th February, 1952. Before Sleigh, President, Cockcroft and Wilkins, Members of the Court.

NATIVE LAW AND CUSTOM.

Native Appeal Case—Native Custom—Animals—Damages caused by—Negligence of owner—Owner not liable unless he was aware of animal's vicious propensities.

Summary: Appellant sued respondent for £15 the value of a foal. It is alleged that respondent is the owner of a stallion which he negligently allowed to run unherded on the commonage in Makoba's Location, Matatiele District, and that the stallion kicked and killed appellant's foal which was running lawfully there. Respondent denied that his stallion killed the foal. He disputed the value of the foal. He requested that Native Law be applied to the case, and avers that under that system of law appellant has no right of action. Judgment of absolution was entered and appellant appeals.

Held:

(1) That respondent's stallion did kick and kill appellant's foal.

(2) That Native Law was correctly applied.

(3) That in Native Law the owner of an animal (not being a dog) is not liable for damage or loss caused by it unless he was aware of its vicious propensities and took no adequate precautions to guard against loss to others.

(4) That respondent's horse had never shown vicious propensities and that therefore he was not negligent in allowing it to run loose on the commonage where it was entitled to graze.

Cases referred to:

Parker *v.* Reed, 21 S.C., 496.
S.A. Railway and Harbours *v.* Edwards, 1930, A.D., 3.
O'Callaghan *v.* Chaplin, 1927, A.D., 310.
Tsalenkabi *v.* Matete & Ano., 4 N.A.C., 30.
Nonene *v.* Gunyaza, 5, N.A.C., 203.
Mpiti *v.* Maxakanga, 2, N.A.C., 38.
Hlangu *v.* Mkutshwa, 2, N.A.C., 46.
Makeleni *v.* Ndlebe, 3, N.A.C., 47.
Gxaniswa *v.* Magqoza, 1936, N.A.C. (C. & O.), 36.

Appeal from the Court of Native Commissioner, Matatiele.

Sleigh (President), delivering the judgment of the Court:—

Appellant sued respondent for £15 the value of a foal. It is alleged that respondent is the owner of a stallion which he negligently allowed to run unherded on the commonage in Makoba's Location, Matatiele District, and that the stallion kicked and killed appellant's foal which was running lawfully there.

Respondent in his plea denied that his stallion killed the foal. He also disputed the value of the foal. He requested that Native Law be applied to the case, and he avers that under this system of law appellant has no right of action in the circumstances set out in the summons.

The Assistant Native Commissioner, in the exercise of his discretion, decided to apply Native Law to the case. He found that respondent's stallion kicked the foal while it was endeavouring to cover appellant's mare, but entered a judgment of absolution on the ground that appellant had failed to prove negligence on the part of respondent.

From this judgment appellant appeals. The original grounds of appeal are that the judgment is against the weight of evidence and the probabilities, and that the Native Commissioner erred in finding that respondent was not negligent. At the hearing of the appeal application was made to argue the additional grounds that the judgment was wrong in law in that the Native Commissioner erred in ruling that Native Law should be applied to the issue between the parties, and that the issue should have been decided according to Common Law under which system of law appellant was entitled to succeed in his claim on the basis (apart from the question of negligence on the part of respondent) of the *actio de pauperie*. Since this matter was canvassed in the Court below the application was granted but it was pointed out to counsel that appellant's claim is based on negligence and that the particulars in the summons do not ground a claim for damages under the *actio de pauperie*.

The Native Commissioner's reasons for applying Native Law to the case are that the foal was the property of appellant in his second hut, and that stock owners are obliged, in view of the circumstances in which they live, to depasture their stock on the common grazing ground. In so far as the first reason is concerned, it can make no difference which system of law is applied as any damages recovered would accrue to appellant's second hut, but the second is a good reason why Native Law should be applied. In rural native locations where the inhabitants have common grazing rights there must always be the risk of stallions and bulls fighting and doing michief. It is a risk which is common to all stock owners and which they must accept. It would be most inconvenient and expensive for owners of bulls and stallions to stall and stable these animals. The Native Commissioner was therefore correct in in applying Native Law to the case, but, as will be seen presently, that Native Law and the *aquilian* remedy at Common Law, in so far as the issue in this action is concerned, are practically the same.

The Native Commissioner's finding that the stallion kicked and killed the foal which was about a week old is supported by the evidence. The remaining question for decision is whether respondent was negligent in allowing the stallion to run loose on the commonage during the mating season. Before considering the evidence, it will be convenient to state the law on the point, because what is regarded as negligence under Roman-Dutch Law may not be negligence if Native Law is applied, having regard to the fact that stock owners enjoy common grazing rights on the location commonage.

There are a number of reported cases which refer to the responsibility of an owner whose animal has killed or injured an animal belonging to another. Some of these decisions are not easy to follow. This may be due to the uncertainty created by the decision in Parker *v.* Reed (21, S.C., 496) where it was held that the *actio de pauperie* had become obsolete in South Africa. This decision was overruled in O'Callaghan *v.* Chaplin 1927, A.D., 310)—see also S.A. Railways & Harbours *v.* Edwards, 1930, A.D., 3—At Common Law damages can be recovered for loss caused by domesticated animals under two well established principles. First, there is the *actio de pauperie* which gives relief against the owner of the animal which acted viciously or from inward excitement contrary to the nature of its class and under circumstances for which no one is to blame. The action is based on ownership and not on *culpa* which need not be alleged or proved. Secondly, there is the *aquilian* action. Here liability is based on the negligence of the person in control of the animal. Negligence must be affirmatively established unless the animal belongs to a class which is normally vicious in which case negligence is presumed (see *McKerron's Law of Delicts*, 3rd Ed. p.p. 284-292). I have been unable to find any principle in Native Law which resembles the *actio de pauperie*, except when the animal which caused the loss is a dog.

At the request of counsel for appellant the matter was referred to the native assessors for an expression of their opinion, which is annexed. The majority state that if an animal is killed in the course of a fight no liability arises, but if an animal is attacked and killed the owner of the animal which attacked is liable. This opinion is in conflict with the expression of opinion of assessors in other cases and especially in Makeleni's case (*infra*) and is not accepted. It will be seen that assessor Bishop Ntlabati agreed with the assessors in Makeleni's case.

In Native Law a person who kills an animal of another, whether by accident or not, must replace it or pay damages. (Tsalinkabi *v.* Matete and Ano., 4, N.A.C., 30). Likewise the person in control of a dog, and presumably also of a cat, is absolutely liable for any damages caused by it. (Nonene *v.* Gunyaza, 5 N.A.C., 203.) But it is clear from the decisions quoted by the Native Commissioner in his able and comprehensive judgment that the owner of a farm animal is not liable if it kills or injures an animal belonging to another stock owner, unless he knew or ought to have been aware of his animal's vicious propensities and failed to take adequate precautions to guard against loss to others. [See Mpiti *v.* Maxalanga, 2, N.A.C., 38; Hlangu *v.* Mkutshwa, 2, N.A.C., 46; Makeleni *v.* Ndlebe, 3, N.A.C., 47; and Gxarisa *v.* Magqoza, 1936, N.A.C. (C. & O.), 36.] It is also possible that Native Law may hold the owner liable if the circumstances were such that he ought to have foreseen that damage would probably result if he did not restrain his animal, but I have been unable to find any decisions on the point.

Now it is clear from the evidence that respondent's stallion is accustomed to running on the commonage with other horses and it has never shown vicious propensities. Further, the evidence does not disclose that it displayed vicious propensities at the time the foal was killed, because it did not savage the foal, but while chasing the mare it kicked at the foal following its mother.

However appellant's whole case is that stallions become vicious during the mating season and that respondent was negligent in not tethering or stabling his horse. No doubt stallions do become excited during mating season and in their excitement are liable to savage young foals running with their dams. It appears that this is particularly so with stallions which are stabled. Consequently it is the practice to keep the foals out of the way when the mare is being served. If, therefore, it is the normal practice in Makoba's Location to tether or stable stallions during the mating season, then respondent would have been negligent in not taking this precaution.

Faya, who impressed the Native Commissioner as a reliable witness, states that stallions are tethered during the mating season. Mr. Hall-Green, the Senior Agricultural Officer of the area, says that thoroughbred stallions in Makoba's Location are shut up all the year round, but he does not know whether inferior stallions are also secured. It is possible that thoroughbred stallions are shut up not because they do damages but to ensure that the owner receives the stud fees. Appellant, however, says that stallions are tethered during the mating season because they kill the foals. Respondent states that this stallion is his riding horse and that he has always allowed to run free on the commonage with other horses. He admits that stallions are savage during the breeding season and that his horse is the same as all other horses but it has never savaged another horse. Nowhere in his evidence does he dispute the statement by appellant and his witnesses that it is the practice in Makoba's location to tether or stable the stallions during mating season. His witness, Mboneli, however, states "all the stallions in Makoba's Location are allowed to run freely in the location even during the mating season. This is the first case that I know where a stallion has injured a foal . . . . . I have never seen stallions in our location being tethered or stabled during the mating". In view of the evidence of Faya and Hall-Green, this statement is too sweeping. The correct position seems to be that in Makoba's Location, being a betterment area, inferior stallions are culled. Those that are passed by the agricultural officers are usually tethered or stabled during the mating season, but some owners allow their stallions to run loose on the commonage. This must be so from the statement of appellant (who owns no stallion), that he does not know which stallion fathered the foal which was killed.

Now although stallions which are accustomed to running with mares all the year round may exhibit viciousness during mating season, they do not normally kill foals. It is significant that not a single witness knows of a case where a foal had been killed. Respondent's stallion has never shown vicious propensities although it ran with mares and foals every mating season. There was, therefore, no reason why he should have foreseen that it might injure foals. Respondent was entitled to run his horse on the comonage and in the absence of proof that he ought to have known that it was likely that the horse would cause damage, he was not negligent in allowing it to run loose.

The appeal is dismissed with costs.

Opinion of Native Assessors.

Names of Assessors: Mordecai Baleni, Matatiele (Nlangwini); Magwayi Bambela, Matatiele (Nlangwini); Bishop Ntlabati, Umzimkulu (Nlangwini); Petros Jozana, Umzimkulu (Nlangwini); Khorong Lebenya, Mt. Fletcher, Basuto.

Question: Do you stable your stallions?

Answer: Khorong Lebenya: They are allowed to run on the location commonages. All agreed.

Question: During mating season stallions are inclined to become vicious. Two stallions attack one another at this time and one is killed. Is the owner of the stallion causing the death in any way liable?

Answer: All assessors: No.

Question: What is the position where a bull pokes a calf or a horse?

Answer: Khorong Lebenya: The owner must pay. All, except Bishop Ntlabati agree.

Bishop Ntlabati: The owner would be told of the damage and be warned to keep his animal in control. The owner is liable for any damage done thereafter by the animal.

Question: Circumstances of this case put to the assessors. Is the owner of the stallion liable?

Answer: Khorong Lebenya: The owner must pay. Mordecai Baleni and Petros Jozana agree.

Magwayi Bambela: He would not be liable because the stallion is attempting to cover the mare on the common grazing ground.

Bishop Ntlabati: My answer is the same as to the last question.

Question: What is your general custom where one animal kills another on the common grazing ground?

Answer: Mordecia Baleni: If there is a fight between the animals and one is killed it is looked upon as an accident and no liability is incurred. If an animal is merely attacked and killed, the owner of the animal which attacked the other is liable to pay compensation. He would offer a lesser amount than the actual value of the dead animal, but if the owner refused our courts would order that the full value be paid.

All, except Bishop Ntlabati, agree.

For Appellant: Mr. Walker, Kokstad.

For Respondent: Mr. F. Zietsman, Kokstad.

SOUTHERN NATIVE APPEAL COURT.

N.A.C. CASE No. 10/52.

UMVOVO *v.* UMVOVO.

KOKSTAD: 11th February, 1952. Before Sleigh, President, Cockcroft and Wilkins, Members of the Court

NATIVE LAW AND CUSTOM.

Native Appeal Case—Contracts—Interpretation of where entered into according to Native custom—Native custom—Heir liable for contractual obligation of deceased—Section 11 (1) *of Act No.* 38 *of* 1927*—Native Commissioner's discretion to apply Native law.*

Summary: U and his relations bought a farm which was registered in the name of U, but was communally occupied by all the relatives including respondent. When U died his estate owed £1,900. M, his heir, requested all the heads of families living on the farm to help him pay this debt and promised that those who contributed could live on the farm until their death. The debt was eventually paid, respondent contributed £88. 10s. M. died and his heir the appellant, then became the registered owner. Appellant demanded rent from respondent which the latter refused to pay. Appellant then obtained an order of ejectment against respondent who was evicted. In an action for refund of the £88. 10s. respondent obtained judgment for £40.

Held (1): That Respondent never agreed to pay rent to appellant.

Held (2): That the agreement entered into between respondent and M would be unu ual among Europeans. On the other hand it has all the features of a Native contract and is in accord with the custom among Natives in regard to the occupation of communal land. The respective rights and obligations under the agreement are therefore governed by principles of law which were contemplated at the time the agreement was entered into.

Held (3): That in Native law, appellant is under an obligation to honour his father's enforceable promises.

Held (4): That this raises a question of Native customary law which is not opposed to public policy or natural justice.

Held (5): That the Native Commissioner was correct in finding that a question of Native law was involved and he was entitled to exercise his discretion in favour of deciding the case under that system of law.

Cases referred to:

Lebona *v.* Ramokone 1946 N.A.C. (C. & O.) 14.
Molo *v.* Gaza 1947 N.A.C. (C. & O.) 80.
Dlumti *v.* Sikade 1947 N.A.C. (C. & O.) 47.

Appeal from the Court of Native Commissioner, Umzimkulu.

Sleigh (President), delivering the judgment of the Court:—

It appears from the evidence and the pleadings that the late Umvovo, father of respondent and grandfather of appellant, was the registered owner of the farm Roodewal in the Umzimkulu district. The farm was purchased by Umvovo, his relatives and one Mswazi, each contributing towards the purchase price. They all lived on the farm, erected their huts and ploughed the lands allotted to each and grazed their stock on the common grazing ground.

Umvovo bequethed the farm to Maqayekana, the eldest son by his prinicipal wife. At his death the sum of £600 was still owing on the farm and a further sum of £300 became due in connection with the administration of his estate. In order to liquidate these debts Maqayekana called a meeting of heads of families living on the farm. At this meeting it was agreed that the head of each family, including respondent, would contribute towards the payment of the debts, and Maqayekana promised that everyone who contributed could live on the farm with his family and stock until his death.

After this meeting Mswazi demanded refund of the sum of £940 contributed by him. Maqayekana then called another meeting at which it was decided to raise a sum of £1,000 on bond to pay Mswazi; the heads of the families each agreed to pay £8. 10s. per annum and Maqayekana confirmed his previous promise. Respondent paid in all the sum of £88. 10s. towards the liquidation of the sums of £600 and £300 and the payment of the bond which was cancelled on 11th January, 1929.

In April, 1934 Maqayekana died leaving the farm by will to appellant to whom it was transferred. At that time he was 16 years of age under the guardianship of Mpikwa, half-brother of respondent. After appellant had become a major and taken over control of the farm, he and respondent quarelled because the latter refused to pay rent. The result was that appellant sued respondent for ejectment. He obtained an order which was confirmed on appeal [see 1 N.A.C. (S) 97]. this Court holding that as respondent's right to reside on the farm was not registered against the title deed and as appellant had no notice of such right at the time of the transfer of the farm to him, he was not bound to recognize respondent's rights. Respondent was ejected in March, 1949.

Thereafter respondent sued appellant for £88. 10s. contributed by him, £35. 7s. for improvements and £25 for growing crops. The Native Commissioner who tried the case applied Common Law and after hearing evidence entered judgment for appellant. On appeal this judgment was altered to one of absolution from the instance [see 1 N.A.C. (S) 190].

In the present action brought under Native law and custom respondent alleges that he is entitled to a refund of the sum of £88. 10s. which amount he claims by way of damages or otherwise.

Appellant excepted to respondent's summons as being vague and embarrasing and bad in law, and as disclosing no cause of action in that the ejectment was a lawful act in pursuance of the judgment of the Court and cannot give rise to any claim for damages.

The exception was dismissed with costs. Thereafter appellant delivered a plea. I need not set it out in full. In so far as it is material to the appeal, he alleges that any amounts paid by respondent to Maqayekana were unconditional gifts and were not paid in consideration of respondent being allowed to reside free of rent on the farm, and this is borne out by the fact that respondent actually paid rent for the right to reside on the farm. Appellant challenged respondent's right to bring the action under Native law and denies that he is liable for any debts and obligations of the late Maqayekana which do not fall strictly within Native Law and Custom or for which he might be liable according to the Comomn Law, and in relation thereto he pleads specially as follows:—

"(*a*) That no claim for damages can lie to the plaintiff owing to his ejectment from plaintiff's property by legal process and that such ejectment was so effected in pursuance of a lawful judgment of this Court as alleged in paragraph 10 of the summons.

(*b*) That if any claim for damages does exist, arising out of the said ejectment, as claimed by the plaintiff, then plaintiff cannot have suffered damages in the full amount of £88. 10s. which he alleges he paid to the said late Maqayekana or in any portion thereof, as this amount would be more than off-set many times by the many years' free occupation which plaintiff enjoyed on the said farm together with the right to arable lands and grazing rights, before he commenced paying rent."

The Assistant Native Commissioner, in the exercise of the discretion conferred on him by section 11 (1) of Act No. 38 of 1927, determined the case according to Native law and custom and awarded respondent £40 damages. From this judgment appellant (defendant in the Court below) has appealed and respondent has cross-appealed on the ground that the amount awarded is, on the evidence, insufficient. The grounds of appeal are as follows:—

"1. That the Assistant Native Commissioner erred in applying Native law and custom to the issues in this case in view of the nature of the claim and defence.

2. That in any event the claim as brought by plaintiff is unknown to Native law and custom.

3. That whether Native law and custom or Roman-Dutch law is applied the summons discloses no cause of action and the exception to the summons taken by defendant on this ground should have been upheld.

4. That on the evidence before the Court the presiding officer erred in finding that no rent had ever been paid by plaintiff or that the latter was entitled to occupation of the ground in dispute without payment of such rent.

5. That the presiding officer erred in basing his estimate of damage on a ground neither claimed nor indicated in the summons and on evidence which the presiding officer himself admits was irrelevant to the issue before the Court.

6. That in the event of the Honourable the Native Appeal Court deciding that Roman-Dutch Law should be applied then the fact that plaintiff is not entitled to damages by reason of the ejectment order is *res judicata* in terms of the judgment of the said Appeal Court given on 8th February, 1950 between the same parties, in which connection appellant craves leave to now plead this defence as being one which only becomes available to him now for the first time in the event of the Court upholding the contention set forth in paragraph 1 of these grounds of appeal."

In regard to the fourth ground, it appears from the evidence that during appellant's minority his guardian Mpikwa paid to a firm of attorneys the sum of £2 on behalf of respondent and the firm's native clerk issued a receipt showing that the amount was accounted for as rent for the period 1/7/33 to 30/6/34 and was credited to Maqayekana's estate. It is contended that this shows that respondent was living on the farm as a tenant and not in pursuance of any promise made by Maqayekana. But respondent denies that he paid any money as rent, and there is no evidence that he agreed to pay rent or that the elders on the farm decided that rent should be paid by the kraalheads. All such heads would under native custom, be under an obligation to assist financially with the payment of the rates, taxes and other charges against the farm. If respondent did hand the £2 to Mpikwa, as seems probable, the payment may have been intended as his share of these charges. Mpikwa was not called. If the clerk chose to account for the money as rent that was his business. One cannot from this infer that it was paid as rent, and respondent is not bound by what Mpikwa may have told the clerk or by the instructions the latter received from his employers. It is significant that this is the only amount alleged to have been paid by respondent and that when rent was demanded from him later, he flatly refused to pay.

Grounds 1, 2 and 3 may conveniently be taken together. The contention is that the Native Commissioner erred in applying Native law to the case since individual tenure of land is unknown to that system of law. The rights of appellant's predecessors in title to the farm flowed entirely from their registered title and any diminution of these rights must be registered against the title deed if they have to have any force against the successors in title. Consequently Common Law should have been applied to the case and under such law no damages could flow from the ejectment of respondent which ejectment was authorised by the Court.

The essence of this contention is that the Native Commissioner had no justification for deciding the case according to Native law. Section 11 (1) of Act No. 38 of 1927 reads as follows:—

> "Notwithstanding the provisions of any other law, it shall be in the discretion of the courts of native commissioners in all suits or proceedings between Natives involving questions of customs followed by Natives, to decide such questions according to the Native law applying to such customs except in so far it shall have been repealed or modified: Provided that such Native law shall not be opposed to the principles of public policy or natural justice."

It is clear from this that if a question of native custom is involved and such custom is not opposed to public policy or natural justice, the Native Commissioner has the discretion of applying Native law and if he did so this Court will not interfere with his decision [Lebona *v.* Ramokone 1946 N.A.C. (C. & O.) 14]. The first question for decision is whether native custom is involved.

It is true that individual tenure of land was unknown to natives before their contact with Europeans. The land they occupied belonged to the Chiefs and was occupied communally. Each head of a family was allotted lands to plough and sites for kraals, and they grazed their stock on the common grazing grounds. It naturally followed that when a group of natives joined together to purchase land, they applied their own system of tenure to such land. The fact that Statute Law required the registration of the land in the Deeds Office did not concern them. This was the position in the present case up to the time when Umvovo died and during the lifetime of Maqayekana. The occupants lived on the farm on a communal basis. Respondent, being the head of the family, could not have been ejected except, under Native law, for gross misconduct, and then only on the decision, after investigation, of the elders of the group. This system of

tenure is peculiar to natives. It is a sort of group contract which confers and imposes identical rights and obligations upon the kraalheads residing on the land. If the head of the group dies his successor is obliged to honour the contract.

In the present case respondent relies on the agreement between him and Maqayekana. On the evidence before us there can be no doubt that the agreement was entered into. The question is whether they contracted according to Native law or according to Common Law.

Among natives it is a very common custom that when one is in financial difficulties or requires work done to call for assistance from relatives and friends. Thus we have the native customs of *ukufakwa, ukukwenzelelele* and *ukubolekana*. These customs are really contracts in which there is an implied condition that in consideration for the assistance rendered, the giver will be compensated in some way or other and he can enforce his claim in an action at law. [See Molo *v.* Gaza 1947 N.A.C. (C. & O.) 80]. Mutual help is an essential feature of native life and assistance is seldom refused. While these contracts resemble in some respects Common Law contracts, they are peculiar to natives. Another feature of these contracts, and indeed of all native contracts, is that should the person who received the assistance die before he has performed his part of the contract, his heir is liable not only for the debts of the deceased but also for the latter's contractual obligations [see assessors' opinion which is annexed, also Dlumti *v.* Sikade 1947 N.A.C. (C. &. O.) 47]. It was suggested that since the assessors have never heard of a case like the present, they are not in a position to say what the law is. This is not so. They, like judicial officers, apply the law to the facts of a case and they know that if a person seeks and obtains assistance from another, he or his heir must pay for the assistance.

Now the contract entered into between respondent and Maqayekana would be regarded as most unusual among Europeans. On the other hand, it has all the features of an ordinary native contract and is in accord with the custom among natives in regard to the occupation of communal land. It cannot be interpreted by applying to it principles of law which are unknown to natives and which were never contemplated. In Native law, appellant is under an obligation to honour his father's enforceable promises. This raises a question of native customary law which is certainly not opposed to public policy or natural justice. Indeed, it would be unjust to permit appellant to enrich himself at the expense of respondent. The Native Commissioner was therefore correct in finding that a question of Native law was involved and he was entitled to exercise his discretion in favour of deciding the case under that system of law. Grounds 1 to 3 consequently fail, and ground 6 falls away.

The remaining points to be considered are grounds 5 and the cross-appeal. The medical evidence is that respondent's expectation of life is about 20 years. The Native Commissioner has arrived at his assessment by allowing respondent £2 per annum for 20 years. Umvovo died in 1920. It was after this date that respondent paid the sum of £88. 10s. On the basis of the Native Commissioner's award respondent has had residential privileges for 29 years at a cost of £48. 10s.

An award of £40 as compensation for the benefits for which he has been deprived is fair and reasonable, on the basis of common law principles. of compensation.

But the claim is one based on Native law, and the computation of compensation should also have been based on the principles of Native law. According to the opinion of the native assessors, the respondent was entitled to refund of the full amount contributed.

But the cross-appeal attacks the award, not on the ground that the amount awarded was against the law, but that it is against the weight of evidence and the probabilities. As I have already indicated the amount awarded *on the evidence* is reasonable. The quantum of damages will therefore be left undisturbed.

The result is that both the appeal and the cross-appeal are dismissed with costs respectively.

OPINION OF NATIVE ASSESSORS.

Names of Assessors:

Mordecai Baleni—Matatiele (Hlangweni).
Magwayi Mbambela—Matatiele (Hlangweni).
Bishop Ntlabati—Umzimkulu (Hlangweni).
Petros Jozana—Umzimkulu (Hlangweni).
Khorong Lebenya—Mt. Fletcher (Basuto).

Question:

Do you know of instances where natives have joined to buy a farm?

Answer:

All assessors—Yes.

Question:

Do the people who buy such a farm live on the same conditions as in the ordinary native locations i.e. each is allotted a land and a kraal site and there is communal grazing?

Answer:

Mordecai Baleni.—We are used to seeing the people occupying on communal conditions as in the locations.

Petros Jozana.—If there are only 20 people the farm is sub-divided. If, however, it is a tribal farm, then the people live under tribal conditions.

Magwayi Mbambela.—The whole matter depends on the wishes of the people.

Bishop Ntlabati.—If the farm was registered in one man's name, then instructions would come from him.

Question:

Who would allot the lands? Who could sell the farm?

Answer:

Bishop Ntlabati.—The registered owner would allot the lands, but he could not sell the farm without agreement by the others.

All agree.

Question:

Facts of case given to assessors and they are asked, is heir in Native law required to honour the obligations which his father undertook before his death?

Answer:

Bishop Ntlabati.—Heir is obliged to keep his father's promises.

All agree.

Question:

Leave the matter of the farm. Is an heir required to carry out the obligations of his deceased father?

Answer:

Mordecai Baleni.—Yes.

All agree.

Question:

Go back to the example of the farm. What claim, if any, have the people who have been driven off the farm?

Answer:

Bishop Ntlabati.—They must be compensated but only for those benefits which they have ceased to enjoy. There must be a deduction for the period during which they did enjoy benefits.

Khorong Lebenya.—They must be paid out the full amounts which they contributed.

Remaining assessors agree with Khorong Lebenya.

Question:

By Mr. Zietsman.—In time of your grandfathers there was no such thing as individual ownership in land, because at that time the land belonged to the Chief. The advent of the white people brought individual tenure. Now a native owed a debt on his farm and asked his brother to assist him in payment of the debt for which the brother would be granted certain rights on the farm. (Mr. Zietsman gave circumstances of this case). Has there ever been a case of this nature before your Chiefs.

Answer:

Petros Jozana.—No.
All agree.

Question:

By Mr. Elliot.—Quotes circumstances of this case. Is it native custom that plaintiff could not be driven off the farm except for serious misconduct? If he is driven off, there being no serious misconduct on his part, is he entitled to a refund of part or the whole of his contribution?

Answer:

Khorong Lebenya.—He must be refunded the whole of the contribution.

All agree.

For Appellant: Mr. W. Zietsman, Kokstad.

For Respondent: Mr. Elliot, Kokstad.

CENTRAL NATIVE APPEAL COURT.

N.A.C. CASE No. 30/51.

TWESHA *v.* **THAMBE AND OTHERS.**

JOHANNESBURG: 13th February, 1952. Before Marsberg, President; Warner and de Beer, Members of the Court.

LAW OF PROCEDURE.

Petition for condonation of late noting of appeal—Within discretion of the Native Appeal Court—Must satisfy Court that all reasonable and timeous steps to comply with the rules were taken—No proof of real and substantial prejudices—Judgment on finding of fact—No important question of law involved—Petition for leave to appeal to the Appellate Division of the Supreme Court—No question of miscarriage of justice—Purpose of section eighteen *of Act No.* 38 *of* 1927*—Appeal Court Judgment final and conclusive.*

Summary: After unsuccessfully applying to the Native Appeal Court for condonation of late noting of appeal against a judgment of a Native Commissioner's Court, appellant now applies for consent to apply for leave to appeal to the Appellate Division of the Supreme Court.

Held: There is no allegation of substantial prejudice arising out of irregularity and there is no important question of law involved. The petitioner can proceed on a fresh action on his counterclaim. The petition for condonation is dismissed with costs.

A petition to grant leave to appeal to the Appellate Division of the Supreme Court of South Africa at Bloemfontein was considered and dismissed with costs.

Statutes referred to:

Section *eighteen* of Act No. 38 of 1927.
Section *six* of Government Notice No. 2254 of 1928.

Application for consent to apply for leave to appeal to Appellate Division against judgment of the Central Native Appeal Court.

Marsberg (President), delivering the judgment of the Court:—

We have before us a somewhat unusual application. On the 22nd September, 1950, judgment was given by the Native Commissioner at Zeerust against applicant George Twesha in an action brought by Zwele Thambe and others. Throughout those proceedings applicant was represented by Mr. Attorney van der Spuy. In this application George Twesha states:—

"4. That after Judgment your Petitioner was dissatisfied and tried to induce his Attorney, Mr. S. J. van der Spuy, of Zeerust to note an Appeal in the matter and thereafter prosecute same; that Mr. van der Spuy refused to note an Appeal and said, 'Once the Judgment is finished, it is finished.' He also said that he could not go against the Judgment of the Assistant Native Commissioner; and that he again refused to do so ten days later.

5. That your Petitioner was well able to defray the costs of an Appeal but he did not know of any other Attorney in Zeerust who could conduct his appeal for him; that he thought that old Mr. van Zyl who is deaf and does not do Court work, was the only other Attorney in Zeerust.

6. That only towards the end of December, 1950, did your Petitioner learn that Mr. A. Barlow, B.A., LL.B., had commenced to practice as an Attorney in Zeerust and that then your Petitioner immediately approached him to take his appeal; and that after consideration of the case, Mr. Barlow noted the necessary Appeal;

11. That on the 7th day of June, 1951, on the hearing of your Petitioner's Petition for condonation for the late noting of the appeal to the Native Appeal Court, Your Honours dismissed same with costs."

The application for condonation of the late noting of the Appeal came before this Court on 7th June, 1951, when the matter was argued and, as stated, the petition for condonation was dismissed with costs, *vide* the judgment of this Court, dated 7th June, 1951.

The present application continues:—

"12. That thereafter your Petitioner gave instructions to his Attorney, Mr. A. Barlow, B.A., LL.B., Zeerust, to file a Notice of Application for Leave to Appeal to the Appellate Division of the Supreme Court of South Africa, Bloemfontein, with the Clerk of the Native Commissioner's Court, Zeerust, for transmission to the Native Appeal Court (Central Division) and that Mr. Barlow did so accordingly on the 20th day of June, 1951, and that such Application also stated that leave would be sought to argue the merits of the case before the Native Appeal Court (Central Division).

13. That your Petitioner verily and honestly believes that he is the victim of a miscarriage of justice in this matter as he verily and honestly believes that he has a perfect right, in common with the other relatives of the late Sam Thambe, to live and reside on the farm Zwartkopfontein 328, District Marico.

18. That the Petitioner has gone to great expense to try to vindicate and establish his rights in this matter; and that he desires and prays that the merits of this case on the evidence alone be argued before the Native Appeal Court with the object of obtaining Leave to Appeal to the Appellate Division of the Supreme Court of South Africa at Bloemfontein;

Wherefore your Petitioner humbly prays that it may please your Lordship to grant his Petition for Leave to Appeal to the Appellate Division of the Supreme Court of South Africa at Bloemfontein against the whole of the Judgment delivered in this matter by the Assistant Native Commissioner, Zeerust, on the 22nd day of September, 1950, and against the Judgment of your Lordships refusing condonation for Leave to Appeal delivered on the 7th day of June, 1951."

Attached to the application are three affidavits, including one from Mr. A. Barlow, who is now representing applicant, in which they all say in effect that they honestly and verily believe that should leave to appeal not be granted a miscarriage of justice will result to the detriment of the applicant.

Section *eighteen* of the Native Administration Act, No. 38 of 1927, reads as follows:—

"(1) Notwithstanding anything in any law contained, no appeal shall lie from the judgment of a Court of Native Commissioner in respect of an action or proceeding except to a Native Appeal Court constituted under section *thirteen*, unless the Native Appeal Court itself consents to an application for leave to appeal (upon any point stated by the said Court) being made to the Appellate Division of the Supreme Court, subject in any event to the rules of the said Appellate Division.

(2) Save as is provided in section fourteen and in this section, *the decision of a Native Appeal Court shall be final and conclusive.*"

The application now before us prays for relief in two respects, viz.—

(1) for leave to appeal to the Appellate Division against the whole of the judgment delivered by the Native Commissioner on 22nd September, 1950; and

(2) against the judgment of this Court of 7th June, 1951, refusing condonation for leave to appeal.

Before us applicant was represented by Counsel, Advocate F. Boshoff, who wisely, in our view, could not and did not advance any argument in support of the request to argue the merits of the case before the Appellate Division. There is no provision in law for such a course. Mr. Boshoff confined his argument to the second ground of relief sought and submitted that the point to be stated was that this Native Appeal Court erred in refusing to condone the late noting of the appeal. Now, Section 6 of the Native Appeal Court Rules, published under Government Notice No. 2254 of 1928, states:—

"6. An appeal from the judgment of a Court of a Native Commissioner shall be noted within twenty-one days after the date of such judgment, but the Court of Appeal may in any case extend such period upon just cause being shown."

It is clear from the judgment of the Native Appeal Court as constituted on 7th June, 1951, that the application for condonation of the late noting of the appeal was not dealt with in a perfunctory manner. The Court gave full reasons for refusing the application for condonation. As is customary the Court perused the record of the trial to satisfy itself that *ex facie* the record there were no grounds on which indulgence could justifiably be granted.

It must be noted that applicant's affairs were duly debated in a trial which was fairly conducted and at which he was duly represented by a legal practitioner, Mr. van der Spuy. This Court cannot go beyond the record of the proceedings. The two applications which have come before us contain much which is based on sentiment. We are concerned only with the legal rights of the parties. Challenged on the question of miscarriage of justice Mr. Boshoff could only submit that applicant is an old man of 70 years and if he has rights of residence on the farm he would be prejudiced were he unable to argue the merits of his case. But we must point out that the question of his rights was fully canvassed at the trial before the Native Commissioner. There was no question of miscarriage of justice there. The matter of granting condonation for late noting of appeals is within the discretion of the Native Appeal Court. We are unable to find any valid reason to suppose that the Court erred in its judgment of 7th June, 1951. Parliament has decreed that its judgments shall be final and conclusive. There is no provision in law that a Native Appeal Court shall hear appeals against its own judgments, which in substance is the effect of the present application. The applicant or his present legal representative has misconstrued the object or purpose of section *eighteen* of Act No. 38 of 1927.

It would be as well to quote Mr. van der Spuy's version of these later proceedings. In the affidavit of Mr. Pieter Daniel van der Merwe, his partner, appear these statements:—

> "4. I was present with all consultations which George Twesha and his witnesses had with Mr. van der Spuy and I acted as Interpreter for Mr. van der Spuy in the case.
>
> 5. I deny the allegation that Mr. van der Spuy ever said 'Once the judgment is finished, it is finished' and can recollect very clearly that Mr. van der Spuy and myself actually told George Twesha that he has not got the slightest hope on appeal and that we were not prepared to note an appeal and waste his money.
>
> 6. That upon Mr. van der Spuy's refusal to note an appeal, George Twesha and his witnesses went to Johannesburg to Messrs. Moss-Morris and Ettlinger for further legal advice on probabilities of an appeal and on their further visit to our offices, approximately five to ten days after judgment was given, George Twesha said that Messrs. Moss-Morris and Ettlinger thought that there might be some grounds of appeal but they would prefer to see the record first."

Upon this Mr. van der Spuy told George Twesha again in my presence, as I interpreted, that he, Mr. van der Spuy, refused to note an appeal. Mr. van der Spuy said to George: 'If you want to waste your money go to Messrs. Moss-Morris and Ettlinger and have an appeal noted. I have no objection whatsoever'". Had applicant listened to the advice of his attorney, Mr. van der Spuy, he would to-day be a wiser and richer man.

There is no point in these proceedings which this Court is prepared to reserve for consideration of the Appellate Division.

The application is dismissed with costs.

For Appellant: Advocate Boshoff, F., instructed by Mr. A. Barlow, P.O. Box 16, Zeerust.

For Respondent: Mr. A. Hirsch instructed by Messrs. Warren and Coulson, Attorneys. P.O. Box 83, Zeerust.

SOUTHERN NATIVE APPEAL COURT.

N.A.C. CASE No. 11/52.

LANDINGWE *v.* **HLATUKA.**

UMTATA: 18th February, 1952. Before Sleigh, President; Bates and Young, Members of the Court.

LAW OF PROCEDURE.

Native Appeal Case—Practice and Procedure—Judgment for defendant—When competent—Appeal—Judgment for defendant altered to one of absolution—Costs—Appellant entitled to costs.

Summary: Appellant sued respondent for 5 head of cattle or their value £40 as damages for the pregnancy of appellant's customary wife. The Court entered judgment for defendant because the wife's evidence was not corroborated. There were indications that corroborative evidence may be available.

Held (1): That where there is a direct conflict of testimony between the witnesses for the plaintiff and those for the defendant, then the Court should not enter judgment for defendant unless it is satisfied that the story told by the defence witnesses is true.

Held (2): That if the sole reason for rejecting the plaintiff's claim is that the woman's story is not corroborated as is required by law, in paternity cases, and if there is an indication that corroborative evidence may become available the judgment should be one of absolution.

Held (3): That the alteration of the judgment on appeal from one for defendant to one of absolution from the instance in one of substance and not merely one of form, and therefore appellant is entitled to his costs of appeal.

Cases referred to:

Oliver's Transport *v.* Divisional Council, Worcester 1950 (4) S.A. (C) 537.

Freedman *v.* Harrismith Town Council, 1945 (2) P.H. F. 63.

Appeal from the Court of Native Commissioner, Engcobo.

Sleigh (President), delivering the judgment of the Court:—

This is an appeal against a judgment for defendant (now respondent) in an action in which appellant sued respondent for five head of cattle or their value £40 as damages for causing the pregnancy of appellant's customary wife, Nodambile.

It is quite clear that Nodambile committed adultery and became pregnant while appellant was away at work. The question is whether the Assistant Native Commissioner was wrong in rejecting her evidence that respondent was responsible for her pregnancy.

Nodambile and Noamen, the go-between, are agreed that the latter knows only of one occasion when respondent and Nodambile slept together, and they made it clear that this was in ploughing season 1949 at appellant's kraal where Noamen was staying at the time. Nodambile says that Noamen left the kraal the next day, that respondent thereafter continued to visit her and that she became pregnant in autumn 1950. Whereas, Noamen says that she stayed on at the kraal for some time after the night respondent and Nodambile slept together and that she left in autumn 1950. The Native Commissioner points to this discrepancy and says that if respondent continued to visit Nodambile as the latter says, Noamen must have been aware of it.

This is undoubtedly a material discrepancy, and there are others. For instance, Nodambile states that Noamen saw them under the same blanket, but Noamen makes no mention of this and her evidence seems to convey that she did not see them under one blanket. In view of these discrepancies the Native Commissioner was justified in declining to give judgment for appellant. But one of the grounds of appeal is that in any event the judgment should have been one of absolution.

Section 38 of Proclamation No. 145 of 1923 provides that the Court, may, as the result of a trial of an action grant—

(*a*) judgment for the plaintiff in respect of his claim in so far as he has proved the same;
(*b*) judgment for the defendant in respect of his defence in so far as he has proved the same;
(*c*) absolution from the instance, if it appears to the Court that the evidence does not justify the court in giving judgment for either party.

Now the judgment of the Native Commissioner would be correct if he were satisfied that respondent had proved his defence, but he does not comment on the defence evidence at all. He finds that Noamen's testimony was not corroborative of Nodambile's story and then goes on to say: "Once the Court was satisfied on this point the remainder of the evidence could do nothing to establish a case for the plaintiff, and the court therefore felt bound to enter judgment for the defendant." The Native Commissioner has misinterpreted the above section. He was not bound to give judgment for respondent (defendant). Where there is a direct conflict of testimony between the witnesses for the plaintiff and those for the defendant, then the Court should not enter judgment for the defendant unless it is satisfied that the story told by the defence witnesses is true and that by the plaintiff's witnesses is false. This is clearly contemplated in paragraph (*b*) of section 38 [see also Oliver's Transport *v.* Divisional Council, Worcester, 1950 (4) S.A. (C), 537].

It may be that Noamen's story is false and that she knows nothing about the intimacy between respondent and Nodambile. But the Native Commissioner was clearly not satisfied that the latter's testimony is false, otherwise he would have said so. His reason for entering judment for respondent (defendant) is because Nodambile's evidence is not corroborated as is required by law in paternity cases. That is the very reason why he should have entered a judgment of absolution, unless Nodambile admitted that she has no corroborative evidence. She made no such admission. On the contrary, there is Nobantam, the alleged first go-between, who might be able to give corroborative evidence. Further Nodambile says that all the women of her section of the location know that respondent was her *metsha*. The corroboration which the law requires in such cases may thus be available.

The Native Commissioner therefore erred in giving a full judgment for respondent. The appeal consequently succeeds on this ground and the judgment will be altered to one of absolution.

In regard to the costs of appeal, it was stated in Freedman *v.* Harrismith Town Council [1945, (2) P.H. F. 63] that where the appellant has failed to establish his case both in the trial Court and in the Court of Appeal, and where no indication was given to the Trial Court of the possibility of fresh evidence coming to light, the alteration of the Trial Court's judgment from one for defendant to one of absolution was not a reversal of the Magistrate's judgment entitling the appellant to the costs of the appeal. But as was shown in the Oliver's Transport case (*supra* at p. 545) that where the defendant has further evidence available and succeeds in having the Trial Court's judgment altered to one of absolution, the alteration is one of substance and not one of form only, and that the appellant would be entitled to costs of appeal. This is the position in the present case.

The result is that the appeal is allowed with costs and the judgment of the Court below is altered to one of absolution from the instance with costs.

For Appellant.: Mr. White, Umtata.

For Respondent: Mr. Airey, Umtata.

SOUTHERN NATIVE APPEAL COURT.

N.A.C. CASE No. 12/52.

ZONDELA *v.* MPAYI.

UMTATA: 19th February, 1952. Before Sleigh, President; Bates and Young, Members of the Court.

NATIVE LAW AND CUSTOM.

Native Appeal Case—Marriage by Native Custom—Desertion of wife—Return of wife or restoration of dowry—Defence of teleka—Putuma—*Husband must* putuma *before he can sue—Letter of demand not sufficient* putuma.

Summary: Appellant sued respondent for the return of his customary wife, N, who he alleged deserted without cause, and, failing her return, restoration of the dowry paid for her. Respondent denies the desertion and that N left appellant without cause. He avers that appellant assaulted his wife, drove her away, and for this reason he has *telekaed* her. He states he is prepared to return her on payment of a *teleka* beast and upon *putuma*. The Court found that appellant had not *putumaed* his wife and entered judgment of absolution. Appellant has appealed.

Held:

(1) That in order to justify the *teleka* respondent must prove the assault and the driving away.

(2) That on the evidence N deserted without cause and the defence of *teleka* has thus not been established.

(3) That in an action for the return of a customary wife the husband cannot succeed unless he satisfies the Court that he has *putumaed* his wife and that she failed to return. It is not sufficient to send a letter of demand.

(4) That the evidence and the circumstances favour the conclusion that Nosargent was *putumaed* and failed to return to appellant.

Cases referred to:

Tas *v.* Mpunga & Ano., 1946, N.A.C. (C. & O.), 5.

Appeal from the Court of Native Commissioner, Cala

Sleigh (President), delivering the judgment of the Court:—

Appellant in this action sued respondent for the return of his customary wife, Nosargent, who he alleged had deserted without cause, and, failing her return, restoration of the dowry paid for her, namely 10 cattle valued at £100.

Respondent in his plea denies the desertion and that Nosargent left appellant without cause. He avers that appellant assaulted his wife and drove her away and for this reason he has *telekaed* her. He states that he is prepared to return her to appellant upon *putuma* and payment of a *teleka* beast. In order to justify the *teleka* respondent must prove the assault and the driving away.

The Assistant Native Commissioner found that Nosargent had left appellant without just cause, but entered an absolution judgment because appellant failed to *putuma* her. Plaintiff (appellant) now appeals against this judgment on the grounds that it is against the weight of evidence, and that in any event the failure to *putuma* was not fatal to appellant's claim because her return was demanded in the letter of demand.

It appears from the evidence that Nosargent is appellant's right hand wife and that they were about 21 and 56 years of age respectively when they married in 1947. It is common cause that Nosargent left appellant on four occasions. She states that appellant was jealous of her, objected to her speaking to other men and had ordered her to take children with her when she went to fetch water. Giving details of the circumstances under which she left on the fourth occasion, she says that she had gone to fetch water by herself. She met appellant coming from the village and after questioning her he said (quoting her own words): "If I disobey his orders I had better go back to my people and have my father warn me." She goes on to say that she did not take him seriously, but the next morning he said: "I want you to go back to your people otherwise I will do something to you". He then slapped her with his open hand and she left. Now it is clear from this that she was not driven away, as the Native Commissioner found. She should have reported herself to respondent, explained the reason why she was sent home, and returned to appellant or waited until she was *putumaed*. Appellant has paid for her what is generally regarded as a full dowry, and the treatment she received at the hands of appellant on the fourth occasion did not call for punishment of appellant by impounding the woman under the custom of *ukuteleka*. Since Nosargent had disobeyed appellant's instructions he was justified in sending her to her people to be reprimanded. The defence of *teleka* has therefore not been established.

In an action for the return of a customary wife, the husband cannot succeed unless he satisfies the court that he has *putumaed* his wife and that she refused or failed to return. This is especially so if his conduct justified her leaving him for the purpose of complaining to her dowry holder [see Jas *v.* Mpunga and Ano., 1946, N.A.C. (C. & O.) 5]. He should himself *putuma* if at all possible. But if the complaint against him is trifling, or if the woman deserted without cause, or if she had been sent to the dowry holder to be reprimanded then he may send messengers. It is not sufficient to send a letter of demand. The Native Commissioner was therefore right in declining to treat the letter of demand as a substitute for *putuma*. But his finding that Nosargent was not *putumaed* is not supported by the evidence.

Appellant states that he *putumaed* her on three occasions about August, 1948, but did not find her. About a year later he sent his messengers Jubele and Mpalweni and Jubele and Tutsu on three occasions, and they were also unsuccessful. Jubele and Tutsu corroborate appellant's evidence. On the other hand respondent and Nosargent say that she was never *putumaed*.

The Native Commissioner has rejected appellant's evidence of the *putuma* because Jubele and Tutsu said that they went in the winter, 1950, whereas appellant said it was in 1949. It is obvious that Jubele and Tutsu are mistaken as to the time. Jubele says that when he went the baby which was born in February, 1949, was about to crawl and that when he went the last time respondent would not give a reply because he had received the legal demand. This demand shows it was issued on 7th November, 1949. It is thus clear that they could not have gone in 1950. The Native Commissioner should not have taken notice of this discrepancy, especially as Jubele states that he does not know the years and months, and that he was not certain of the season. He went on three occasions which may well have covered the period from winter to ploughing season, 1949. Uneducated natives are notoriously unreliable when testifying as to time. The age of the baby and the date of the demand make it clear that they visited respondent's kraal in 1949 and not 1950.

We have in appellant's favour that it is customary to *putuma* an absent wife, and appellant and his witnesses say that Nosargent was *putumaed*. If appellant was jealous of her and suspected her fidelity—as he had cause to, seeing that she had since given birth to an illegitimate child—it is improbable that he would have left her out of his control for long. Against this we have the evidence of respondent and Nosargent that she was not *putumaed*. Their evidence on the whole is contradictory and unreliable. In our opinion the evidence and circumstances favour the conclusion that Nosargent was *putumaed* and that she failed to return to appellant. The appeal consequently succeeds.

Ten cattle were paid as dowry and there are now two issue of the union including the illegitimate child which, in Native Law, belongs to appellant. There is no evidence of the value of the cattle but counsel for the parties have agreed that the average value of cattle in Cala district is £8 per head.

The appeal is allowed with costs and the judgment of the Court below is altered to read: "Judgment for plaintiff with costs for the return of his wife, Nosargent, within one month of the date hereof, failing which delivery of eight head of cattle or payment of their value at £8 each."

For Appellant: Mr. Airey, Umtata.

For Respondent: Mr. Mbobo, Tsolo.

SOUTHERN NATIVE APPEAL COURT.

N.A.C. CASE No. 13/52.

GAULAKAYA *v.* **TONYELA.**

UMTATA: 19th February, 1952. Before Sleigh, President; Bates and Young, Members of the Court.

LAW OF PROCEDURE.

Native Appeal Case—Practice and Procedure—Appeal—Objection to hearing of—In absence of specific instructions an attorney has no authority to note and prosecute an appeal in a Native Appeal Court.

Summary: An objection to the hearing of the appeal was lodged and in support thereof an affidavit by appellant was filed. In it he states that he was satisfied with the Native Commissioner's judgment and that he had not authorised his attorney to appeal.

Held: Since the rules of the Native Appeal Court provide for the noting and prosecution of an appeal, an attorney for a party in a Native Commissioner's Court has, in the absence of specific instructions, no authority to note and prosecute an appeal in the Native Appeal Court.

Objection upheld.

Cases referred to:

Mdontsa *v.* Fumbalele, 1946, N.A.C. (C. & O.), 68.

D. and D. H. Fraser, Ltd., *v.* Waller, 1916, A.D., 494.

Appeal from the Court of Native Commissioner, Mqanduli.

Sleigh (President), delivering the judgment of the Court:—

In this action plaintiff (now respondent) sued Gamtiliya Mafa for certain 10 cattle alleged to have been paid as dowry for his daughter.

The case was set down for trial and after Gamtiliya had given evidence the case was postponed. At the resumed hearing the Court was informed that Gamtiliya had died and that his heir, Mtondwana, had absconded in 1937 and has not been heard of since. Respondent's attorney then applied that Gilbert Gaulakaya (herein referred to as appellant) be appointed *Curator ad litem* and that his name be inserted as defendant in that capacity. The application was granted, appellant's attorney raising no objection to the appointment. I should say at once that the heir should have been substituted as defendant and Gilbert could then have been appointed to represent the heir [see Mdontsa *v.* Fumbalele, 1946, N.A.C. (C. & O.), 68]. However, the result is the same.

At the close of the case judgment was entered in favour of respondent. From this judgment an appeal was noted on behalf of appellant.

On the 30th November, 1951, respondent's attorney notified appellant's attorney that the latter's authority to note and prosecute the appeal would be challenged at the hearing on the ground that appellant had not authorised him to note the appeal.

An objection to the hearing of the appeal was duly lodged and in support thereof an affidavit by appellant was filed. In it he states that he was satisfied with the Native Commissioner's judgment and that he had not authorised his attorney (Mr. Wilkins) to note the appeal. Counter affidavits were then filed. From these it appears that Mr. Wilkins advised appellant to appeal and that the sum of £5 was handed to Mr. Wilkins' interpreter by the widow of Gamtiliya as security for the costs of appeal in the presence of appellant who did not object.

Formal power of attorney to appear and prosecute a civil case is not required either in the Native Commissioner's Court or in this Court. It is sufficient if the attorney had general instructions to bring or to defend the case. The attorney's mandate, however, lapses upon the death of the party he represents. If a party in a pending case dies it is the practice of courts, under Common Law, to call upon the heir to accept the case as it stands, and proceed therein with the opposite party, or to consent to his opponents claim (see *van Leeuwen's Roman-Dutch Law,* Kotze's Translation, Vol. II, p.p. 381-2). This is also the practice in Native Commissioners' Courts.

Now since appellant did not admit respondent's claim he must be deemed to have authorised Mr. Wilkins to act for him in the Native Commissioner's Court. In D. and D. H. Fraser, Ltd., *v.* Waller (1916, A.D., 494), it was held that a power given to an attorney to appear in a suit in a Magistrate's Court is a sufficient authority to him to note an appeal, as this is an act done in the lower Court where his power was intended to operate, but the power of attorney does not authorise him to prosecute the appeal since the rules of appellate tribunals require the filing of a power of attorney to prosecute the appeal.

As I have already stated, the rules of the Native Appeal Court do not require the filing of a power of attorney. But it must be noted that the regulations governing the noting of an appeal are contained in the rules of the Native Appeal Court and not in the rules of the Native Commissioner's Court. In this respect the rules of the latter Court and that of the Magistrate's Court differ. Since the rules of the Native Appeal Court provide for the noting and prosecution of an appeal, an attorney for a party in a Native Commissioner's Court has, in the absence of specific instructions, no authority to note and prosecute an appeal in the Native Appeal Court. An unsuccessful litigant in the lower Court may, for various reasons, accept the judgment even if he was convinced that it was wrong. If, therefore, he wishes to take the judgment on appeal it is essential that he gives instructions to that end.

In the present case appellant has definitely stated in his affidavit, and the other affidavits support him, that he has given no specific instructions to note the appeal and that he is satisfied with the judgment. Since he is the appellant of record he has the sole right to say whether or not the appeal should be proceeded with.

For this reason the objection to the hearing of the appeal is allowed and the appeal is struck off the roll with costs.

For Appellant: Mr. Wilkins, Mqanduli.

For Respondent: Mr. Airey, Umtata.

CENTRAL NATIVE APPEAL COURT.

N.A.C. CASE No. 8/52.

RABOTATA *v.* MALUNGA.

JOHANNESBURG: 19th February, 1952. Before Marsberg, President, Warner and Hattingh, Members of the Court.

COMMON LAW.

Ejectment-judgment entered in terms of settlement—Consent to judgment for ejectment—Writ of execution suspended on conditions—On breach of conditions writ of execution issuable without further legal process.

Summary: The facts emerge from the judgment.

Held:

(1) Appellant not a statutory tenant.
(2) No further legal process necessary.
(3) That settlement was not a novation of judgment.

Cases referred to:

Cairn (Pty.), Ltd. *v.* Playdon & Co., Ltd., 1948, S.A. (3), 121.
Anamia *v.* Moodboy, 1943, A.D. 538, 9.
St. Patrick's Mansions (Pty.), Ltd., *v.* Graham's Restaurants (Pty.), Ltd., S.A. (4), 1949—69.

Statutes referred to:

Rents Act, Section 23.

Appeal from the Court of Native Commissioner, Johannesburg.

Marsberg (President), delivering the judgment of the Court):—

In the Native Commissioner's Court at Johannesburg, plaintiff, Paul Malunga sued defendant, Jackson Rabotata for damages and ejectment from premises at 72 Edward Street, Sophiatown, Johannesburg, of which plaintiff was the landlord and defendant the tenant. It is unnecessary to quote the particulars of the claim or the defence and the counterclaim which was lodged by defendant because when the parties appeared in Court on 25th June, 1949, duly represented, Mr. Bregmann for plaintiff informed the Court that a settlement between the parties had been reached and handed in a written statement signed by both parties to the action, setting out the terms of the settlement. The settlement was then attested in Court and agreed to by the parties concerned.

Judgment was entered into in terms of the settlement recorded and filed.

The deed of settlement is as follows:—

"In the matter between:

Paul Malunga ... ... Plaintiff

and

Jackson Rabotata ... ... Defendant.

Terms of Settlement.

1. The defendant hereby agrees that judgment be entered for ejectment against the defendant, the said judgment to be entered as a judgment by the above Honourable Court.
2. The defendant hereby acknowledges that at all times material hereto he was created a statutory tenant requiring rental to have been paid by him, in terms of the Rents Act, by the 7th of each and every month.
3. The parties hereto agree that in terms of judgment granted in paragraph 1 hereof the writ of execution be suspended upon the following conditions:—
   (*a*) The defendant is to pay to the plaintiff the sum of £7. 11s. 4d. forthwith in full settlement of rental and lights account up to the 30th June, 1949.
   (*b*) The defendant is to pay the sum of £4. 10s. each and every month as rental (inclusive of lights account). The said amount to be paid to the plaintiff at 72 Edward Street, Sophiatown, and a receipt by plaintiff to issue as evidence thereof, by the 7th of each and every month, in advance, the rental for July, 1949, to be paid accordingly by the 7th July, 1949.
4. It is agreed that in the event of the defendant failing to comply with any condition of 3 (*a*) or 3 (*b*) hereof the Writ of Execution may be put into operation forthwith, without any further notice to the defendant.
5. The above agreement does not derogate in any way from the position that the defendant is and remains a statutory tenant as defined in paragraph 2 hereof.
6. Each party hereto is to pay his own costs.

Signed at Johannesburg this 25th June, 1949.

PAUL MALUNGA, Plaintiff.
JACKSON RABOTATA, Defendant.

As witnesses:
(1) (Signed)?
(2) (Signed)? "

Thereafter, in 1951, plaintiff apparently endeavoured to put the writ of execution into effect, alleging failure on the part of defendant to pay the rental for the month of April, 1951, in terms of the settlement. Defendant then applied to Court for an order restraining the Messenger of the Court. The application was granted on 27th June, 1951, the rule to operate as an interim interdict and the return day for the hearing of the confirmation or otherwise of the rule was fixed for 11th July, 1951. After several postponements, the matter was finally disposed of on 15th August, 1951, when the rule granted on 27th June, 1951, was discharged.

Defendant has appealed against this order on the following grounds, viz.:—

"(*a*) The judgment is bad in law in that the Additional Native Commissioner should have granted the application, for one or other of the following reasons:—

(i) In terms of the agreement dated the 25th day of June, 1949, applicant was constituted a tenant of the premises and by reason thereof it was not competent to eject applicant by means of execution pursuant to the judgment;

(ii) inasmuch as applicant was constituted a tenant as aforesaid, it was not competent to eject applicant from the said premises pursuant to clause 4 of the said agreement, the said clause being of no force and effect;

(iii) The said agreement in its effect constituted a novation of the judgment, and created a relationship of landlord and tenant between respondent and applicant respectively."

None of the points now taken in the notice of appeal was taken before the Native Commissioner when the application for stay of the writ of execution was under consideration. Relief was sought on quite different grounds, as disclosed in the affidavits placed before the Court. The Native Commissioner decided the issue on the question whether rental had or had not been paid in terms of clause 3 (*b*) of the settlement. At that stage defendant accepted and relied on the settlement as being of force and effect.

Mr. Mann who appeared for defendant (appellant) before us submitted the following propositions:—

(1) That the terms of settlement were so ambiguous as to be incapable of interpretation and that they should be construed against the plaintiff;

(2) that the settlement novated the judgment and left the defendant in the position of a statutory tenant in terms of the Rents Act;

(3) that defendant could not be ejected without further legal process.

(1) We have carefully followed Mr. Mann's argument on the question of ambiguity in the language of the terms of settlement but we are unable to agree with him. To us the document is quite clear. Defendant had been sued by plaintiff, *inter alia*, for ejectment from certain premises. Defendant lodged a plea and counterclaim. On the 25th June, 1949, when the matter came before the Court a settlement had been arrived at, the effect of which was that defendant consented to judgment being entered against him for ejectment and that the writ of execution would be suspended on certain conditions. These matters were incorporated in a written document handed into Court and judgment was entered in terms of the settlement. We can see no ambiguity and indeed both parties followed the arrangements laid down until 1951. It is quite clear that they had no doubt as to the effect and intention of the settlement.

(2) We have been asked to say that the settlement novated the judgment. The argument submitted to us seems to be quite illogical. Judgment was entered *after* the settlement. We can appreciate an agreement novating something which went before but we cannot perceive of a *novation* of something which is to follow; nor does our concept of novation run to something which novates itself. If anything was substituted by the settlement it was the preceding disputes between the parties as disclosed in the pleadings in the case. We can read nothing into the settlement to suggest that there should be no judgment against defendant or that the parties should be left in *status quo*. On the contrary defendant consented to judgment being entered against him for ejectment and such judgment was entered. It was submitted that the provisions for payment of future "rental" and that the defendant was to be held to continue as a statutory tenant constituted a new agreement abrogating the judgment. That, however, was clearly not the intention of the parties nor can that be gathered by their conduct subsequent to the judgment. It is our duty to construe the settlement to give effect to the intention of the parties and the judgment of the Court. Perusal of the terms of settlement can leave no doubt as to the position of the defendant. There is a valid judgment against him for ejectment. Ejectment was suspended on certain conditions. Payment of future "rental" was a condition of the suspension of the writ of execution, not an element of a new relationship of landlord and tenant. Similarly, the object of clause 5 of the settlement that defendant was to remain a statutory tenant, read in the light of the whole settlement, was to make provision for the basis on which defendant would be treated in case of other disputes between the parties. Clause 5 cannot be construed to mean that the whole settlement was abrogated and that after the judgment the parties stood in the relationship of landlord and statutory tenant. Clause 5 must be read in conjunction with clause 2. The reference to

"statutory tenant" relates to the payment of rental and not to the definition of statutory tenants in the Rents Act. Much of the argument under this heading has been concerned with the use of the particular words "rental" and "statutory tenant". Confusion has thereby ensued. To argue on words taken out of their context is not helpful. The terms of settlement read as a whole are clear and we are satisfied that the Native Commissioner was correct in his judgment.

(3) It was submitted that defendant could not be ejected without further legal process. In view of the fact that there is a valid judgment against defendant for ejectment we are unable to appreciate that further legal proceedings are required. In any event further legal relief was sought by defendant in his application for stay of execution. In this he failed and the matter is now at an end.

The argument under this heading may have been of greater force had there been no prior legal action.

The appeal is dismissed with costs.

For Appellant: Mr. Adv. Mann, D.K., instructed by Messrs. Broomberg, Graaff & Korb, Magor House, Fox Street, Johannesburg.

For Respondent: Mr. Adv. Spitz, D., instructed by Messrs. Bregmann & Van der Walt, Commissioner House, Commissioner Street, Johannesburg.

SOUTHERN NATIVE APPEAL COURT.

N.A.C. CASE No. 14/52.

BUBI AND ANOTHER *v.* MAHLOKOMANE.

UMTATA: 20th February, 1952. Before Sleigh, President, Bates and Young, Members of the Court.

NATIVE LAW AND CUSTOM.

Native Appeal Case—Native custom—Adultery—Proof of—Evidence that ceremony for child held by appellant strong proof of adultery—Place where ceremony may be held.

Summary: Respondent obtained judgment against appellants (inmate and kraalhead) respectively for 5 head of cattle or their value £40 as damages for adultery with and pregnancy of respondent's customary wife. The only corroborative evidence in support of the wife's testimony is that appellants performed the customary ceremony for the child secretly at the kraal of one N who is a relative of appellants.

Held (1): That if a person performs the customary ceremony for a sick child, that is very strong proof that he is the father of the child.

Held (2): That the ceremony should be held at the kraal of the natural father, but it may also be held at the kraal of a relative.

Appeal from the Court of Native Commissioner, Mqanduli.

Sleigh (President), delivering the judgment of the Court:—

Respondent obtained judgment against appellants (inmate and kraalhead respectively) for five head of cattle or their value £40 as damages for adultery with and the pregnancy of Respondent's customary wife, Notobile. Appellants appealed. The judgment is attacked on its merits and on the ground that the expert evidence given by Bazindlovu Pangindlela is not a true reflection of the custom involved.

It is clear that Notobile committed adultery during respondent's absence at work. She accused first appellant. In the summons it is alleged that she was rendered pregnant by him during the 1949/50 ploughing season but in her evidence she states that it was after the hoeing of that crop. Her evidence is contradictory in other respects. The only corroborative testimony in support of her story is the evidence that about March 1951 appellants held the customary ceremony for the child at the kraal of Nokeke. If this is so the appeal must fail because it is inconceivable that appellants would have performed this ceremony if first appellant was not the father of the child.

There is no doubt that the ceremony was performed. The only question is whether it was held at the instigation of appellants as the Native Commissioner found.

Notobile states that her child became ill and first appellant told her to take it to Nokeke's kraal where he promised to perform the customary ceremony. According to her evidence she arrived at Nokeke's kraal on a Sunday and told him the purpose of her visit. Later that day he left the kraal and after this first appellant arrived to see Nokeke, but finding the latter absent left and returned again the following day. As Nokeke was still absent he left again. On the following Monday second appellant arrived after lunch, Nokeke being present. She was at the time in Nokeke's mother's hut. She was called to the hut in which second appellant and Nokeke were and there the former told her that he would arrange for the slaughtering of a goat for the child and thereafter left. On the Tuesday morning at dawn first appellant arrived at the kraal, Nokeke being present, and said that he would bring a goat that day. It arrived with a boy of appellants' kraal in the afternoon. Later first appellant arrived and at sunset the goat was slaughtered. She was given some of the meat and part of the skin was tied on the child's arm. First appellant slept there that night, left the next morning, returned again at sunset that day, ate the balance of the meat and both he and Nokeke then left the kraal. At about bed-time that night her husband arrived.

Notobile's evidence of the time and date of arrivals and departures of the appellants, of the arrangements made by them for slaughtering of a goat, and of the actual slaughtering and ceremony is corroborated by Nokeke to the last detail not withstanding severe cross-examination. She would hardly have given evidence of first appellant's unsuccessful visits if her story had been fabricated. She does not agree with Nokeke as to the time when the latter made his statement to the headman implicating appellants, but this discrepancy is immaterial as it is not disputed that Nokeke did give a statement to the headman explaining the presence of the woman at his kraal.

It is contended that in accordence with custom the ceremony is held at the kraal of the natural father of the child, and since it was held at Nokeke's kraal he is the father and has falsely accused first appellant. It is clear however from the evidence of the expert witness called, and the opinion of the assessors, a record of which is annexed, that the ceremony may also be held at the kraal of a relative of the father, especially if the child is adulterine and the adultery has not been admitted. Since Nokeke is related to appellants it is improbable that he would have falsely accused first appellant.

In all the circumstances we are satisfied that the judgment is correct. The appeal is consequently dismissed with costs.

Opinion of the Native Assessors.

Names of the Assessors: Sazingam Mgudlwa (Engcobo), Bazindlovu Holomisa (Mqanduli), Mbawuli Dlongwana (Cofimvaba), Henry Makamba (Tsolo), Ntabezulu Mtirara (Umtata).

Question: Should the customary ceremony for an adulterine child be held at the kraal of the natural father or may it be held at another kraal?

Answer: Ntabezulu Mtirara: If the adultery had been denied the ceremony must be held at the adulterer's kraal or at the kraal of a relative. The ceremony is held secretly.

All the other assessors agree except Mbawuli Dlongwana, who states that the ceremony must be held by the husband of the woman.

Henry Makamba: If the adulterine child becomes ill and the ceremony is held by the husband of the woman that would be no good as it would not cure the child. If a man comes forward and performs the ceremony that shows that he is the father of the child. It is necessary for both the adulterer and his father to be present when the ceremony is held, but if they had discussed the matter then the father need not be present.

For Appellant: Mr. K. Muggleston, Umtata.

For Respondent: Mr. Airey, Umtata.

SOUTHERN NATIVE APPEAL COURT.
N.A.C. CASE No. 15 OF 1952.

FULENI *v.* **BHEBHEZA.**

UMTATA: 20th February, 1952. Before Sleigh, President; Bates and Young, Members of the Court.

COMMON LAW.

Native Appeal Case—Damages—Mitigation of damages—Unlawful killing of pig—Offer of carcass to defendant rejected—Plaintiff entitled to full value of pig.

Summary: Respondent unlawfully killed appellant's pig valued at £6. Respondent was offered the carcase which he rejected. Appellant sued for the value of the pig. The Court entered a judgment of absolution holding that there is no evidence of the value of the carcase which value should be deducted from the value of the live pig.

Held:

(1) That there is a duty upon a plaintiff who has suffered loss as the result of the acts of the defendant to take such steps as a reasonable and prudent man whould take to mitigate the loss.

(2) That since the carcase was offered to respondent he could have mitigated the loss to himself by making use of the carcase.

(3) That since he rejected the offer and discarded the carcase he cannot complain if appellant who, as owner, had to dispose of the carcase, made use of parts of it.

Cases referred to:—

Wilhelm *v.* Norton, 1935, E.D.L., 172.

Kinemas, Ltd. *v.* Berman, 1932, A.D., 246.

Butler *v.* Mayor and Councillors of Durban, 1936 (1), P.H., J.7.

Matanzima *v.* Mbobi, 1942, N.A.C. (C. & O.), 105.

Pretoria Light Aircraft Co., Ltd. *v.* Midland Aviation Co. (Pty.), Ltd., 1950 (2), S.A. (N) at p. 663.

Appeal from the Court of Native Commissioner, Tsolo.

Sleigh (President), delivering the judgment of the Court:—

This is an appeal against a judgment of absolution in an action in which appellant sued respondent for the sum of £6 being the value of a pig which respondent had unlawfully killed after it had trespassed in his land.

Respondent admitted that the killing of the pig was unlawful. The only question the trial Court had to decide, therefore, was the measure of damages to be awarded.

The Assistant Native Commissioner found that the live value of the pig to plaintiff was £6, but he says in his reasons, "Having recovered the carcase, there was a duty on plaintiff (appellant) to minimise the damages by taking all reasonable measures to profitably dispose of it or using portion of it for feeding purposes at his own kraal or rendering down of the fat for soap making. He states that he did not do this as he was keeping it as an exhibit for a contemplated case. This explanation was most unreasonable".

There is undoubtedly a duty upon a plaintiff to take such steps as a reasonable or prudent man would take to mitigate the loss. This legal principle (which appears to have been taken from the English Common Law) applies more particularly to damages arising from a breach of contract (see *Wessels on Contract*, pars. 3325-7). The onus is on the defendant to show that the plaintiff failed to adopt a course which would have lessened the damages (see Wilhelm *v.* Norton, 1935, E.D.L. at p. 172; and Kinemas, Ltd. *v.* Berman, 1932, A.D., 246). However, the priciple has also been applied in actions based on delicts. McKerron in his *Law of Delicts* (Third Ed. at p. 165) says that the defendant cannot be held responsible for the damages which are due to the plaintiff's failure to take steps to mitigate his loss. This principle was applied in Butler *v.* Mayor and Councillors of Durban, 1936 (1), P.H., J.7) and in Matanzima *v.* Mbobi [1942, N.A.C. (C & O.), 105].

The evidence in the present case is that appellant took his complaint to the headman who instructed respondent to take the carcase. To this the latter replied that he was not prepared to take is and that appellant could "throw it in the dongas". Appellant then instructed one, Gideon, to take it to his kraal where the head was cut off and retained as an exhibit and the body was skinned. Appellant states that the body became rotten and had to be thown away, but there is evidence that at least part of it was consumed at appellant's kraal.

Respondent's whole case is that since appellant took possession of the carcase, its value should be deducted from the value of the pig before it was killed. In Pretoria Light Aircraft Co., Ltd. *v.* Midland Aviation Co. (Pty.), Ltd. [1950 (2), S.A. (N), at p. 663] the plaintiff company sued the defendant company for £700, the value of an aircraft which the defendant undertook to assemble and which was partly destroyed by fire through the negligence of defendant's servants. The defendant claimed that plaintiff must submit to a reduction of this sum by the value of the parts which remained after the fire. The Court, however, held that there was no obligation upon plaintiff to take the parts whch remained; that he was entitled to a complete aeroplane, and, that defendant could recoup itself by disposing of the parts.

The position in the present case is very much the same. Respondent was offered the carcase which he rejected and clearly indicated that he did not care what happened to it. It was then open to any one to make use of it. If appellant had claimed the carcase in the first instance and had denied respondent's right to remove it, then the former would have had to reduce the damages by the value of the carcase, but it was offered to respondent who was thus in the position to mitigate the loss to himself by making use of the carcase. He has not done so. Appellant, as the owner, had to dispose of it and if he was able to make use of parts of it respondent cannot complain. Appellant is entitled to the full value of the pig.

The appeal is allowed with costs and the judgment of the Court below is altered to one for plaintiff for £6 and costs.

For Appellant: Mr. Airey, Umtata.

For Respondent: Mr. Mbobo, Tsolo.

CENTRAL NATIVE APPEAL COURT.
N.A.C. CASE No. 48/51.

NTLAKO *v.* DEJASMARCH.

JOHANNESBURG: 25th February, 1952. Before Marsberg, President; Warner and de Beer, Members of the Court.

LAW OF PROCEDURE.

Practice and Procedure—Security: Application for condonation of late noting of appeal—Native Appeal Court Rules—Security not given in terms of rule 8 (3) *Government Notice No.* 2254 *of* 1928*—Application for condonation with supporting affidavits not filed with Registrar as required by Rule* 19*—Subject to proviso to section* fifteen *of Act No.* 38 *of* 1927*—Court will not allow departure from the rules nor any laxity of practice where parties were represented in Lower Court—What applicant for condonation must show in addition to his explanation of his delay—Aboriginal race or tribe "of Africa"—Meaning of section* thirty-five *of Act No.* 38 *of* 1927.

Summary: Appellant, also applicant for condonation of late noting of appeal, alleged that as a full blooded Abyssinian, he is not a "member of an aboriginal race or tribe of Africa", alleging that Abyssinians originated from Yemen in Asia.

Held: Abyssinian is member of aboriginal race of Africa—therefore a Native in terms of definition.

Cases referred to:

Mncwango *v.* Mpungose, 1931, N.A.C. (T. & N.), 23.

Majozi *v.* Majozi, 1945, N.A.C. (T. & N.), 98.

Appeal from the Court of Native Commissioner, Johannesburg.

Marsberg (President), delivering judgment of the Court:—

In the matter between Ras Sultan Dejasmarch, appellant and Solomon Ntlako, respondent, an application came before this Appeal Court on 11th October, 1951, for condonation of appellant's failure to lodge security with the Clerk of the Court in the appeal which he had noted against the judgment of the Native Commissioner of Johannesburg. Objection having been taken by the respondent that in terms of the rules no valid notice of appeal was before the Court, the appeal was struck off the rolls.

We have now before us another application for condonation for appellant's failure to lodge security, accompanied by an affidavit setting forth his reasons why the security was not duly lodged at the time he lodged the appeal. The firm of Max Goodman, Attorneys, was acting for him at the time. Before the date of judgment Mr. Vranas of that firm withdrew from the case and the matter was subsequently taken over by Mr. Attorney S. Miller. In the correspondence between the two firms there was a failure to lodge security, the matter being complicated by appellant's journeying to other places. The appellant alleged a misunderstanding between himself and Mr. Vranas as the cause of the failure to lodge the security. An affidavit by Mr. Vranas, handed in by respondent, however, does not confirm appellant's allegation of a misunderstanding. He states specifically that he drew up a notice of appeal for appellant and instructed him what to do with it. Appellant states that he refused to follow this advice but took the papers and instructed Mr. Miller to act for him. Mr. Miller failed to lodge or ascertain that the security had been lodged. It was paid in about 15th August, 1951, long after the due date.

Now, following the decisions of the Native Appeal Court, an applicant for condonation of the late noting of an appeal must show, in addition to his explanation of his delay, that he has a reasonable prospect of succeeding on the appeal itself. Advocate Julian Phillips, who appears for appellant, has put three propositions before us:—

(1) That the Native Commissioner erred in placing the onus on appellant, defendant in the case in the Court below, to prove that he was not a native.

(2) That appellant, being a full-blooded Abyssinian, is not a member of an aboriginal race or tribe of Africa.

(3) That on the merits of the claim and counter-claim appellant has a prospect of success.

(1) For the purposes of our decision on the application before us we will grant that the onus of proving that the parties before the Native Commissioner were natives rested on the plaintiff, not on applicant who was the defendant in the Court below. In a special plea in bar, defendant alleged that he was an Abyssinian and not subject to the jurisdiction of the Court. Normally, on such a plea, the onus would rest on the defendant. The Native Commissioner so placed the onus, Mr. Vranas accepted the onus and called applicant to give evidence. The only part of this evidence with which we need concern ourselves is that defendant claimed to be a full-blooded Abyssinian and that his race came from Yemen in Arabia. All that plaintiff was required to prove was that defendant was an Abyssinian. Defendant alleged that fact in his plea and no further proof was needed. To that extent the onus on plaintiff was discharged.

(2) We can, therefore, proceed to Mr. Phillips's next proposition, that an Abyssinian is not a member of an aboriginal tribe or race of Africa. This proposition comprised the greater part of his argument before us. His submission as to the meaning of "aboriginal" has been somewhat startling. We understood him to suggest that in order to prove that a person from a part of Africa, not being South Africa, was a native within the definition of the Native Administration Act, No. 38 of 1927, a plaintiff must adduce evidence of the ultimate origin of his race or tribe and prove that that race or tribe had its origin in Africa. He suggested that it would be necessary to invoke the aid of anthropologists to establish these facts. In particular he claimed that as the Abyssinians held that they originally came from the Yemen, a part of Asia, they could not be held to be race of Africa. In the elaboration of his argument it was quite clear that Mr. Phillips had given much thought to this proposition. Carried to its logical conclusion we could imagine the proceedings of the Courts of Native Commissioner being enlivened now and then by some fascinating speculations as to the origin of various peoples. In endeavouring to pierce the mists of antiquity would we know where to cry halt? Should we recall Charles Darwin with his "Descent of Man"? Or perhaps Dr. Broome with his amazing discoveries at Sterkfontein?

Surely Parliament when passing the Native Administration Act could never have had in contemplation that Native Commissioners' Courts would be required to inquire into problems of this nature. Mr. Phillips has suggested that the purpose of the Act was to establish Courts for South African Natives where their problems would be dealt with according to their customs and that they were not intended to administer law to peoples of higher development from other parts of Africa. We think he has misconceived the purpose of the Act, as a wider experience of the business of the Courts of Native Commissioners would have indicated and as the judgment in the Appellate Division in the case of Yako *v.* Beyi would show. The Act clearly established a forum where people, as defined, would in the Union of South Africa, be amenable to and subject to the laws of this country. Included in the definition are persons who are members of any aboriginal race or tribe of Africa. Applicant is a full-blooded Abyssinian. The only question to be answered is: is he a member of an aboriginal race or tribe of Africa?

For ourselves we do not intend to speculate on the origin of the Abyssinians. They may have come from the Yemen, as claimed. We do not know. We are content to abide by the meaning of "aboriginal" as currently used and as, we are sure, intended by Parliament. The Concise Oxford Dictionary has this definition:—

> "Aboriginal, a & n. Indigenous, existing in a land at the dawn of history, *or before arrival of colonists* (of races and natural objects)."

Every school boy knows that in historical times the Abyssinians have been in Africa. They were certainly there when white men began to take an interest in the Dark Continent. These facts are so notorious that, in our opinions, they are not arguable.

(3) We have perused the record of the trial before the Native Commissioner in the light of submissions made to us on the facts of the case but there too we can see no prospect of applicant succeeding on the appeal.

We can see no good purpose therefore in granting indulgence to applicant and the application for condonation of the late noting of the appeal in due form is therefore refused with costs.

For Appellant: Adv. Phillips, instructed by S. Miller, Standard Bank Chambers, corner of West and Commissioner Streets, Johannesburg.

For Respondent: Mr. B. A. S. Smits, A.H.T. Building, 67 Commissioner Street, Johannesburg.

NORTH EASTERN NATIVE APPEAL COURT.

N.A.C. CASE No. 134/51.

MOSEHLA *v.* MOSEHLA.

PRETORIA: 17th March, 1952. Before Steenkamp, President; O'Connell and Bosman, Members of the Court.

COMMON LAW.

Native Estate—marriage by Christian rites—community of property excluded by section twenty-two (6) *of Act* 38 *of* 1927—*estate devolves according to Native Custom.*

Custody of children—claim to be determined according to Common law where marriage was by Christian rites.

Practice and Procedure: Claim in summons for specific articles followed by words "and etc."—Court will not recognise words "and etc." as being a description to be supplemented by evidence.

Summary: Plaintiff, who had been married to her late husband by Christian rites, sued her father-in-law for the custody of the two minor children born of her marriage, and for delivery of certain household articles.

Held: That as the marriage was by Christian rites with community of property excluded in terms of section *twenty-two* (6) of Act No. 38 of 1927, the estate devolves according to Native law and custom in terms of paragraph 2 (*c*) of Government Notice No. 1664 of 1929, as amended.

Held further: That as the union between the deceased and plaintiff was a marriage and not a Native customary union, the claim for custody of the minor children falls to be determined according to Common law.

Held further: That as no Court will recognise the words "and etc." as being a description to be supplemented by evidence, only the articles mentioned in the summons could be adjudicated on.

Cases referred to:

Sikenkelana *v.* Ngcukane, 1947, N.A.C. (C & O) 9.
Danana *v.* Satatsha, 1947, N.A.C. (C & O) 48.
Butelezi *v.* Tango, 1947, N.A.C. (T & N) 98.
Ex parte Minister of Native Affairs *in re* Molefe *v.* Molefe, 1946, A.D. 315.
Sondhlo *v.* Sondhlo, 1937 (2) P.H.—B. 54.

Cases distinguished:

Lehasa *v.* Cewane, 1947, N.A.C. (T & N) 132.
Ndhlovu *v.* Ndhlovu, 1946, N.A.C. (T & N) 13.

Statutes referred to:

Section *eleven* of Act No. 46 of 1887 (Natal).
Section *twenty-two* (6) of Act No. 38 of 1927.
Paragraph 2 (*e*) of Government Notice No. 1664 of 1929.

Appeal from the Court of the Native Commissioner, Hammanskraal.

Steenkamp (President), delivering the judgment of the Court:—

Plaintiff (now respondent) sued the defendant (now appellant), her father-in-law, for custody of two minor children and delivery of her household effects consisting of—

> "1 sideboard, kitchen dresser, two boxes, 1 table, 1 bed two chairs, and etc."

In this action she was assisted by one Johannes Kgomo, described as her natural guardian, but this was unnecessary as Common law applies to her claims as will be apparent from what follows.

In her summons plaintiff avers that she was married to the defendant's son, Silas Mosehla, who died on the 5th January, 1948, and that she resided with her late husband at the defendant's kraal. This is admitted by the defendant in his plea. She also avers that she now desires to establish her own kraal with her parents and defendant refuses and neglects to give her the two minor children of the marriage with defendant's late son, and also the household effects already described.

The rest of the defendant's plea reads as follows:—

> "I do not want plaintiff to leave me. I am not chasing her away. If she wants to get married again I will not stop her. I will help her to get married to her second husband. The household effects and the two children are in my kraal. I am not chasing her. I want her to come back."

In her evidence plaintiff states that she was married to the late Silas by Christian marriage. A copy of the marriage certificate was handed in and from this it appears that community of property was excluded by virtue of section *twenty-two* (6) of the Native Administration Act, 1927. This exclusion of community of property is very important for the purposes of this case, as it results in the property in the late Sila's estate falling within the purview of the provisions of paragraph 2 (*e*) of Government Notice No. 1664 of 1929, as amended by Government Notice No. 939 of 1947, and therefore in its distribution according to Native law and custom. This question was dealt with in the case of Sikenkelana *v.* Ngcukane, 1947, N.A.C. (C.O.) 9, the decision in which was to the effect that where parties are married by civil rites and community of property is excluded by operation of law, as in the present case, then on the death of one of the spouses, the property shall devolve according to Native law and custom. I agree that that is the correct position.

The Assistant Native Commissioner in his reasons for judgment, came to the conclusion that as the marriage was celebrated according to Christian rites the plaintiff, by virtue of such marriage, was the legal guardian of the children and the heir to the assets in the deceased estate. He has overlooked the law as set out in Sikenkelana's case that a distinction must be drawn for the purposes of succession between marriages in community of

property and under antenuptial contract on the one hand, and marriages in which community was excluded by operation of law on the other. In the last-mentioned, the Native law of succession is applicable whereas in the two former ones, our Common law of succession is to be applied.

It was not elicited in the Court below whether the two children are males or females. Native law being applicable, it follows that the deceased's heir is his eldest son, if he had one, or failing male issue, then his father or his eldest brother, on the death of the father, becomes heir.

In any case the widow may, in no circumstances, become heir in a case of the nature in question and she is only entitled to her own property as laid down by the Appellate Division in the case of *ex parte* Minister of Native Affairs *in re* Molefe *v.* Molefe, 1946, A.D. 315.

The Sister Court also dealt with this matter in Danana *v.* Satatsha, 1947, N.A.C. (C.O.) 48. It is apparent that the Assistant Native Commissioner overlooked all these cases, otherwise he would have approached the matter from the correct angle.

It is observed that the Assistant Native Commissioner gave judgment in favour of plaintiff for certain property not included in the summons, viz., 4 head of cattle and 7 sheep. This is definitely against all principles of procedure and law. In any case the plaintiff is not entitled thereto as, in her evidence, she admits that her late husband bought the cattle and sheep. In the summons, after describing some of her household property, the words "and etc." are inserted. No Court will recognise the words "and etc." as being a description to be supplemented by evidence. If plaintiff was not able to mention in detail the property she claimed, an amendment of the claim could have been applied for during the course of the trial. This was not done and therefore only the articles actually mentioned in the summons could be adjudicated on. The plaintiff is therefore only entitled to the following articles claimed in the summons, which, according to her uncontroverted evidence, she purchased:—

1 Sideboard.
1 Kitchen dresser.
1 Table.
2 Chairs.
1 Three-quarter bed.
2 Boxes.

I am not concerned with any property not mentioned in the summons.

It was suggested during argument that where the plaintiff states in evidence that she bought certain articles of furniture, it does not follow that she used her own money, and her late husband might have provided the means therefor. This Court is not prepared to return the record for further evidence to have this elicited, as defendant could have led evidence or cross-examined plaintiff as to whether or not her late husband provided the funds for the purchase of furniture.

Council for appellant has argued that the custody of the two children falls to be determined under Native law and custom and he has quoted the following cases:—

(1) Lehasa v. Cewane, 1947, N.A.C. (T & N) 132.
(2) Ndhlovu *v.* Ndhlovu, 1946, N.A.C. (T & N) 13.

In the first case the custody of an illegitimate child was sought. The claimant who sued through her guardian, alleged that the child in question was illegitimate, being the offspring of the claimant's daughter. Although the claimant, i.e. the grandmother had been married by civil rites, it does not follow that Common law was applicable when the custody of the grandchild was in dispute.

The second case was heard on appeal in Natal where special statutory provisions existed by virtue of section *eleven* of Act No. 46 of 1887. This section reads as follows:—

> "No marriage between Natives solemnized under this Law shall, when the male Native is subject to the Native Law in force in this Colony, in anywise, except as in this Law provided, remove either of the parties to such marriage from the operation of such Native Law, either in their person or in their property."

Subsequent to the decision of Ndhlovu's case, this Court held that section *eleven* of Act No. 46 of 1887 had been tacitly repealed by Act No. 38 of 1927.

It will therefore be observed that the decision in Ndhlovu's case, even if correctly decided, has no application in the Transvaal.

Counsel for appellant has also quoted the case of Butelezi *v.* Tango, 1947, N.A.C. (T & N) 98, but in that case the question of the custody of children was not involved and a distinction must be drawn between a claim for property and a claim for custody of children.

The claim for the custody of the two minor children concerned falls to be determined according to Common law as the union between the plaintiff and her late husband was a marriage and not a customary union. This is borne out in the case of Sondhlo *v.* Sondhlo, heard in the Supreme Court, Transvaal Provincial Division, reported in Prentice Hall, 1937 (2) B. 54, in which it was held that even if there were considerations of Native custom, they could not prevail against the ordinary rules obtaining in our Courts regarding the custody of children of European parents. It follows that the plaintiff, on her late husband's death, became the guardian *under Common law* of their minor children and she is therefore entitled to their custody. But this finding must not be construed to mean that the plaintiff is thereby also awarded the property rights in the children concerned, e.g. any lobola paid for them at a later date, if either or both are females, as that aspect is not in issue in the present action and in any event lobola transactions being unknown to Common law, fall to be determined according to the law in which they have their origin, viz., Native law.

In my view the appeal should be allowed in part with costs, and the Assistant Native Commissioner's judgment altered to read:—

> "For plaintiff for 1 sideboard, 1 kitchen dresser, 1 table, 2 chairs, 1 three-quarter bed and 2 boxes. Custody of the two minor children is awarded to the plaintiff."

O'Connell (Member): I concur.

Bosman (Member): I concur.

Pretoria, 19th March, 1952.

For Appellant: Adv. Van Reenen, instructed by Messrs. Mathews & Lanser, Warm Baths.

For Respondent: Mr. A. P. Nel of Messrs. Nel & Nel, Pretoria.

NORTH EASTERN NATIVE APPEAL COURT.

N.A.C. CASE No. 131/51.

NGWENYA *v.* MANZINI.

PRETORIA: 17th March, 1952. Before Steenkamp, President; O'Connell and Bosman, Members of the Court.

COMMON LAW.

Practice and Procedure—Appeal—No security given for respondent's costs on appeal.

Summary: An appeal was noted by the appellant, but he gave no security for respondent's costs on appeal.

Held: That as the noting of the appeal is not complete until both events have happened, viz., delivery of a notice of appeal and the giving of security, the appeal be struck off the roll with costs.

Cases referred to:

Campbell *v.* Mcdonald, 1920, O.P.D., 255.

Mance and Another *v.* Blaetye, 1936, N.A.C. (C.O.), 111.

Statutes, etc. referred to:

Rule 8 (3) of Government Notice No. 2254 of 1928.

Rule 5 (3) of Government Notice No. 2887 of 1951.

Rule 47 (4) of Magistrates' Courts Rules.

Appeal from the Court of the Native Commissioner, Standerton.

Steenkamp (P), delivering the judgment of the Court:—

Judgment was delivered on the 18th September, 1951. The attorney for appellant (plaintiff in the Court below) filed a notice of appeal which is dated the 8th October, 1951, but this notice of appeal was only received by the Clerk of the Court on the 29th October, 1951. No security in terms of the old rules [Government Notice No. 2254 of 1928—Rule 8 (3)], was given. This rule reads as follows:—

> "The party noting an appeal or cross-appeal shall give security to the satisfaction of the Clerk of the Court in the sum of £5 for the payment of costs of the other party."

The Magistrates' Courts Rules published under Act No. 32 of 1944, make the following provision under Rule 47 (4):—

> "An appeal shall be noted by the delivery of notice, and, unless the Court of Appeal shall otherwise direct, by giving security for the respondent's costs of appeal to the amount of £20."

In the case of Campbell *v.* Mcdonald, 1920, O.P.D., 255, it was held that that security need not be given *simul ac semel* with delivery of notice, but the noting of appeal is not complete until both events have happened.

The Native Appeal Court, Cape, in the case of Mance and Another *v.* Blaetye, 1936, N.A.C. (C.O.), 111, struck the appeal off the roll with costs because, when the appeal was noted, the security bond was rejected by the Clerk of the Court, and the appellant's attorney duly notified—the Court holding that the appeal had not been duly noted.

The present case was placed on the roll by the Registrar of this Court, after having been notified by the Clerk of the Court that an appeal had been noted. The Registrar must assume that the notice of appeal is in order and he has no other alternative but to comply with the other directions contained in the rules, but this Court is entitled to hold and to order that when the record is considered by the Appeal Court and it is found that the notice of the appeal is defective, the case be removed from the roll as provisionally prepared by the Registrar.

The new rules, published under Government Notice No. 2887 of 1951 (Native Appeal Court Rules) are even more explicit, and under Rule 5 (3) it is laid down as follows:—

> "The party noting an appeal or cross-appeal shall, when delivering the notice of appeal, give security to the satisfaction of the Clerk of the Native Commissioner's Court in the sum of £7. 10s. for the payment of the costs of the other party."

As there is no proper notice of appeal before this Court it is ordered that the appeal be struck off the roll with costs. This does not prevent appellant from noting a fresh appeal and applying for condonation of the late noting.

O'Connell (Member): I concur.

Bosman (Member): I concur.

For appellant: Adv. I. E. Lubinsky, i/b H. W. Chaim, Esq., Johannesburg.

For respondent: Adv. G. P. C. Kotze, i/b Messrs. Batteson, Curlewis & Els, Devon.

NORTH EASTERN NATIVE APPEAL COURT.

N.A.C. CASE No. 141/51.

NKOSI *v.* ZWANE.

PRETORIA: 18th March, 1952. Before Steenkamp, President; O'Connell and Bosman, Members of the Court.

COMMON LAW.

Practice and Procedure: Chief's Court—No jurisdiction conferred on Chief—Judgment and everything flowing therefrom void ab origine.

Summary: Six head of cattle were attached by the Messengers of a Chief, who has no civil jurisdiction, in pursuance of a judgment of such Chief. Plaintiff (now respondent) sued defendant (now appellant) for the return of the cattle or their value £40.

Held: That as the judgment of the Chief was void *ab origine,* everything that flows therefrom must also be of no legal force.

Statutes referred to:

Section 12 of Act No. 38 of 1927.

Appeal from the Court of the Native Commissioner, Piet Retief.

Bosman (Member), delivering the judgment of the Court:—

In the Native Commissioner's Court at Piet Retief, Ntlanezwe Zwane (plaintiff) sued Bonaparte Nkosi (defendant) for the return of six head of cattle which, according to the summons, defendant wrongfully and unlawfully removed from the possession of plaintiff on the 3rd March, 1949, plus three increase, or their value, £70.

The Assistant Native Commissioner gave judgment for the return of six head of cattle or their value £40.

The defendant now appeals against this judgment on the following grounds:—

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

(2) That the judgment is bad in law in that the Court erred in holding that because the defendant admitted that he had possession of the six head of cattle, he was bound to return them and further that this was a case of spoliation and Mhlaba Dlamini who sent his Police boys to take the cattle should have been sued for the return of the cattle.

According to the evidence in the Court below the appellant avers that he obtained a judgment from Chief Mahlaba against respondent for six head of cattle and to enforce that judgment the cattle of respondent were attached by a Police boy of Chief Mahlaba. Appellant also admits that he took possession of the cattle of which he had already sold five.

According to the evidence, no jurisdiction in terms of Section 12 of the Native Administration Act, 1927, as amended, was at any time conferred upon Chief Mahlaba. This Chief has, therefore no jurisdiction to hear and determine claims by Natives against Natives and any judgment which he, in these circumstances, delivers, cannot be legally enforced.

It is also clear from the evidence that the Police boy referred to actually took the cattle from the possession of respondent, merely to assist appellant in enforcing the judgment of Chief Mahlaba.

As this judgment is void *ab origine,* everything that flows there from must also be of no legal force.

Counsel has advanced the argument that plaintiff should have vindicated his property from the person in possession thereof—there being evidence that defendant had disposed of the cattle to a third person. This contention cannot be upheld, because at the time appellant disposed of the cattle, he was aware of the respondent's claim to them. He was also fully acquainted at that time with the fact that the Chief in question had no jurisdiction to adjudicate on the matter.

The appeal is dismissed with costs.

Steenkamp (P): I concur.

O'Connell (Member): I concur.

For appellant: E. Phillips, Esq., i/b Messrs. Olmesdahl & Olmesdahl, Piet Retief.

For respondent: A. W. Jones, Esq., i/b Messrs. Bennett & Myburgh, Vryheid.

NORTH EASTERN NATIVE APPEAL COURT.

N.A.C. CASE No. 11/52.

LEBOGO *v.* MALAPO AND ANOTHER.

PRETORIA: 19th March, 1952. Before Steenkamp, President; O'Connell and Bosman, Members of the Court.

COMMON LAW.

Practice and Procedure: Application to rescind judgment obtained by fraud—Affidavits by parties contradictory—Allegations to be investigated in the form of viva voce *evidence.*

Summary: Judgment was entered for plaintiffs. Application made by defendant for rescission of that judgment, which he alleges was obtained by fraud, supported by affidavits. Counter-affidavits were filed by plaintiffs. These two sets of affidavits were contradictory.

The Native Commissioner, without hearing *viva voce* evidence on the questions raised, dismissed the application. An appeal was brought against this dismissal of the application.

Held: That as the affidavits lodged by the two parties were contradictory, the record should be returned to the Native Commissioner for the purpose of converting the application into a trial action, and after *viva voce* evidence has been heard, a fresh judgment to be given.

Cases referred to:

Colonial Government *v.* Mowbray Municipality, 11 C.T.R., 605.
Jamalodien *v.* Ajimudien, 1917, C.P.D. 293.
De Marillac *v.* Bruyns, 14, S.C., 317.

Statutes, etc., referred to:

Rule 30 (2) of Government Notice No. 2253 of 1928.
Section 10 (3) of Act No. 38 of 1927.
Section 15 of Act No. 38 of 1927.

Appeal from the Court of the Native Commissioner, Pretoria.

Steenkamp (P), delivering the judgment of the Court:—

On the 25th October, 1951, the Additional Native Commissioner of Pretoria entered judgment in favour of plaintiffs (now respondents) for the immediate restoration of possession and occupancy of the dairy premises at 1170 La Fleur Street, Lady Selborne, District Pretoria, and £103. 12s. damages with costs. The defendant did not note an appeal but on the 12th December, 1951, the Native Commissioner heard an application by the defendant (now appellant) for the rescission of the judgment which had been given against him. In his application he avers that that judgment was obtained by means of fraud.

The applicant filed several affidavits in support of his application. The respondents, who were the judgment creditors in the trial case, filed counter-affidavits. After perusing these affidavits the Native Commissioner dismissed, with costs, the application for a rescission of the judgment.

An appeal has now been noted to this Court against the dismissal of the application. The grounds of appeal are as follows:—

"1. The Additional Native Commissioner should have allowed the application and found that the original judgment delivered on the 25th October, 1951, was obtained by the plaintiffs, now the respondents, on false evidence.

2. Alternatively if it was found that there was a dispute on facts and that the Court could not decide the matter on Affidavit, the matter should have been referred for *viva voce* evidence to be adduced in order that the applicant, now the appellant, could have subpoenaed the Manager of Yskou Dairy to produce his books in order to show the amount of milk deliveries made to the plaintiffs, now the respondents."

There can be no doubt that the affidavits furnished by the applicant and the respondents are contradictory and it would therefore have been most difficult to decide the application unless *viva voce* evidence was adduced and for the respective parties to cross-examine the witnesses on the other side.

According to Rule 30 (2) of the Native Commissioner's Courts, published under Government Notice No. 2253 of 1928, and which were in force at the time the application was heard, it is provided that the Court may rescind or vary any judgment granted by it which was void *ab origine* or was obtained by fraud or by mistake common to the parties. There is no provision in the old Native Commissioners' Courts Rules as to how applications should be brought and one will have to resort to the Common law to find out what the procedure is.

Counsel for respondents has strongly argued that Native Commissioners' Courts are creatures of statute and do not possess jurisdiction beyond that given by the statute and regulations empowered to be published under the statute, and seeing that the regulations, i.e. Rules of Court make no provision for the conversion of an application into a trial, it was not competent to resort to the Common law which might have existed prior to specific rules having been promulgated for the Supreme or Magistrate's Court.

In my opinion such an argument cannot be entertained as, according to Section 10 (2) of the Native Administration Act, No. 38 of 1927, as amended by Section 3 of Act No. 21 of 1943, every Native Commissioner's Court *shall be a Court of law*. This I understand to mean that such a Court must administer the law of the land and unless the Common law of this country has been specifically excluded by a statutory provision, then that Common law, including procedure and practice, with all its complications and antiquity, must be followed irrespective of any complicacy or difficulties encountered in the absence of codification.

Nathan, in his "Common Law of South Africa", Volume IV, pages 2323 to 2326, deals with motions and applications to Court. After describing how applications should be made, the author states:—

> "Where the affidavits of parties on an opposed appliction are contradictory so that the Court cannot decide the issue from such affidavits, the Court will not decide the matter on motion but will order an action to be brought; and the Court may allow the notice of motion to stand for the summons in the action (Colonial Government *v.* Mowbray Municipality, 11, C.T.R., 605)."

I have no reason to doubt, nor has any been advanced, that this was the Common law procedure and practice followed by our Courts before specific rules were promulgated.

Briefly the facts are that the plaintiffs in their original action averred that the Yskou Dairies delivered to them 80 gallons of fresh milk and 30 gallons of sour milk per day at their premises where they carried on the business of a dairy, and which premises they had leased from the defendant. Because the defendant had forcibly ejected them from the premises and they were unable to carry on with the business for a period of 24 days, the loss they sustained amounted to £103. 12s. as assessed by the Court in the original trial.

It is observed that one of their main witnesses in the original trial case was a Mr. Schalk Willem van Heerden, who testified in his evidence that he used to deliver daily 80 gallons of fresh milk and 30 gallons of sour milk at the premises where the plaintiffs carried on their business. Mr. van Heerden was the driver of the delivery lorry used by the Yskou Dairies. Mr. van Heerden, in a subsequent affidavit, when the application was made for a rescission of the judgment, declared on oath that he had made a mistake. There are also filed, on behalf of the applicant, an affidavit by Mr. Quintus Pienaar, who is the Assistant Manager of Yskou Dairy, in which he states that during the period in question, the respondents in the present application were supplied with an average of 20 to 30 gallons of fresh and sour milk daily, with a maximum of 50 gallons during the week and 60 gallons per day on Sundays; and an affidavit by Mr. Pieter P. du Plessis which is to the effect that on the 14th October, 1951, i.e. before the original trial case was heard, one of the plaintiffs per telephone requested him to give evidence to the effect that they used to purchase 80 gallons of milk a day. He refused to give evidence to that effect as it was not the truth. It is noted from the record that neither Mr. du Plessis nor Mr. Pienaar were called as witnesses.

If the affidavits of these two gentlemen are to be believed, then it is manifest that the plaintiffs obtained damages far in excess of what they could have suffered, and the credibility of their evidence in connection with their ejectment from the premises might thereby be affected. There must have been a doubt in the mind of the Additional Native Commissioner as to where the truth lay when he heard the application and he should have ordered that the matter go for trial to enable him to determine whether the judgment obtained by the plaintiffs in the first instance was the correct one, and whether or not fraud had been committed.

It is true, as pointed out by the Additional Native Commissioner, that the Courts are slow to set aside judgments on the ground of perjury unless proved in the clearest possible manner, and that the best proof is a criminal conviction, but the decisions given by the Supreme Court in the case of Jamalodien *v.* Ajimudien, 1917, C.P.D., 293, and De Marillac *v.* Bruyns, 14, S.C. 317, are not so peremptory that before a Court may consider an application for rescission on the ground of fraud, it must have in its possession a conviction for perjury. There are other factors, as is shown in the present application, where one of the main witnesses has admitted that he had mistakenly given false evidence on oath.

Both Counsel have quoted various cases in connection with applications for rescission of judgments obtained by fraud, but it is not necessary to analyse those cases, as I prefer to deal with the present application in terms of the wide powers given to this Court by Section 15 of the Native Administration Act, No. 38 of 1927. We have the power to direct that a case from a Native Commissioner's Court be retried or reheard or to make any such order upon the case *as the interests of justice may require.*

There is sufficient information in the form of the affidavits filed before the Native Commissioner for this Court to direct that the allegations contained therein be more fully investigated in the form of *viva voce* evidence.

In my opinion the appeal should be allowed with costs and the Additional Native Commissioner's decision set aside, and the record returned for the purpose of converting the application into a trial action, and after *viva voce* evidence has been heard, a fresh judgment to be given.

It is realised that the Presiding Additional Native Commissioner might find himself in somewhat a predicament in hearing the case as now directed, after having dismissed the application, and this Court does not wish to lay it down that he must personally try the case. It might therefore be advisable for some other judical officer to undertake this duty.

O'Connell (Member): I concur.

Bosman (Member): I concur.

For appellant: Adv. J. P. O. de Villiers, i/b Messrs. De Beer & Co., Pretoria.

For Respondent: Adv. W. J. Human, i/b Messrs. Edelstein & Veale, Pretoria.

SOUTHERN NATIVE APPEAL COURT.

N.A.C. CASE No. 16/52.

SISHUBA *v.* SISHUBA.

KING WILLIAM'S TOWN: 25th March, 1952. Before Sleigh, Presi-Pike and Davis, Members of the Court.

COMMON LAW.

Native Appeal Case—Estate—Marriage in comunity of property—Devolve according to Roman-Dutch Law.

Summary: D, who was the registered owner of one garden lot and one building lot, was married to his two wives according to Native Custom and died in 1905. In 1933 the family of D agreed that the two lots should go to his four sons, namely L, K, N and J. L and K were then already dead, but it was agreed that their estates should figure as shareholders. It is clear that the lots were not surveyed into four portions. In 1935 L's estate and J's were each paid £100 for their shares, in 1937 N bought K's share for £100, the money being paid to appellant as eldest son of K. The latter was married according to Christian rites and left nine children including respondent. In this action respondent sued appellant for one ninth share of £100 and obtained judgment. Appellant appeals.

Held: That since Kapase was married in community of property his estate must devolve in the manner prescribed by Section 2 (*c*) of G.N. 1664 of 1929, as amended, i.e. according to Roman-Dutch Law.

Cases referred to:

Njobe *v.* Njobe and Dube, N.O. 1950 (4), S.A. (C), 545.

Appeal from the Court of Native Commissioner, Whittlesea.

Sleigh (President) delivering the judgment of the Court:—

It appears from the evidence that the late Dulini Sishuba was the registered owner of Garden Lot No. 236 and Building Lot No. 79, in Hukuwa Location, Queenstown District. Dulini, who was married to his two wives by native custom, died in 1905. Nothing was done to transfer the lots which were still registered in his name in 1933. Apparently, about this time, the lots were the subject of an investigation by a Commissioner appointed in terms of Section 8 (1) of Act No. 38 of 1927. The Commissioner's finding was apparently taken on appeal to the Land Appeal Board. It is not disclosed what the decision of the Board was, but we have it on record that in 1933 the family of Dulini agreed that the two lots should go to four of his sons, namely, Lufele, Kapase, Nzeli and James. Lufele and Kapase were then already dead,

but it was agreed that their estates should figure as share-holders. It is not stated how the land was occupied, but it is clear that the lots were not surveyed into four portions. In 1935 Lufele's estate and James were each paid £100 for their shares, and in 1937 Nzeli bought Kapase's share for £100, the money being paid to appellant who is the eldest son of Kapase. The latter was married twice according to Christian rites and left nine children including respondent.

In this action respondent sued appellant for one-ninth share of the £100 and obtained judgment. From this judgment appellant has appealed on the following grounds:—

1. That defendant acquired a vested right to certain share of Garden Lot No. 235 and Building Lot No. 79, in Hukuwa Location, District Queenstown, such vested right having been transmitted to defendant as the heir of the late Kapase according to native custom.
2. That after defendant had obtained the vested right aforementioned he disposed of his share in the land for the sum of £100, which sum he was entitled to keep in full as the heir of the late Kapase according to Native Custom.
3. That the Native Commissioner erred in holding that European Law applied to the disposal of the said garden Lot No. 235 and Building Lot No. 79, or the shares therein or the money received from the sale thereof.
4. That in any event the plaintiff is barred from recovering the amount claimed as the evidence establishes that his right to do so is prescribed according to law.

At the hearing of the appeal the fourth ground was abandoned and it is in any case untenable as prescription was not pleaded or canvassed in the Court below, and appellant cannot now rely on this defence.

In regard to the other grounds of appeal it is clear that appellant relies on Native law as the basis of his claim to retain the full amount, for he says in his evidence, "I received the share of Kapase because he was dead and I am his eldest son". And in his grounds of appeal he says in effect that Kapase's estate acquired a vested right to a quarter share in the two lots and such right was transmitted to him as heir of Kapase according to Native Custom.

According to the evidence, which is not disputed, Kapase was a registered parliamentary voter and died in 1927. That is before Chapter V of Act No. 38 of 1927 came into operation. It seems to be common cause that he died intestate, that his estate was never reported to the Master and that he was domiciled in Queenstown District when he married his wives according to Christian rites. When these marriages were contracted the only form of marriage in the Cape Province, excluding the Transkeian Territories, was either in community of property or by antenuptial contract. The latter form of marriage is so rare among natives that it is most improbable that they entered into this form of marriage. We are therefore entitled to assume that Kapase was married to his wives in community of property.

There can be no dispute that in terms of the family agreement Kapase's estate acquired a right to a quarter share in the lots and since the estate was not reported to the Master it must, in view of the provisions of Section 23 (11) of Act No. 38 of 1927, devolve as is provided in this Act.

Now it is contended that what the estate acquired was a vested right in quitrent land in a native location, that that right was transmitted to appellant in terms of Section 23 (2) of the Act and that he is therefore entitled to the £100. Assuming for the moment that the right which was an asset in Kapase's estate was governed by Section 23 (2), the fallacy in the contention lies in the fact that the right was transmitted not to appellant alone but to all Kapase's children since their right of inheritance is protected by Section 22 (8) of the Act. [See Njobe *v.* Njobe and Dube, N.O. 1950 (4) S.A. (C) 545.] The fact that at one time appellant was

the sole registered owner of both lots does not alter the position. The other children were entitled to their share of their father's estate even when appellant was the registered owner, and could have pressed their claims against him then for the value of their inheritance even though they could not impeach his title.

The position is that although Kapase's estate had a right to a quarter share in the two lots, that right was never perfected into ownership in the lots because the estate never obtained transfer of its share in the Deeds Office so as to bring the matter within the ambit of Section 23 (2) of Act No. 38 of 1927. The right was an asset in the estate and this asset was by agreement between the four brothers valued at £100, and since Kapase contracted a marriage in community of property the amount must devolve in the manner prescribed by section 2 (c) of Government Notice No. 1664 of 1929 as amended, i.e. according to Roman-Dutch Law.

If I am wrong in assuming that the estate was never reported then it will still devolve as if Kapase was a European since the provisions of Act No. 39 of 1887 (Cape) would apply. The contention that the assets in the estate devolve according to native law consequently fails.

The appeal is dismissed with costs.

For appellant: Mr. Stanford, King William's Town.

For respondent: Mr. Kidson, Queenstown.

SOUTHERN NATIVE APPEAL COURT.

N.A.C. CASE No. 17/52.

KOLOTI *v.* **SOMYO.**

KINGWILLIAMSTOWN: 26th March, 1952. Before Sleigh, President, Pike and Davis, Members of the Court.

LAW OF PROCEDURE.

Native Appeal Case—Estate—Practice and Procedure—Native Commissioner has no jurisdiction to hold inquiry in terms of Section 3 (3) if in respect of an estate devolving according to Roman-Dutch Law—Devolution is governed by Section 2 of G.N. 1664 of 1929—Prescription does not operate if estate devolves according to Native custom.

Summary: This is an appeal against the finding of the Assistant Native Commissioner in regard to an inquiry held in terms of Section 3 (3) of G.N. No. 1664 of 1929. The case concerns two perpetual quitrent garden lots, situate in Ntselemanzi Native Village (Lovedale) within the municipal area of Alice, and registered in the names of Nomenene and Seti Qololo respectively.

Held (1): That as the estates were not reported to the Master the devolution of the estates is governed by Section 2 of G.N. No. 1664 of 1929.

Held (2): That as Nomenene was married according to Native custom her estate would devolve on her eldest son Seti and it follows that Seti's heir or heirs are entitled to both lots.

Held (3): That in order to determine the person or persons entitled to succeed to Seti's estate, it is essential to know whether he was married to his wife according to Christian rites or according to Native custom, and there is no satisfactory evidence on this point.

Held (4): That if Seti contracted a Christian marriage his estate would devolve according to Roman-Dutch Law, prescription would operate and the Native Commissioner would have no jurisdiction to hold the inquiry in terms of Section 3 (3) in so far as his estate is concerned. If he contracted a customary union his estate would devolve according to Native custom and prescription would not apply.

Case referred to:

Lequoa *v.* Sipamla 1944 N.A.C. (C. & O.) 85.

Appeal from the Court of Native Commissioner, Victoria East.

Sleigh (President) delivering the Judgment of the Court:—

The dispute in this case concerns the devolution of two perpetual quitrent garden lots, each two morgen in extent, situate in Ntselemanzi Native Village (Lovedale), within the Municipal area of Alice, Victoria East District. The lots are:—

(*a*) Garden Lot No. 26 granted to Nomenene on 23/7/1858, and

(*b*) Garden Lot No. 7 granted to Seti Rololo on 1/11/1875.

The grants appear to have been made under the Cathcart Proclamation of the 6th August, 1813.

There are two claimants to the lots, namely Petwell Koloti on behalf of a minor, Morris Koloti and Sinah Somyo.

The Assistant Native Commissioner held an inquiry in terms of Section 3 (3) of G.N. No. 1664 of 1929 and held—

(1) that Temba Puru is heir to Garden Lot No. 26, and
(2) that Fikile Mancapa is heir to Garden Lot No. 7 by reason of acquisitive prescription.

Although the Native Commissioner rejected the claims of both claimants only Petwell Koloti has appealed.

The lots are still registered in the names of the original grantees who died more than 50 years ago. We are therefore entitled to assume that the estates of the grantees were never reported to the Master of the Supreme Court. If they had been so reported the lots would have been transferred to the rightful heirs long ago. If we are correct in our assumption then, in view of the provisions of Section 23 (11) of Act No. 38 of 1927, the devolution of the estates is governed by Section 2 of G.N. No. 1664 of 1929 as amended. It should be noted that the lots being immovable property in a Municipal area, do not fall within the purview of sub-sections (1) and (2) of Section 23 of the Act.

It is common cause that Nomenene and Seti were related but the witnesses disagree as to how they were related. Petwell and his witnesses maintain that they were mother and son, whereas Sinah and her witnesses contend that they were sister and brother. The Native Commissioner accepted the latter contention and awarded Nomenene's lot to Temba Puru, the great grandson of Puru who, he found, married Nomenene; and Seti's lot to Fikile Mencapa, the son of Willie, the son of Maria who was the daughter of Seti, on the ground that Willie had acquired the lot by acquisitive prescription.

None of the witnesses is able to give first-hand evidence on the point whether Seti was the brother or son of Nomene. It is clear that they rely on what they were told. The probabilities, however, indicate that they were mother and son. It is clear that there was a great disparity in their ages. Nomenene was obviously already a widow when she was granted the Lot No. 26 in 1858. Lettie Maqoma who was born in 1872, says that Nomenene was a very old woman when she died during the Ncayicibi war (1877-78), i.e. 20 years after she acquired the lot. She must therefore have been an elderly woman in 1858. Seti died about 1897-8 and even if he died at a very great age as Nomenene did, he must have been born about 20 years after Nomenene. Moreover, it is improbable, if they were sister and brother, that a lot would have been granted to her 17 years before one was allotted to her brother. In our opinion the probabilities support Petwell's contention, and her estate would therefore devolve on her eldest son, Seti, and it follows that Seti's heir or heirs are entitled to both lots.

The next question to be decided is who is Seti's heir. To determine this it is essential to know how he was married to his wife, Nyilinga. Although David Maqoma says that Seti was married according to Native Custom, it is clear from his evidence that he was only about six years of age when Lot No. 7 was allotted to Seti in 1875 and the probabilities are that Seti was then already married. David's evidence in this respect is therefore inconclusive. He goes on to say that Seti was a strong Church man and an elder of the Church. This is supported by other witnesses. Since he was an elder of the Church it is likely that he contracted a Christian marriage before he was appointed an elder, although it is possible that he was, prior to this, married according to Native Custom. There is no evidence that the Church registers were searched in order to determine whether Seti had contracted a Christian marriage. It therefore becomes necessary to return the proceedings to the Assistant Native Commissioner for inquiry into this aspect of the case. If it is found that Seti was married according to Christian rites then the Native Commissioner would have no jurisdiction to hold an inquiry in terms of Section 3 (3) in so far as Seti's estate in concerned. His estate would devolve according to Roman-Dutch Law and prescription would operate if the circumstances justify it.

If no record of Seti's marriage can be traced in the Church records then it may be assumed that he was married according to Native Custom. His estate will then devolve according to Native law and prescription would not operate, since this principle is unknow to, and not applicable to actions arising out of Native Law and Custom [see Lequoa *v.* Sipamla 1944 N.A.C. (C. & O.) 85, and Section 11 (4) of Act No. 18 of 1943].

As is have indicated the Native Commissioner has awarded the lots to two persons who were not claimants and are not parties in this appeal. It is possible that they may lay no claim to the lots, but they are entitled to be heard. Then there are others who may have a good claim, especially if Seti's estate devolves according to Roman-Dutch Law.

In the circumstances the appeal will be allowed, the findings of the Native Commissioner are set aside and the record of the proceedings is returned to him to enable Temba Puru, Fikile Mancapa and any other person to lodge their claims, if any, and to deliver a fresh finding. There will be no order as to costs in this Court as Sinah has not opposed the appeal.

For Appellant: Mr. R. H. Randell, King William's Town.

For Respondent: In default.

SOUTHERN NATIVE APPEAL COURT.

N.A.C. CASE No. 18/52.

KWINANA AND ANOTHER *v.* LENGESI AND OTHERS.

KING WILLIAM'S TOWN: 28th March, 1952. Before Sleigh, President; Pike and Davis, Members of the Court.

COMMON LAW.

Native Appeal Case—Defamation—The words as a whole are defamatory per se *and were understood in a defamatory sense—The defence of fair comment must fail—Damages—Appellants awarded* £80.

Summary: Appellants sued respondents for £200 as damages for defamation alleging that in a card printed, at the order of respondents, defendants wrongfully and unlawfully published a malicious and defamatory statement concerning appellants. That the words were understood to mean that appellants were traitors to their people and that they commit-

ted a breach of trust and acted *mala fide* against the interest of the people. Defendants deny that the words complained of are defamatory and that they were understood to mean any of the imputations alleged. The Native Commissioner held that the words were not defamatory *per se* and appellants appealed.

Held:

(1) That the words complained of are as a whole defamatory *per se*.

(2) That according to the attitude adopted by the mass of people it is reasonable to conclude that at least some of them understood the words in a defamatory sense.

(3) That the defence of fair comment must fail since the comment is based on untrue facts.

(4) That nominal damages will not console the hurt done to appellants.

The appeal succeeds.

Cases referred to:

New Age Press, Ltd. & Ano. *v.* O'Keefe, 1947 (1) S.A.L.R. at page 315.

Crawford *v.* Albu, 1917, A.D. page 102.

Appeal from the Court of Native Commissioner, East London.

Pike (Member), delivering the judgment of the Court:—

Appellants, who were plaintiffs in the Court below, sued respondents for £200 for defamation. In the particulars of claim it is alleged that appellants were formerley Members of the Joint Location Advisory Board of East London and that respondents were officials of the Congress Youth League; that in November, 1950 and at a meeting of the Board at which appellants were present, a proposal by the Housing and Non-European Affairs Committee of the East London Municipality to impose a lodger free of 2s. per lodger on all lodgers residing in the Native Locations was discussed and that appellants voted against the proposal. It is further alleged in the particulars as follows:—

"4. During or about April, 1951, and in a card printed by the *East London Daily Dispatch,* Limited, at the order of defendants, defendants wrongfully and unlawfully published the following malicious and defamatory statement of and concerning plaintiffs in the Xosa language:—

CONGRESS YOUTH LEAGUE.

AZIBATALWA I 2s.
I COUNCIL MAYIZIBIZE I 2s.
KU KWINANA (B.A.)—MNGQIKANA
Aboyelisele inkedama Zase Africa

Mayibuye, Mayibuye i Africa.

A true translation whereof in the English language is:

CONGRESS YOUTH LEAGUE.

2s. not being paid
The Council must demand the 2s. from
Kwinana (B.A.)—Mngqikana, who have
betrayed the orphans of Africa.

Africa must come to being.

5. By the said words set out in paragraph four, defendants meant and were understood to mean that plaintiffs were traitors to their peolpe, that they committed a breach of trust and acted *mala fide* against the interests of their people."

To these averments respondents pleaded as follows:—

"4. (*a*) Defendants deny that the words complained of are defamatory and/or that they bear the meaning alleged in plaintiff's translation of them into English and put plaintiff to the proof thereof.

(*b*) Defendants deny that the said words mean and/or were understood to mean any of the imputations alleged or that if any such imputation was conveyed, that it was defamatory of plaintiffs and put plaintiffs to the proof thereof."

The Assistant Native Commissioner held that the words complained of are not defamatory *per se* and that he was unable to read the words the *innuendo* set out in the particulars of claim. He entered judgment for respondents with costs and appellants have appealed on the following grounds:—

1. That the Magistrate erred in finding that the words contained in the card published by the defendants were not *per se* defamatory of the plaintiffs.

2. That even if the said words are not *per se* defamatory the Magistrate erred in finding that they did not bear a secondary meaning which was defamatory, in law, of the plaintiffs.

The first question for decision is the correct meaning of the words "abeyelisele" and "inkedama" appearing on the card. The witnesses are all in substantial agreement with the literal translation but differ in regard to the meaning attached to the words by the ordinary Xosa speaking native. The literal translation of the word "abeyelisele" viz.; "to cause to sink into a hole, river, snare or temptation" conveys no sense in relation to the context of the words on the card. It therefore becomes necessary to examine the evidence of the various witnesses, not for the purpose of finding out whether they placed a defamatory meaning upon their interpretations, but to ascertain the correct English meaning of the words.

First appellant, who is a teacher and holds the degree of Bachelor of Arts, says that the word "abeyelisele" means "to betray" and has the same meaning as "ukungcatsha" "to betray" and that read in the context on the card it does not mean "to cause to sink, to let down". In regard to the word "inkedama", literally translated as "orphans", he states that it means "every African in this country who is hopeless, helpless and down and out and who are looking to me for guidance".

Gibson Maneli, who gave evidence for appellants and who was a teacher and has been an attorney's interpreter for the past 25 years, says that "abeyelisele" is a very strong word; that it is used when two people come to a krantz or deep waters and one pushes the other in to be drowned or pushes from behind over the krantz. He says the words "elelisele" and "ukungcatshe" mean the same thing and that the former word, as used in the context, means "betray" because it must be read in conjunction with the other words on the card and not by itself.

The only witness called by the defence was Davidson Jabavu, a retired professor in bantu languages. It is clear that both he and Maneli have no interest in this case. In his evidence in chief he translates the card "The 2s. are not being paid. The Council should require them from Kwinana B.A. and Mngqikana who have caused the orphans of Africa to sink down into something like a hole or mud or water. Let Africa come back". He says that the word "abeyelisele" implies that the thing or person sinks out of sight. He denies that the word means betray and says that the word "ukungcatsha" is a much stronger word meaning betray. In cross-examination he admits that the Xosa language has developed since Kropf's dictionary was published in 1916 and states that the card as a whole means "let the Council demand the 2s. from these men who have done down the poor of Africa who ought to be pitied". He stated that he fully understood the implication of the words "done down" but goes on to say that these words do not impute dishonesty or improper conduct. Continuing he states that the words convey 'something less than what Judas did to our Lord'. I would say that the words on the card are unpleasant".

The Assistant Native Commissioner accepted the literal translation given by Professor Jabavu in his evidence in chief but in our opinion having regard to the evidence as a whole, the correct translation is: "The 2s. will not be paid. Let the Council demand the fee from Kwinana B.A. and Mngqikana who have betrayed the poor of Africa who are helpless and ought to be pitied. Let Africa come back."

The test for determining whether the above statement is defamatory or not is whether under the circumstances in which the statement is published, reasonable men to whom the publication is made, would be likely to understand it in a defamatory sense (The Law of Delict by McKerron, 3rd edition, page 206).

The word "betray", according to the various meanings ascribed in the dictionary, may be used in an innocent or defamatory sense. The fact that a word can have an innocent meaning does not necessary preclude it from having defamatory meaning. The word cannot be divorced from its context. The document must be taken as a whole. (The Law of Defamation in South Africa, by Nathan, page 34.) Among the meanings of the word furnished by Webster's dictionary is the following:—

> "To prove faithless or treacherous to, as to a trust or one who trusts; to be false or recreant to, to fail or desert in a moment of need; as to betray a friend or cause."

The Oxford Dictionary gives among others, the following meaning:—

> "To be or prove false to (a trust or him who trusts one) to be disloyal to, to disappoint the hopes and expectations of.
>
> To prove false, to let go weakly or basely."

Reading the word betray with the other words on the card, i.e. "Let the Council demand the fee from Kwinana and Mngqikana who have" and "the poor of Africa who are helpless and ought to be pitied", we are of opinion that the words as a whole are defamatory *per se*. [See New Age Press, Ltd., & Ano. *v.* O'Keefe, 1947 (1) S.A.L.R., page 315].

Having come to this conclusion it is unnecessary to decide whether the words bear the *innuendo* assigned to them in paragraph 5 of appellant's declaration. But in our opinion the words are capable of such a meaning. The appellants were elected as Members of the Advisory Board to represent the interests of the inhabitants of the municipal locations.

The evidence shows that the Municipality decided to impose a lodger's fee and to place the matter before the Advisory Board for its comments. The appellants voted against the imposition of the fee. Professor Jabavu in his evidence says that the words on the card conveyed that the appellants had done down the people and that they were responsible for the imposition of the fee. The allegation that appellants had actually imposed the fee, thereby having done down the people they were elected to protect, imputes a dishonest breach of trust and therefore, that they acted *mala fide*.

The next point to be considered is whether the persons to whom the words were published understood them in the sence set out above. The evidence on this point is overwhelming. First appellant says it would be understood from the words on the card that he had been guilty of a breach of trust, that he had done something against the interests of the people and that he had done so in bad faith. This is supported by the uncontradicted facts that the children at the school where he teaches, shouted "traitor" at him and that at public meetings which he attended, the public would not allow him to speak as they accused him of being a traitor. Maneli, who, be it remembered, is a completely impartial witness, states that the words conveyed to him that the appellants are a danger to the people and that they had done something to oppress the people. Jabavu, who is also an impartial witness, called by the defence, states that the effect of these words would lessen the esteem in which a public man is held, to some degree. It is not disputed in

evidence that the respondents distributed these cards to some 4,000 people who were demonstrating against the imposition of this fee. In view of the attitude taken up by this mass of people it is reasonable to conclude that at least some of them understood the words in the defamatory sense indicated. Moreover, there is no evidence to the contrary.

The alternative defence of fair comment raised by respondents, and which was not dealt with in the Court below, remains to be considered, Council for both parties having requested this Court to dispose of the issue. It will be convenient to set out the relevant pleadings in this connection. Paragraph 3 of the appellant's declaration reads as follows:—

> " During or about November, 1950, and at a meeting of the said Joint Location Advisory Board at which plaintiffs were present a proposal of the Housing and Non-European Affairs Committee of the East London Municipality to impose a lodger's fee of 2s. per lodger on all lodgers residing in the Native locations was discussed. Plaintiffs voted against the imposition of such a lodger's fee."

Respondents replied in their plea—

> " *Ad para* 3.—Save that defendants have no knowledge that plaintiffs voted against the imposition of the said lodger's fee and put plaintiffs to the proof thereof the allegations in this paragraph are admitted."

and in paragraph 4 (*c*) stated:—

> " Alternatively and in any event defendants plead and state that the abovesaid statement was a fair and *bona fide* comment on a matter of public interest, namely, the discussions and proceedings of the meeting referred to in para. 3 of plaintiffs' summons and the subsequent imposition by the East London Municipality of a lodger's fee of 2s. per lodger and the storm of public protest, agitation, controversy and public demonstration, in or about April, 1951, which followed the announcement of the abovesaid imposition."

There are three essentials of this defence as laid down in Crawford *v.* Albu, 1917, A.D., page 102.

(*a*) The statement must appear to be recognisable to the ordinary reasonable man as comment and not as a statement of fact.

(*b*) The comment must be fair.

(*c*) The facts commented upon must be truly stated and must be matters of public interest.

In the above case Innes, C.J. said " then the superstructure of comment must rest upon a firm foundation and it must be clearly distinguishable from that foundation. It must relate to a matter of public interest and it must be based upon facts expressly stated or clearly indicated and admitted or proved to be true. There can be no fair comment upon facts which are not true ".

In the present action the respondents have failed to state expressly or to clearly indicate, in their plea, the facts upon which the publication was fair comment. On the contrary, the plea states that respondents have no knowledge that appellants voted against the imposition of the lodger's fee, yet the publication of the defamatory words conveyed to the public that appellants were responsible for the imposition of this fee and this has been proved to be untrue. This defence must therefore fail.

It remains for the Court to assess the damages to be awarded to appellants. They are both responsible members of the native community and hold positions above that of the average urban native. Respondents are all office bearers of the Congress Youth League and, it would seem, are not without influence among the native community. The publication was made at a public gathering in the municipal location at which over 4,000 persons were present and at other public places. The circumstances indicate therefore that nominal damages will not adequately console the hurst done to the appellants. Taking all the circumstances into account the appellants are awarded damages in an amount of £80.

Argument was heard on the 24th March, 1952, and judgment reserved until today. Mr. Stanford who represents Council for appellants applies for costs under items 4 and 5 of the tariff provided in Government Notice No. 2887 of the 9th November, 1951, to be increased to £4. 4s. each owing to the length of the record and the legal issues involved. Counsel for respondents is not represented today.

The application is granted.

The appeal is allowed with costs and the judgment of the Court below is altered to one for plaintiffs for the sum of £80 and costs.

For Appellant: Mr. L. Kaplan, East London.

For Respondent: Miss Advocate E. Egan, instructed by Mr. W. M. Tsotsi, Lady Frere.