SELECTED DECISIONS

OF THE

NATIVE APPEAL COURT

(North-Eastern Division)

VOLUME I

PART XIII

THE GOVERNMENT PRINTER PRETORIA

G.P.-S.6094—1951-? -500.

NATURELLE-APPÈLHOF.

SAAK No. 29 VAN 1951.

HENDRIK MUTANDABA (Appellant) *v.* ALFRED ADAM MORENWA (Respondent).

N.A.H. SAAK No. 33/1951.

PRETORIA: Maandag, 4 Junie 1951. Voor Steenkamp, President. Balk, Permanente Lid en Ahrens, Lid van die Hof (Noordoostelike Afdeling).

Naturellereg en Praktyk en Prosedure—Bewaring van kinders—Sitasie van partye—Verklaring vereis deur artikel twee-en-twintig (1) *van Naturelle-administrasie Wet,* 1927. *nie afgelê nie—Huwelik word as geldig beskou behoudens bewys dat dit deur Naturelle-egskeidingshof nietig verklaar is.*

Beslis: Dat in 'n aksie teen die vader van 'n vrou vir haar terugkeer na haar man, so nie, vir die ontbinding van die betrokke gebruiklike verbinding en die terugkeer van die kinders, waar hulle in haar bewaring en nie in dié van haar vader is nie, moet sy ook as verweerderes siteer word;

Verder: Dat alhoewel eiser erken het dat hy nie die verklaring vereis deur artikel *twee-en-twintig* (1) van die Naturelle-administrasie Wet, 1927, afgelê het nie toe hy met 'n ander vrou die huwelik gesluit het, behoort die huwelik as geldig beskou te word behoudens bewys dat dit deur die Naturelle-egskeidingshof nietig verklaar is.

Appèl van die Hof van die Naturellekommissaris, Warmbad.

Balk (Permanente Lid), wat die uitspraak van die Hof lewer:—

Gedurende 1947 het eiser (respondent) in 'n gebruiklike verbinding getree met Onika, dogter van verweerder (appellant).

Uit hierdie verbinding is daar twee kinders gebore, altwee seuns, ouderdom 6 jaar en 3½ jaar.

Gedurende Oktober 1950 het eiser in die huwelik met 'n ander vrou getree.

Dié gedeelte van die uitspraak van die Naturellekommissaris waarteen appelleer word betref die terugkeer aan eiser van gemelde kinders.

Die advokaat wat namens appellant (verweerder) opgetree het, het daarop gewys dat eiser volgens sy getuienis nie die verklaring wat vereis word deur artikel *twee-en-twintig* (1) van die Naturelle-administrasie Wet (No. 38 van 1927), afgelê het nie toe hy met die ander vrou die huwelik gesluit het en dat om daardie rede was die huwelik nietig *ab initio*. Alhoewel eiser erken het dat hy gemelde verklaring nie gemaak het nie, is hierdie Hof verplig om die huwelik as geldig te beskou aangesien daar geen bewys bestaan dat dit deur die Naturelle-egskeidingshof nietig verklaar is nie (Maasdorp, Deel 1, Sewende Uitgaaf, bladsye 88/89).

Uit die getuienis is dit duidelik dat verweerder nie volgens Naturellereg die voog van gemelde kinders is nie asook dat hulle nie in sy bewaring is nie maar in dié van sy dogter Onika. Om daardie redes en ook soos vasgestel in Mguli Nkosi *teen* Caiphas Ngubo (1949, Naturelle-appèlhof, Noordoostelike Afdeling, bladsy 87), moes die moeder van die kinders ook as verweerder genoem gewees het in verband met die toesig en beheer oor hulle.

In hierdie saak is dit nie gedoen nie. Gevolglik slaag die appèl met koste en die betrokke gedeelte van die Naturellekommissaris se uitspraak word as volg verander: „Absolusie van die instansie met koste op eis Nr. 3".

Namens Appellant: Adv. Rabe, in opdrag van Reitz, Joubert en Van der Merwe, van Pretoria.

Namens Respondent: Mnr. Botma, van Resnick en Botma, Pretoria.

Sake waarna verwys word:—

Mguli Nkosi *v.* Caiphas Ngubo, 1949, N.A.H. (N.E.), 87.

Maasdorp, Deel 1, Sewende Uitgaaf, bladsye 88/89.

Wette, Ordonnansies en Proklamasies, ens., waarna verwys word:—

Artikel *twee-en-twintig* (1) van die Naturelle-administrasie Wet, Wet No. 38 van 1927.

CASE No. 30 OF 1951.

MBALI MASOKA (Appellant) *v.* BANGIMPI MCUNU (Respondent).

N.A.C. CASE No. 14/1951.

PIETERMARITZBURG: Monday, 9th July, 1951. Before Steenkamp, President. Balk and Oftebro, Members of the Court (North-Eastern Division).

Native Law and Custom and practice, procedure and evidence—Order for return of lobolo cattle on decree of divorce at instance of wife—Interpretation of section 83 *of Natal Code of Native Law—Citing of parties—Admissibility in evidence of judgment in prior proceedings not between same parties—Estoppel*—Quantum *of lobolo cattle returnable on divorce—Recording of evidence.*

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 and that section 83 (*c*) of the said Code has no application in such cases.

Held further: That it is not necessary to cite the wife as a party in an action by her husband against her father solely for the return of lobolo cattle consequent on a decree of divorce.

Held further: That the judgment in the divorce proceedings in which the father of the wife is not cited as a party is not admissible in evidence in a subsequent action by the husband of such wife against her father as proof that such husband had wilfully deserted his wife in the absence of an admission by such husband in the divorce proceedings that he had done so and that such husband is in that event not estopped by the divorce proceedings from pleading and proving in the subsequent action that his wife had in fact deserted him.

Held further: That in such case the number of lobolo cattle, if any, to be returned by the father to the husband rests upon the issue whether the husband had wilfully deserted his wife or she had wilfully deserted him.

Addendum: In recording the evidence the full names of the parties followed by the capacities in which they appeared must be set out.

Appeal from the Court of the Native Commissioner, Weenen.

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

The facts of this case are that in 1947, defendant (present respondent) contracted a customary union with plaintiff's daughter, Nkehlana, the lobolo agreed upon for her being ten head of cattle plus the Ngqutu beast. That beast was actually delivered to plaintiff (present appellant). Six head of the lobolo cattle proper were pointed out to the latter but not handed over to him. After one child had been born of the union, Nkehlana instituted divorce proceedings against defendant in the Native Commissioner's Court on the ground of malicious desertion. In this action she was duly assisted by plaintiff, who was not other-

wise a party thereto, and on the 19th July, 1950, she obtained judgment by default in the following terms:—

> "Divorce granted with costs. It is ordered that the woman Kehlana remain at the kraal of her guardian Mbali Masoka (plaintiff) until re-marriage. That the child Langudu remain with its mother until it reaches the age of 10 years. No order as to return of cattle."

Defendant applied for rescission of this judgment which was refused. He did not appeal against this refusal so that that judgment stands.

On the 13th February, 1950, plaintiff sued defendant in the Native Commissioner's Court for ten head of cattle, being the lobolo agreed upon for Nkehlana. This action (hereinafter referred to as "the present action") was heard on the 17th January, 1951. At that time the six lobolo cattle referred to above, were still at the kraal at which defendant resided. A few days before the hearing of the present action plaintiff gave his daughter, Nkehlana, in re-marriage to one Nganda-Ganda, from whom he received eight head of cattle as lobolo for her.

Defendant resisted plaintiff's claim in the present action on the ground that no order had been made in the divorce proceedings referred to above as to the return of lobolo cattle, that Nkehlana had deserted him, was young and marriageable, and that plaintiff was entitled to receive a substantial lobolo for her. Defendant tendered one beast in respect of the child born of his union with Nkehlana and another beast for "her services during the subsistence of their union". Judgment was entered on the 26th January, 1951, for plaintiff for two head of cattle with costs up to the time that defendant tendered the two head of cattle. Costs after that to be paid by Plaintiff. It is against this judgment that the present appeal has been noted by plaintiff on the following grounds:—

"1. That the Native Commissioner erred in considering the question of the return of cattle to the defendant as this was not in issue in the present action.

2. That the decision in Case No. 16/50 finally disposed of any claim which the defendant might have to the return of cattle. In view of the provisions of section 83 (*c*) of the Code it was imperative that the return of cattle should be dealt with in a divorce action. The matter was canvassed and dealt with in the said case No. 16/50 and the order made can only mean the forfeiture by the defendant of his lobolo cattle.

3. That in any event a judgment for only two head of cattle was in effect a judgment for the plaintiff to return eight head of lobolo cattle to the defendant which in the circumstances was excessive.

4. That the woman Nkehlana Mcunu not being a party to the action the question of the number of cattle to be returned to her husband should not have been considered.

The Native Commissioner's reasons for his finding read as follows:—

> "The judgment in the divorce proceedings No. 16/50 did not finally dispose of the lobola question in that it did not comply with the imperative requirement of section 83 (*c*) of the Code as no order in regard to the return of the cattle was made. It merely states "no order *as to* return of cattle". Had it stated that no order "in regard to" or "for" return of cattle one might still have argued that it meant that cattle already delivered were not to be returned, but the way it is worded can only be interpreted to mean that no order was made leaving the position the same as if nothing at all had been written in regard to return of cattle.
>
> In this case six head of cattle were delivered to plaintiff although he never actually removed them from defendant's kraal. If in this case the number of cattle to be returned had been considered one would have been deducted for the

child born to the union *vide* page 83, Staffords Law, as practised in S.A. In view of the the very short period during which the parties lived together it is doubtful whether any more would have been deducted but as two were tendered—the second one for services—the Court awarded plaintiff two. That is if defendant had paid all the cattle and the question of the number to be returned had been considered eight would have been ordered to be returned *vide* also page 251/2 of Whitfields *S.A. Native Law*. It might be argued that as six were delivered the Court should have given judgment for four, leaving defendant again in another action to sue for the return of the four animals but defendant's plea really amounted in effect to one of set-off and to have held that he should have recourse to yet another action would unnecessarily have duplicated litigation with its attendant costs. The final effect of this judgment is that plaintiff received the full number of 10 head of cattle as lobola for his daughter as, according to his own evidence, he received eight head for her from the man she married after her divorce from defendant.

In regard to paragraph 3, no order for the return of 8 head of cattle was made as eight were not paid and an order for the return of more cattle than were paid could not be made.

In regard to paragraph 4, order for no return of cattle to Nkehlana Mcunu's husband was made."

The portion of the judgment in the divorce proceedings relating to the return of cattle, viz. "No order as to return of cattle" appears to have been correctly construed by the Native Commissioner in his reasons for judgment quoted above as meaning that the Court gave no direction regarding the return of any of the lobolo cattle, regard being had to the ordinary meaning of the words forming that portion of the judgment in question. Even assuming that it was intended thereby to direct that no lobolo cattle were returnable by plaintiff to defendant on the dissolution of the latter's customary union with Nkehlana, the position in so far as the present action is concerned remains the same as it was not competent for the Court to have made such an order in that the plaintiff was not a party to the divorce proceedings as he appeared therein solely for the purpose of assisting his daughter, Nkehlana, and the question as to the number of lobolo cattle returnable, if any, by plaintiff to defendant on the dissolution of the customary union in question was therefore not in issue in the divorce proceedings. That this is the position is clear from the fact that any judgment in favour of plaintiff in the divorce proceedings directing that no lobolo cattle were returnable by him to defendant, would not be binding on the latter in that in any subsequent action by him against plaintiff for the return of any such cattle, the defence of *res judicata* could not be invoked. This position is not affected by the provisions of section 83 of the Natal Code of Native Law (hereinafter referred to as the Code) in that, whilst those provisions are admittedly peremptory, their application must be confined to cases in which the matters dealt with in the provisions in question are in issue, if absurdity is to be avoided; for example, though that section, *inter alia,* provides that "When granting any decree of divorce, the Court shall give clean and explicit orders and directions as to the custody of the young children of the union" obviously no such order could be made in the event of there being no such children; similarly should no claim arise in the divorce proceedings regarding the number of lobolo cattle returnable, if any, on the dissolution of the customary union, as needs must be the case where the father or "protector" of the wife is not cited as a party thereto, that matter would likewise not be in issue and an order by the Court thereanent would equally have no application, *vide* Mhlangano Xulu *v.* Gertrude, 1947, N.A.C. (N. & T.), 32. Whilst it is true that it is foreign to the native conception of divorce for the question of the return of lobolo cattle not to be

decided *pari passu* with the dissolution of the customary union, since in Native Law the return of lobolo cattle automatically dissolves such union, that law has been codified in Natal and as it is clear from the relative provisions of the Code (sections 78 to 83, inclusive), that the position is as set out above in that Province, Native Law in that respect must be regarded as having been modified to the extent indicated in so far as Natal is concerned.

It follows that the matter of the number of the lobolo cattle returnable, if any, by plaintiff to defendant on the dissolution of the latter's customary union with Nkehlana, was not disposed of in the divorce proceedings and as defendant obviously had the right in the present action to set-off any such cattle against the lobolo cattle owing by him to plaintiff for Nkehlana, the question of the return of the lobolo cattle, if any, is in issue in the present action. Accordingly the first and second grounds of appeal fail.

The fourth ground of appeal also fails since the matter of the number of lobolo cattle returnable, if any, on the dissolution of the customary union in question is one entirely between plaintiff and defendant.

As regards the remaining ground of appeal, which is based on the number of the lobolo cattle in question returnable, if any, by plaintiff to defendant, it seems clear from the summons in the present action and from plaintiff's reply to defendant's plea therein, that plaintiff relied on the portion of the judgment in the divorce proceedings "No order as to return of cattle" (the record of which was put in at the hearing of the present action) as absolving him from returning any of the lobolo cattle in question to defendant. For the reasons given above, it was not competent for him to rely thereon. Moreover the judgment in the divorce proceedings was not admissible in the present action as proof that defendant had wilfully deserted Nkehlana in the absence of an admission by defendant that he had done so, *vide* Hollington *v.* Hewthorn & Co., Ltd. (1943), 2 ALL E.R., 35, wherein it was held that in a civil trial the Court should come to a decision on the facts before it without regard to the proceedings before another tribunal. Not only was there no admission by defendant in the divorce proceedings that he had deserted Nkehlana, but in the present action, he both pleaded and stated in his evidence that she had deserted him; and he is not estopped by the divorce proceedings from so doing, *vide* Maartens Chabane *v.* Mascabe Sietse, 1946, N.A.C. (C. and O.F.S.), 53. The Native Commissioner gave no finding on this issue and it does not appear to have been properly canvassed in the Court *a quo*. It is essential that he should do so for a just decision of the present action since the number of lobolo cattle returnable, if any, by plaintiff to defendant which may be set off by the latter against the ten lobolo cattle owing by him to plaintiff rests upon this issue, i.e. whether defendant wilfully deserted Nkehlana or she him, *vide* Mkohliswa Mkize *v.* Nokuwega Mkize, 1941, N.A.C. (N. & T.), 125.

In the result the judgment of the Native Commissioner in the present action is set aside and the record is returned to him for such further evidence as either party may desire to adduce on the point at issue and a fresh judgment thereupon. Costs of appeal and costs in the Court below to be costs in the cause.

It is observed that the Native Commissioner in taking the evidence in the present action has recorded "Plaintiff s.s." and "Defendant who s.s." instead of the full names of the parties followed by the capacities in which they appeared, thus "Mbali Masoku duly sworn states: I am plaintiff in this case". In this connection attention is invited to the instruction contained in the penultimate paragraph of the judgment in Kazamula Malungane *v.* John Khoza, 1 N.A.C. (N.E.), 81, which must be strictly complied with.

For Appellant: Adv. Seymour, instructed by Milne Buchan of Weenen.

For Respondent: Adv. Shearer.

Cases referred to:—

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

Hollington *v.* Hewthorn & Co. Ltd. (1943), 2 ALL E.R., 35.

Maartens Chabane *v.* Mascabe Sietse, 1946, N.A.C. (C. and O.F.S.), 53.

Mkohliswa Mkize *v.* Nokuwega Mkize, 1941, N.A.C. (N. & T.), 125.

Kazamula Malungane *v.* John Khoza, 1 N.A.C. (N.E.), 81.

Statutes, etc., referred to:—

Natal Code of Native Law, sections 78 to 83, inclusive.

CASE No. 31 OF 1951.

ELIAS BHULOSE (Appellant) *v.* **MAKHOSINI NZIMANDE (Respondent).**

N.A.C. CASE No. 55/1951.

PIETERMARITZBURG: Tuesday, 10th July, 1951. Before Steenkamp, President. Balk and Oftebro, Members of the Court (North-Eastern Division).

Practice and Procedure and Native Law and Custom—Interpleader action—Onus of proof—Cattle in possession of judgment debtor—Ownership of lobolo cattle—Proof of essentials of customary union postulate such union and not a marriage in absence of other evidence which contemplated—Additional evidence available.

Held: That in an interpleader action where the stock was attached in possession of the judgment debtor, the onus of proof is on the claimant.

Held further: That the actual pointing out of lobolo cattle followed by the celebration of the customary union passes ownership in such cattle.

Held further: That where the essentials of a customary union are proved and where there is no other evidence on record whether such a union or a marriage was contemplated, it would not be correct to hold that the parties might have contemplated a civil marriage nor that consequently the ownership in the lobolo cattle does not pass until a civil marriage is celebrated.

Held further: That where both parties had closed their cases and it is clear from the record that a customary union had taken place, there is no room for the argument that additional evidence is available, and accordingly ownership in the cattle held to have passed on the day of the celebration of the customary union.

Appeal from the Court of the Native Commissioner, Harding.

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

The judgment creditor obtained a judgment against the judgment debtor for refund of 6 head of cattle due as a result of the customary union between the daughter of judgment debtor and the judgment creditor having been dissolved.

A writ was issued on 9th February, 1951, and on the 17th of the same month the Messenger of the Court attached 6 head of cattle in possession of the debtor.

Claimant then instituted an interpleader action averring that the cattle in question had been paid to him by the judgment debtor as lobolo for his daughter. The cattle were duly pointed out on the day of the marriage ceremony in the presence of the official witness. The cattle were however not removed as the claimant was not allowed to take more cattle on to Crown Lands where he was residing. This marriage took place during November, 1949, i.e. about 15 months before the judgment creditor obtained his judgment.

The judgment creditor gave evidence first and he could only testify that he had obtained a valid judgment and that these were cattle at the debtor's kraal.

The onus was on claimant to prove that the cattle in question had been paid over to him as lobolo prior to the judgment obtained by the creditor. In the case of Nyongwana *v.* Xolo, 1912(²), N.H.C., 46, it was decided that the actual pointing out of the cattle followed by the celebration of the customary union passes ownership.

Claimant is supported by the official witness that a proper union had taken place and that the cattle had been pointed out. The Native Commissioner believed the evidence of claimant and that of the official witness. He has also decided the case on the principle that the onus was on the claimant.

Counsel for appellant has argued that there is no evidence on record whether this was to be a civil marriage or a customary union seeing that the girl was a Christian. Where the essentials of a customary union are present it would not be correct to hold that the parties might have contemplated a civil marriage and that consequently the lobolo cattle do not pass until a civil marriage is celebrated.

Counsel has also argued that additional evidence is available. Both claimant and respondent had closed their respective cases and it is clear from the record that a customary union had taken place, and this being the case ownership in the cattle passed on the day of the celebration of the union.

The appeal is dismissed with costs.

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

For Respondent: Mr. Weinberg, instructed by Gurwitz & Co., Durban.

Cases referred to:—

Nyongwana *v.* Xolo, 1912(²), N.H.C., 46.

CASE No. 32 OF 1951.

MCUNUKELWA TSHOBA (Appellant) *v.* CHARLIE RADEBE (Respondent).

N.A.C. CASE No. 51/1951.

PIETERMARITZBURG: Tuesday, 10th July, 1951. Before Steenkamp, President. Balk and Oftebro, Members of the Court (North-Eastern Division).

Practice and Procedure—System of law applied must be noted in record of proceedings—Appropriate system to be applied—Order in which evidence to be led.

Appeal from the Court of the Native Commissioner, Pietermaritzburg.

Steenkamp, J. H. (President):

Before dealing with the facts of the case, this Court is constrained to draw attention to certain irregularities apparent from the record.

Firstly: The Acting Additional Native Commissioner did not indicate on the record what system of law he applied. Only after he was called upon to furnish reasons did he indicate in the reasons that he applied Common Law. This system of law would not appear to have been the appropriate one to apply. The Presiding Officer's attention is invited to the case of *Ex-parte* the Minister of Native Affairs *in re* Yako *v.* Beyi, 1948 (1), S.A., 388, A.D. and paragraph 18 of General Circular No. 18 of 1950, dated 24th July, 1950, issued by the Secretary for Native Affairs. Any future dilatoriness on the part of Judicial Officers in this respect will have to be reported administratively.

Secondly: It is observed from the record that plaintiff and

his one witness gave evidence and without plaintiff closing his case the defendant and all his witnesses gave evidence and after defendant had closed his case one more witness was called by the plaintiff and only then was his case closed. This is a procedure entirely foreign to well recognised practice and law that plaintiff can only call evidence after defendant had closed his case, to rebut certain evidence and even then there is a limit to this.

For Appellant: Mr. Seymour, instructed by McGillewie & Co., Pietermaritzburg.

For Respondent: Mr. Niehaus, instructed by C. C. C. Raulstone & Co., Pietermaritzburg.

Cases referred to:—

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

CASE No. 33 OF 1951.

MTAKATI MNGADI AND OTHERS (Appellants) *v.* **JACOB MKIZE (Respondent).**

N.A.C. CASE No. 49/1951.

PIETERMARITZBURG: Thursday, 12th July, 1951. Before Steenkamp, President. Balk and Oftebro, Members of the Court (North-Eastern Division).

Damages—Unlawful killing—Concerted attack—Joint and several responsibility—Quantum *of damages—Dependants—Pecuniary loss—Defences.*

Appeal: On fact.

Locus standi in judicio: Guardian.

Held: That as the defendants had unlawfully killed deceased with lethal weapons in the course of a concerted attack by them on him and his party, which precipitated the fight, the defendants were jointly and severally liable.

Held further: That the damages awarded by the Court *a quo* had been properly assessed solely on the pecuniary loss suffered by deceased's widow and minor children and were not in the circumstances excessive.

Held further: That to succeed in an appeal on fact, the appellant must satisfy the appellate tribunal that the Court below was wrong in its findings.

Held further: That it was competent for the guardian of the widow and minor children of deceased to sue in that capacity in this case.

Held by Steenkamp (President): That, assuming the parties had gathered to take part in a premeditated fight, any defence the defendants might have had against an injured person who took part therein on that account, would be of no avail in an action instituted by the dependants of a deceased killed in similar circumstances.

Held further by Steenkamp (President): That the evidence indicates that there was a fight rather than an attack or assault by one party on the other but that it makes no difference which it was as plaintiff is in either event entitled to recover damages based on loss of support.

Held further by Steenkamp (President): That the submission on behalf of appellants (defendants) that there was no common purpose (deceased having been stabbed by first defendant before the other defendants had joined in the fight) was not well founded as it was clear from the evidence that the two parties had already decided to fight before any blow was struck.

Appeal from the Court of the Native Commissioner, Richmond.

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

The plaintiff (now respondent) in his personal capacity and in his capacity as guardian of the widow and six minor children of his late son, Phillip Mkize, sued the eight defendants (now appellants), jointly and severally in the Native Commissioner's Court for damages sustained as a result of the unlawful killing of the said Phillip (hereinafter referred to as the deceased) by defendants in the course of an unlawful faction fight.

The Native Commissioner found for plaintiff in the sum of £180 with costs against defendants Nos. 1 to 7, inclusive, the one paying the others to be absolved.

On the 17th February, 1951, an appeal against this judgment was allowed by this Court, with costs, the judgment being set aside and the record returned for the necessary evidence to be led in regard to the circumstances in which the deceased was killed.

Such evidence was duly adduced and the Native Commissioner again entered judgment for plaintiff in the sum of £180 with costs against defendants Nos. 1 to 7 inclusive, jointly and severally, the one paying the others to be absolved.

The present appeal is against this judgment and is based on the following grounds:—

(1) On the evidence led it was clear that Jacob Mkize, the plaintiff, has not been supported by the late Phillip Mkize. Plaintiff and the deceased had independent kraals of their own and plaintiff was not therefore entitled to any damages in his personal capacity and therefore the judgment in his personal capacity was bad in law.

(2) The weight of evidence was in defendant's favour that they did not start a fight and plaintiff failed to discharge the onus which it was his duty to do.

(3) There was no clear evidence that any of the said defendants were responsible for the death of plaintiff's son.

(4) Assuming that the parties gathered to take part in a premeditated fight, i.e. that there was a challenge to fight and an acceptance of the challenge, may the dependents of the deceased claim damages from the defendants, based on loss of support?

(5) There is no clear evidence that any of the defendants killed the deceased. What are the existing circumstances at the time the mortal blow was struck, we have no clear evidence.

(6) At the most there should have been an absolution from the instance, but in any event the amount awarded was excessive.

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

(1) That a fight took place between the Mkizes and Mngadis.

(2) Deceased was a member of the Mkizes and the defendants were all members of the Mngadis.

(3) That the deceased died of wounds he received in this fight.

(4) That each and every member of the Mngadis struck deceased with some weapon.

(5) That the Mngadis were the aggressors.

Dealing with the grounds of appeal *seriatim:*—

1. Whilst paragraph 1 of the summons is not happily drawn it is nevertheless unmistakable from the wording thereof, as also from the evidence, that plaintiff sued not only in his personal capacity but also in his capacity as guardian of the widow and six minor children of deceased, which it was competent for him to do, *vide* Mdhleni Dhlamini and Others *v.* Sokwetshata Ngubane [N.A.C. 1 (N.E.), 14, Ephraim Mvemve *v.* Carolina

Mkatshwa [1, N.A.C. (N.E.) 284] and Mokhesi, N.O. *v.* Demas [1951 (2), S.A.L.R., 502]. Moreover it is clear from the Native Commissioner's reasons for judgment that he assessed the *quantum* of damages in the case solely on the pecuniary loss suffered by deceased's widow and minor children. This aspect will be dealt with more fully when the sixth ground of appeal is considered.

2. There is ample evidence in support of the Native Commissioner's findings and it is clear from his reasons therefor that he gave due consideration to the weight of the evidence both as dictated by the probabilities or improbabilities as were disclosed by the evidence to have been material and by the demeanour of the witnesses, in arriving at those findings. In an appeal on fact the appellant must satisfy the appellate tribunal that the Court below was wrong in the conclusions reached by it, *vide* Rex *v.* Lekaota [1947 (4), S.A.L.R., 258] and the authorities cited therein. It follows that this ground of appeal fails.

3. It is clear from the evidence of plaintiff's witnesses, which was accepted by the Native Commissioner, and may also properly be inferred from the evidence of the seventh defendant, that each of defendants Nos. 1 to 7, inclusive, struck the deceased with lethal weapons in the course of a concerted attack by them on the Mkize party, of which deceased was a member, which precipitated the fight and that the latter was unlawfully killed by them in the course of that attack. Moreover it was admitted by the defence that deceased died of the wounds which he had received in the attack in question. It follows that defendants Nos. 1 to 7, inclusive, are jointly and severally responsible for the unlawful killing of the deceased, *vide* Rex *v.* Mkize (1946, A.D., 197) and Rex *v.* Bayat and Others [1947 (4), S.A.L.R., 128]. Consequently this ground of appeal fails.

4. The evidence as a whole does not support a finding of a premeditated fight but shows that the fight was precipitated by the unlawful attack on the Mkize party, to which the deceased belonged, by the Mngadi party which included defendants Nos. 1 to 7, inclusive. This ground of appeal accordingly falls away.

5. For the reasons given in paragraph 3 above, it is clear from the evidence that defendants Nos. 1 to 7, inclusive, acting in concert, unlawfully killed the deceased, so that there is also no substance in this ground of appeal.

6. Deceased's widow and plaintiff stated in their evidence that deceased had sent her £6 per month from his earnings for the support of herself and that of her minor children. This evidence has not been rebutted and accordingly stands. It appears from the record that deceased was middle-aged at the time that he was killed and his normal expectation of life may safely be said to be at least another ten years. Computed on that basis, the Native Commissioner's award of £180 as damages amounts to no more than £18 per annum and can by no means be said to be excessive particularly in view of the fact that deceased during his lifetime remitted £6 per month to his wife for her support and that of her children. As pointed out in paragraph 1 above, the award was computed by the Native Commissioner solely on the pecuniary loss suffered by the deceased's widow and minor children. In the circumstances this ground of appeal also fails.

In the result the appeal is dismissed with costs.

Steenkamp (President):—

I agree that the appeal should be dismissed. Ground 4 of the appeal was not pressed but I would like to point out there are ample authorities from which it can be held that any defence the defendants might have had against an injured person who took part in a preconceived fight, would be of no avail in an action instituted by the dependants of a deceased killed in similar circumstances.

See Rex. *v.* Donovan 1934, 2 K B, p. 507.

Salmond on the Law of Torts, 10th Edition, p. 35, Note K.

Brooms Legal Maxims, 9th Edition, p. 189.

McKerron Law of Delict (3rd Edition), p. 174.

Also see S.A. Law Journal, May, 1951, page 220.

I do not agree that this was an assault or an attack by one party. The evidence rather indicates that it was a fight but it makes no difference which it was, the plaintiff is entitled to recover damages based on loss of support.

Counsel for appellants has advanced the argument that according to the evidence adduced on behalf of the plaintiff, there was no common purpose in so far as all the defendants were concerned. He stressed that the deceased had been stabbed by first defendant and that the other defendants had not yet joined in to fight at that stage.

This argument might have been sound if the stabbing of the deceased had been the cause of the fight but from the evidence it is clear that the two sides had already decided to fight and it is immaterial whether one of the participants had already received a blow before any of the others could get an opportunity of striking at his adversary.

For Appellants: Mr. Niehaus, instructed by Messrs. J. Hershensohn, Pietermaritzburg.

For Respondent: Major Cowley, of Cowley & Cowley, Durban.

Cases referred to:—

Mdhleni Dhlamini and Others *v.* Sokwetshata Ngubane [1. N.A.C. (N.E.), 14].

Ephraim Mvemve *v.* Carolina Mkatshwa [1, N.A.C. (N.E.), 284].

Mokhesi, N.O., *v.* Demas [1951 (2), S.A.L.R., 502].
Rex *v.* Lekaota [1947 (4), S.A.L.R., 258].
Rex *v.* Mkize (1946, A.D., 197).
Rex *v.* Bayat and Others [1947 (4), S.A.L.R., 128].
Rex *v.* Donovan, 1934, 2 K.B., p. 507.
See also Salmond on the Law of Torts, 10th Edition, p. 35, Note K.

Brooms Legal Maxims, 9th Edition, p. 189.
McKerron Law of Delict (3rd Edition), p. 174.
Also see S.A. Law Journal, May, 1951, page 220.

CASE No. 34 OF 1951.

YALEKILE MKIZE (Appellant) *v.* MPIKWA MKIZE (Respondent).

N.A.C. CASE No. 63/1951.

PIETERMARITZBURG: Wednesday, 11th July, 1951. Before Steenkamp, President. Balk and Oftebro, Members of the Court (North-Eastern Division).

Child—Custody of, on dissolution of customary union by divorce. Practice and Procedure—Addressing Court.

Held: That in deciding which party should have the custody of the child of a customary union on its dissolution by divorce, the paramount consideration is which course is best in the interests of the child.

Held further: That where a legal practitioner does not intimate that he wishes to address the Court at the conclusion of the evidence for both parties, the presiding judicial officer's ommision to enquire whether he desires to exercise that right does not constitute an irregularity.

Appeal from the Court of the Native Commissioner, Camperdown.

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

The criterion in this matter is which course would be best in the interests of the child.

The child is still with its mother (appellant) and is of tender years, having, according to the evidence, been born on the 17th April, 1948. Appellant's father testified that she has taken proper care of the child and this evidence has not been rebutted. The reasons given by respondent in support of his contention that appellant is not a fit and proper person to have custody of the child do not affect her attitude towards it but only her attitude towards him and cannot be construed as rendering her unfit to have its custody; nor does the evidence support the Native Commissioner's finding that appellant is always at Pietermaritzburg. In the course of her evidence at the hearing of the application, appellant explained that at the time of the trial of the divorce action, she was ill at her aunt's place of residence near Pietermaritzburg and her father at that time stated that he did not then know her address. Respondent at that trial testified that appellant had returned to her father and did not then nor at the hearing of the application in any way imply that she was always in Pietermaritzburg. On the contrary it may fairly be inferred from the evidence of the parties and their witnesses as a whole that appellant was living with her father and had been away at Pietermaritzburg only temporarily.

The best person to have the custody of a child of tender years is its mother unless she is not a fit person [Mina *v.* Alfred Ntshingela, p. 32, N.H.C. (1927)]. In the present case the child is only three years of age and was at the time this application was heard in the Court below still with its mother who, on the evidence, is a fit and proper person to have charge of it, whereas *ex facie* the record, respondent is at work and there is no evidence to indicate who will care for the child if its custody is awarded to him. According to the evidence of appellant's father, respondent has made no contribution towards the maintenance of the child and this evidence is uncontroverted.

In the circumstances this Court considers that appellant should not be deprived of the custody of the child until it reaches a maturer age. This view is in accordance with the trend of the decisions in connection with matters of this nature both by this Court and the Appellate Division of the Supreme Court, *vide* Mina Maruping *v.* Samuel Maruping [1947, N.A.C. (T. & N.), 129], the authorities cited therein, Mguli Nkosi *v.* Caiphas Ngubo, 1, N.A.C. (N.E.), 87, Fletcher *v.* Fletcher [1948 (1), S.A.L.R., 130].

Accordingly the appeal succeeds on this ground. It is, therefore, unnecessary to deal with the remaining grounds, of appeal but the third ground calls for comment to elucidate the position in regard thereto.

There is nothing in the record of the proceedings of the application to indicate that the attorney who represented the appellant therein, intimated to the Native Commissioner that he desired to address the Court at the conclusion of the evidence for both parties. The correctness of that record has not been called into question, so it must be assumed that it reflects the true position, viz., that the Attorney concerned did not intimate that he wished to address the Court. Accordingly this point cannot be regarded as having been well taken as the Native Commissioner's omission to enquire whether appellant's attorney desired to exercise the right in question did not constitute an irregularity since the latter must be presumed to know his right in this direction, *vide* Rex *v.* Cooper (1926, A.D., 54) and Rex *v.* Aitken [1951 (2), S.A.L.R., 564].

In the result the appeal is *allowed with costs.* The Native Commissioner's judgment is set aside and the following judgment is substituted therefor:—

> "Application granted. The order regarding the custody of the child in the Divorce Action (Case No. 38/1948) is varied to read as follows:—
>
> 'Defendant awarded the custody of the child, Babungile, until it reaches the age of seven years, i.e. until the 16th April, 1955, whereafter plaintiff to have its custody.

Either party to have access to the child at all reasonable times whilst in the custody of the other.' Applicant to pay the costs of the application."

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

For Respondent: In person.

Cases referred to:—

Mina *v.* Alfred Ntshingela, p. 32, N.H.C. (1927).
Mina Maruping *v.* Samuel Maruping (1947), N.A.C. (T. & N.), 129.
Mguli Nkosi *v.* Caiphas Ngubo, 1 N.A.C. (N.E.), 87.
Fletcher *v.* Fletcher [1948 (1), S.A.L.R., 130].
Rex *v.* Cooper (1926, A.D., 54).
Rex *v.* Aitken (1951) (2), S.A.L.R., 564.

CASE No. 35 OF 1951.

LIZA MBONGWA (Appellant) *v.* XOSHEYAKE MBONGWA (Respondent).

N.A.C. CASE No. 58/1951.

PIETERMARITZBURG: Wednesday, 11th July, 1951. Before Steenkamp, President. Balk and Oftebro, Members of the Court (North-Eastern Division).

Practice and Procedure—Recording of system of law applied—

System to be applied.

Maintenance: Claims for arrear—*in praeteritum non vivitur.*

Native Law and Custom: Isondhlo.

Held: That it is the duty of the presiding judicial officer to record either at the commencement of the proceedings or during the course thereof which system of law is provisionally applied and at the conclusion of the case to record which system is finally applied.

Held further: That where this Court finds that the presiding judicial officer has applied the wrong system of law, it is for this Court to remedy the position on appeal.

Held further: That under Common Law claims in respect of past maintenance are not governed by the same principles as apply to present and future aliment.

Held further: That whilst under Common Law there is no remedy in this case, under Native Law and Custom there is provision for payment of "isondhlo" by the lobolo holder for a girl maintained by some person other than her legal guardian who is entitled to her lobolo.

Appeal from the Court of the Native Commissioner, Pietermaritzburg.

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

The plaintiff (now appellant) duly assisted by a duly appointed *curator ad litem,* was divorced from the late Solomon Mbongwa, whom she had married by Civil Rites. The custody of two children, Lena and Ntinini, was awarded to the plaintiff.

After Solomon died during the year 1947 the defendant (now respondent) became his heir and is entitled to any lobolo payable for these two girls. Lena has now been married and defendant received her lobolo. Plaintiff is now claiming £60 being in respect of the maintenance she provided for the two girls.

During the course of her evidence plaintiff stated that she was only claiming in respect of the daughter who is already married.

The defendant through his attorney, after the case had been postponed on three occasions, offered without prejudice one beast in respect of Lena's maintenance and undertook to pay another beast when Ntinini gets married. Plaintiff refused the offer and

after she had given her evidence the Native Commissioner informed her that under Native Law she would only be entitled at most to one beast and that she should accept defendant's offer. Defendant's attorney intimated that his client would pay the costs. There is no record whether plaintiff accepted the offer but she was evidently not prepared to do so as she has now appealed against the Native Commissioner's judgment for one beast or its value £5, which judgment was entered immediately after Defendant's attorney undertook to pay costs.

There is no indication on the record whether the case was tried under Native Law and Custom or Common Law but the Native Commissioner in his reasons for judgment states that he applied Common Law as the claim is one for refund of expenses incurred in maintaining a child.

At this stage it is desired to point out, as has been done on previous occasions by this Court, that it becomes the duty of the Presiding Officer either at the commencement of the proceedings, or during the course thereof, to indicate provisionally what system of law is applied and in the end to indicate finally what system he applied and to record such decision. Presiding officers should not wait until an appeal is noted to rectify the omission in a very important aspect of cases between Native and Native. From the record it is therefore abundantly clear that the Native Commissioner had not before giving judgment, decided what system of the law he applied.

It is not understood how the Native Commissioner could have indicated in his reasons for judgment that Common Law was applied when he had advised the plaintiff during the proceedings that under Native Law and Custom she was at most entitled to one beast for one child. At that stage of the proceedings only one conclusion could be arrived at and that is that the Presiding Officer was satisfied Native Law was applicable.

She cannot succeed under Common Law as it is trite law that *in praeteritum non vivitur;* in other words, claims in respect of past maintenance are not governed by the same principles as apply to present and future aliment; *vide* remarks by Van den Heever (J) (as he then was) on page 298 in the case of Oberholzer *v.* Oberholzer, 1947 (3), S.A.. 294 (O.F.S.)

In switching over to Common Law he was certainly not exercising a judicial discretion and where this Court finds that a Presiding Officer has used the wrong system, this Court is entitled to say so and to decide the appeal on the system it thinks is the most appropriate.

The position, therefore, is that under Common Law there is no remedy but under Native Law and Custom there is the provision for the payment of "isondhlo" by the dowry holder for a girl maintained by some person other than the legal guardian who is entitled to the lobolo.

The Native Commissioner in his reasons states he is doubtful whether "isondhlo" was payable and from the wording of the reasons he seems to be doubtful whether he should have made such an award.

The defendant when he made the offer knew what the Native Law and Custom is and he was only complying with a well established system of law as followed by natives and which has the approval of the Courts.

Under Native Law only one beast is payable for "isondhlo" irrespective of the type of maintenance a girl has received.

Counsel for respondent submitted that in Common Law, plaintiff had no claim for maintenance against defendant as the latter was the uncle of the child unless there had been an agreement between plaintiff and her late husband in respect of such maintenance, which would then have been a charge against the estate inherited by defendant.

Plaintiff has not based her claim on any agreement with her late husband. She admitted in this Court that there was no such agreement.

The appeal is dismissed with costs.

Appellant: In person.

Respondent: Mr. Simon of L. Simon & Co., Pietermaritbzurg.

Cases referred to:

Overholzer *v.* Oberholzer, 1947 (3) S.A. 294 (O.F.S.)

CASE No. 36 OF 1951.

MZIBENI SHOBEDE (Appellant) *v.* TUWA SHOBEDE (Respondent).

N.A.C. CASE No. 39/1951.

ESHOWE: Tuesday, 17th July, 1951. Before Steenkamp, President. Balk and Oftebro, Members of the Court (North-Eastern Division).

Practice and Procedure—Condonation of late noting of appeal—Other remedy—Application dictated by extraneous factor.

Held: That as the matter could and still can be remedied by an application to the Court below for the restoration of the *status quo* and as the application to this Court for condonation of the late noting of the appeal was dictated by an extraneous factor, it must be refused.

Appeal from the Court of the Native Commissioner, Nkandhla.

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

This is an application by defendant (present applicant) for condonation of a late noting of an appeal against a judgment in the Native Commissioner's Court upholding an appeal against a judgment in a Chief's Court for plaintiff (present respondent) primarily for certain nineteen head of cattle and altering that judgment to one of absolution from the instance.

The grounds on which condonation is sought are briefly:—

1. That applicant was advised by his attorney after the latter had received a copy of the Native Commissioner's written judgment, that as the nineteen head of cattle in question had been in his (applicant's) possession prior to the judgment in the Chief's Court and had been transferred from applicant to respondent in pursuance of the Chief's judgment, which had been altered to one of absolution from the instance on appeal to the Native Commissioner's Court, he (applicant) was in reality the successful party.
2. That both the Clerk of the Native Commissioner's Court and the Native Commissioner declined to issue a writ for the restoration to applicant of the said cattle on the ground that no order was embodied in that Court's judgment for the return of those cattle to applicant.
3. That applicant considers that he has good grounds for appeal in that the Native Commissioner's judgment was against the weight of the evidence and as respondent (plaintiff in the Court *a quo*) had failed to discharge the onus of proving that the said cattle had not been repaid by his father and had in fact led no evidence beyond his own to establish this point.

No application was made in the Native Commissioner's Court for an order for the restoration of the cattle in question to applicant and failing such application it was not incumbent on the Native Commissioner's Court to make such an order nor in the absence of such order competent for it to issue the writ in question.

This matter could and can still be cured by an application to the Native Commissioner's Court for the restoration of the *status quo* prior to the judgment in the Chief's Court, i.e. for an order for the return of the nineteen head of cattle in question to applicant on those grounds, *vide* Jasmat and Another *v.*

Bhana, 1951 (2), S.A., 496 (T.P.D.).

The first two grounds on which the present application is based can therefore not be regarded as good ones nor can the third ground be so regarded, as applicant has another remedy, viz. that specified in the last preceding paragraph, and as it is clear that his application was dictated by the fact that he was refused a writ by the Court *a quo* for the restoration to him of the cattle in question.

The application is accordingly refused with costs.

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

For Respondent: In person.

Cases referred to:—

Jasmat and Another *v.* Bhana, 1951 (2), S.A., 496 (T.P.D.).

CASE No. 37 OF 1951.

VUMAZONKE MBATA (Appellant) *v.* ZEPHANIAH BUTELEZI (Respondent).

N.A.C. CASE No. 44/1951.

ESHOWE: Tuesday, 17th July, 1951. Before Steenkamp, President. Balk and Oftebro, Members of the Court (North-Eastern Division).

Damagaes for delict—Destruction of wattle bark by fire—Responsibility of kraal head for delict committed by inmates of his kraal—Citing of parties—Section 141 (3) *of Natal Code of Native Law—Effect of offer to compromise—Practice and Procedure—Recording of result of application for rescission of default judgment.*

Held: That in terms of section 141 (3) of the Natal Code of Native Law the kraal head can only be sued in respect of a delict committed by the inmates of his kraal jointly with them and that they must therefore also be cited as parties to the action.

Held further: That in the absence of an unqualified admission of liability, an offer to compromise must be regarded as having been made without prejudice and that, if such offer is rejected, it falls away and the only remedy is for the other party to sue for such damages as he considers he has suffered.

Held further: That the result of an application for rescission of a default judgment must be recorded.

Appeal from the Court of the Native Commissioner, Mahlabatini.

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

Plaintiff sued the defendant in the Native Commissioner's Court for £60 being damages sustained by reason of the fact that certain inmates of defendant's kraal wilfully and negligently destroyed certain wattle bark by fire.

Defendant's plea was a denial that he or the inmates of his kraal were responsible for the damage.

Plaintiff led evidence on the first day's hearing and a postponement was granted at the request of plaintiff's attorney for the purpose of calling further evidence. At the adjourned hearing defendant was in default and after plaintiff had called one more witness he closed his case and on application a default judgment was granted for £60 with costs.

Defendant thereafter noted an appeal which was withdrawn and application made for a rescission of the judgment. There is no record of the proceedings of the application but apparently the judgment was rescinded because on the day the application was set down plaintiff adduced further evidence and defendant and his witnesses also gave evidence.

Here it should be mentioned that the Native Commissioner should have recorded the result of the rescission application and

it is not enough to mention in his reasons that the judgment had been rescinded.

The Native Commissioner eventually gave judgment for plaintiff for £15 and costs. Against this judgment an appeal has been noted by defendant on the grounds that (1) the judgment is against the weight of evidence and contrary to law; (2) that the Court erred in finding appellant (defendant) liable to pay damages to plaintiff; (3) that in any event the award of £15 is excessive; and (4) that the Court erred in awarding costs to plaintiff.

The plaintiff also noted a cross appeal after the prescribed period had elapsed but on application this Court granted the necessary condonation.

The grounds of the cross appeal are as follows:—

(1) That the uncontradicted and undisputed evidence of the respondent as to the value of the bark established that 50 bundles of bark equalled one ton and was priced and valued at £12. 1s. 6d.

(2) That the evidence established that 246 bundles had been destroyed by fire and the value thereof would accordingly be £59. 9s. 0d.

(3) That the evidence accordingly established that the respondent had suffered damage in an amount of not less than £59. 9s. 0d. and that the evidence did not disclose any reason in law why the respondent should not have been awarded damages to the full extent of his actual loss.

The Native Commissioner tried the case under Native Law and Custom.

It is observed that the plaintiff did not sue the tort-feasors and join the defendant as the kraal head as being liable under Native Law and Custom for the tortious acts of the inmates of his kraal. It is clear from the wording of sub-section (3) of section 141 of the Code that the kraal head can only be sued jointly with the person committing the delict. He cannot be sued alone and therefore on the face of the summons the action was not properly before the Court. In his evidence plaintiff states "I was satisfied with a beast but I wanted to compromise with defendant. I have never received the beast." Further on he states "Defendant's son brought a calf which I refused." Taking the evidence as a whole there can be no doubt that defendant was quite prepared to compromise but once his offer is not accepted, as in the present case, it falls away and the plaintiff's only remedy is to sue for whatever damages he considers he has suffered and the offer made by defendant must be regarded as having been made without prejudice as there is no evidence that he at any time made an unqualified admission of liability.

Plaintiff's citation of the defendant is not in accordance with prescribed law [section 141 (3) of the Code] and therefore the case could not be tried if parties are not correctly cited.

In the circumstances the appeal is allowed with costs and the Native Commissioner's judgment is altered to read "Summons dismissed with costs".

The cross appeal is dismissed with costs.

For Appellant: Mr. H. H. Kent, instructed by Bennett & Myburgh of Vryheid.

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

Statutes, etc., referred to:—

Natal Code of Native Law, section 141 (3).

CASE No. 38 OF 1951.

MSIKENI XULU (Appellant) *v.* MKEMEZELI ZULU (Respondent).

N.A.C. CASE No. 50/1951.

HELD: Wednesday, 18th July, 1951. Before Steenkamp, President. Balk and Oftebro, Members of the Court (North-Eastern Division).

Native Law and Custom—Person not entitled to lobolo for girl, an illegitimate child by another man, on giving her in marriage —Girl acquired by such person on marrying such girl's mother by means of lobolo paid for latter by him—Claim by such person's heir for refund or expenses incurred by such person in connection with girl's marriage—Legality of such claim.

Held: That whilst the acquisition of the girl, who was an illegitimate child by another man, by the person concerned by her inclusion under the lobolo paid by such person for her mother on marrying the latter, was an illegal transaction, the claim by such person's heir for a refund of the expenses incurred by such person in connection with the girl's marriage was not so tainted in that such person had acted in good faith in giving the girl in marriage and as the obligation sought to be enforced by him was separable from the illegal transaction.

Held further: That even in illegal transactions the doctrine of undue enrichment must be considered.

Appeal from the Court of the Native Commissioner, Nkandhla.

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

The late Msimango married a woman who already had an illegitimate child named Nomzunguliso, by another man. The child lived with the mother and the late Msimango until she was married. Msimango arranged the marriage and received the lobolo. The reason he received the lobolo is that according to the evidence adduced, Nomzunguliso was bought by Msimango when he married the mother.

That transaction was declared illegal when action was brought by the girl's maternal grandfather's representative and Msimango was obliged to hand the full lobolo over to the legal guardian of the girl.

Msimango then claimed a refund of the expenses incurred in arranging the marriage of the girl. No action was, however, taken and both Msimango and the girl's grandfather are now dead and the present action is between their respective heirs.

The claim before the Chief was for five head of cattle being refund of the necessary expenses incurred when the girl got married.

The Chief gave judgment in favour of defendant and the Native Commissioner dismissed the appeal lodged against the Chief's judgment.

The Native Commissioner has, however, not considered the merits of the case and after plaintiff had given evidence he came to the conclusion that as the sale of a girl was illegal plaintiff cannot succeed in his claim.

The facts of the case are similar to those of Mdakane *v.* Kumalo, 1938, N.A.C. (T. & N.), 219, which the Native Commissioner has evidently overlooked.

In the present appeal the late Msimango would appear to have acted in good faith when he gave the girl in marriage. He genuinely thought he was entitled to her lobolo otherwise he would not have incurred the considerable expense in arranging the celebrations, which can easily be separated from the illegal aspect which has influenced the Native Commissioner.

Even in illegal transactions the doctrine of undue enrichment must be considered *vide* the case of Jajbhay *v.* Cassim, 1939, A.D., 558.

As the Native Commissioner has not approached the case from the correct angle the appeal will be allowed.

It is ordered that the appeal be and is hereby allowed, with costs, and the Native Commissioner's judgment is set aside. The record is returned to the Native Commissioner to hear the case on the merits. Costs in the Court below to be costs in the cause.

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

Respondent: In person.

Cases referred to:—

Mdakane *v.* Kumalo, 1938, N.A.C. (T. & N.), 219.

Jajbhay *v.* Cassim, 1939, A.D., 588.

CASE No. 39 OF 1951.

MHLOMULENI NGEMA (Appellant) *v.* HLOMENTABENI KUBISA (Respondent).

N.A.C. CASE No. 57/1951.

ESHOWE: Wednesday, 18th July, 1951. Before Steenkamp, President. Balk and Oftebro, Members of the Court (North-Eastern Division).

Practice and Procedure—Appeal from Native Chief's Court to Native Commissioner's Court—Respondent (plaintiff in the Court a quo) wilfully refusing to answer questions under cross-examination in Native Commissioner's Court—Native Commissioner thereupon in effect altering Chief's judgment in favour of plaintiff to an absolution judgment—Competency of this procedure.

Held: That as the appellant (plaintiff in the Court of first instance) was given ample opportunity to consider his position but persisted in his defiant attitude in wilfully refusing to answer questions whilst under cross-examination in the Native Commissioner's Court during the hearing of the appeal from the Chief's Court and as he is not without another remedy since it is open to him to sue the defendant again in that the Native Commissioner's judgment in effect altered that of the Chief in favour of plaintiff to one of absolution from the instance, he has himself to blame for the position that has arisen and this Court cannot properly come to his assistance in the matter.

Appeal from the Court of the Native Commissioner, Mtunzini.

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

In the Chief's Court the plaintiff (now appellant) obtained judgment against defendant (now respondent) for 20 head of cattle and costs being damages for defamation of character in that defendant with intent to injure plaintiff's name and reputation accused plaintiff of having raped defendant's daughter. Plaintiff was detained in gaol for six months awaiting trial of the charge. He was found not guilty and discharged.

The Native Commissioner on appeal to his Court entered a judgment reading as follows:—

> "Plaintiff refused to answer questions. Case dismissed with costs for defendant.
>
> Judgment of Chief dismissed."

The wording of the judgment is not in accordance with general practice or with Rule 28 of Government Notice No. 2253/1928, being the Native Commissioners' Court rules.

What the Native Commissioner really intended was that the appeal is allowed with costs and the Chief's judgment altered to read the claim is dismissed.

It is on this basis that this Court, to whom an appeal has been noted, will deal with the matter.

At the outset it is not at all clear whether plaintiff sued for defamation of character or whether he sued for malicious

prosecution or imprisonment.

Let this be as it may as the main aspect in the case will determine the appeal.

Plaintiff gave his evidence which is to the effect that defendant accused him of having raped his (defendant's) daughter during the night at the kraal of defendant where a beer drink was in progress.

Defendant was legally represented and when his attorney commenced cross-examining the plaintiff the latter refused to answer any questions and openly stated that he would not answer all questions put to him by the attorney. Plaintiff was warned by the Court to think over the matter and the Court actually adjourned the hearing for five minutes to enable plaintiff to reconsider the attitude adopted. After resumption plaintiff still refused to answer questions whereupon the Court entered the judgment already mentioned. An appeal has now been noted to this Court.

There is not much this Court can do as plaintiff only has himself to blame for having taken up an attitude of defiance. He is not without remedy as he may still sue defendant. All the Court below did was to dismiss the claim before the Chief which is in reality an absolution judgment.

In the cas of Nkabinde *v.* Nkabinde, 1, N.A.C. (N.E.) 67, the defendant took up a defiant attitude when the Native Commissioner heard an appeal from the Chief's Court. The Native Commissioner entered judgment in favour of plaintiff and defendant thereafter appealed and also applied for condonation of the late noting of the appeal. The application was refused and the Appeal Court remarked as follows:—

> "The applicant only has himself to blame for the position in which he finds himself and if he will treat Court proceedings with the contempt he did he must not come to this Court for indulgence or relief."

The appeal is dismissed with costs but the Native Commissioner's judgment is altered to read:—

> "Appeal from the Chief's Court is allowed with costs and the Chief's judgment is altered to read: 'Absolution from the instance with costs'."

For Appellant: Mr. Bruin, instructed by A. Goldberg of Durban.

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

Cases referred to:—

Nkabinde *v.* Nkabinde, 1, N.A.C. (N.E.). 67.

Statutes, etc., referred to:—

Section 28, Government Notice No. 2253/1928.

CASE No. 40 OF 1951.

GANDI GOBA (Appellant) *v.* LETHIWE KUMALO (Respondent).

N.A.C. CASE No. 42/1951.

DURBAN: Monday, 23rd July, 1951. Before Steenkamp, President. Balk and Leibrandt, Members of the Court (North-Eastern Division).

Abduction—Intention to abduct must be present.

Held: That the giving of sanctuary by a fiancé to his betrothed by reason of her father's attempting to coerce her into a marriage with another man does not amount to abduction.

Appeal from the Court of the Native Commissioner, Ndwedwe.

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

Plaintiff (now appellant) sued the defendant (now respondent)

for £50 damages as a result of an alleged abduction of plaintiff's daughter by the defendant.

The Native Commissioner dismissed the claim and plaintiff has now appealed to this Court on the grounds that the judgment was against the weight of evidence and is bad in law.

This Court need only concern itself with the fact whether or not on the evidence a claim lies for damages for abduction.

The facts are that negotiations for a marriage took place and defendant actually paid to plaintiff an Ngqutu beast, £5 Mvimba beast, £14 Izibizo, £3 Bikibiki, £5 Mgezemuzi, apart from the presents to the mother consisting of 100 lbs. sugar, washing basin, a big knife, 2 cups and saucers, 1 gallon paraffin, fork and teapot. The girl actually visited the defendant. There is a dispute as to the periods of the various visits but this is immaterial as it is clear from the Assistant Native Commissioner's reasons for judgment that he accepted the defendant's version, and properly so on the evidence, that plaintiff's daughter visited him twice only, the first time with plaintiff's consent and the second time without it, so that the matter at issue is the final visit to defendant.

According to defendant's evidence that visit took place in the following circumstances:—

> During the subsistence of the daughter's betrothal to defendant she advised the latter that her father was forcing her to marry another man. Defendant met her and her brothers on the way to the kraal of a certain Buso Shangase and intervened after she told him that she was being taken to that kraal against her will for the purpose of marriage. There was a struggle between defendant and the brothers and thereafter she followed him to his kraal. In these circumstances it is clear that there was no intention by defendant to abduct plaintiff's daughter as his keeping her at his kraal was prompted by her telling him that plaintiff was trying to force her into a marriage with another man while she was still betrothed to him (defendant) and his action therefore amounted to no more than giving her sanctuary and cannot be regarded as abduction.

The appeal is accordingly dismissed with costs.
For Appellant: Mr. R. I. Arenstein of Durban.
For Respondent: In person.

CASE No. 41 OF 1951.

SIMON ZWANE (Appellant) *v.* **EDWIN NGIDI (Respondent).**

N.A.C. CASE No. 54/1951.

DURBAN: Tuesday, 24th July, 1951. Before Steenkamp, President, Balk and Leibrandt, Members of the Court (North-Eastern Division).

Practice, Procedure and Evidence—Documents not in either of official languages—Not to be admitted in evidence unless accompanied by translations in one of the official languages.

Appeal from the Court of the Native Commissioner, Durban.

Steenkamp (President):—

There was handed in as an exhibit a letter written in the native language. No translation accompanied the exhibit and I wish to point out that in no circumstances should presiding officers admit any document not in either of the official languages unless a translation is attached.

For Appellant: Mr. Adv. A. Lansdown, instructed by Goldberg & Co., of Durban.

For Respondent: Mr. A. D. G. Clarke of Clarke & Robbins, Durban.

SELECTED DECISIONS

OF THE

NATIVE APPEAL COURT

(North-Eastern Division)

1951

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