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DECISIONS

OF THE

NATIVE APPEAL COURT

CENTRAL DIVISION

1948-1951

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This index is a complete guide to all cases reported in the volume for the Native Appeal Court (Central Division) up to the 31st December, 1951, and previous indexes may be destroyed

THE GOVERNMENT PRINTER, PRETORIA
G.P.-S.12926-1952-3-506

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SELECTED DECISIONS

OF THE

NATIVE APPEAL COURT

(CENTRAL DIVISION)

1948

VOLUME I

(Part 1)

PRINTED IN THE UNION OF SOUTH AFRICA BY THE GOVERNMENT PRINTER,
PRETORIA, 1949

G.P.-S.5220—1949-50—500.

MARRIAGE BY CIVIL RITES.

CASE No. 1 OF 1948 (VEREENIGING).

WILLIAM NTSHUMAYELO *v.* LAGAYA MBULI.

JOHANNESBURG: 10th June, 1948. Before Marsberg, President, Morgan and Van Gass, Members of the Court (Central Division).

Marriage by civil rites—Wife's desertion—Claim for return of wife, failing which refund of dowry—desertion can be established only by action in Native Divorce Court. No action taken—wife died before action taken—no cause of action for refund of dowry.

Incompetent for husband to bring action under form prescribed for customary unions—under latter form no cause of action when wife dies after union has subsisted for more than one year. If she dies childless within one year of union, portion of dowry may be reclaimed by husband.

Claim: Order for return of wife, failing which refund of dowry, on grounds of desertion.

Plea: Marriage was by civil rites. Desertion denied. Wife died before *litis contestatio*.

Judgment: Claim dismissed with costs.

Appeal:

(1) On questions of fact.

(2) Bad in law.

Held:

A. (1) In civil marriages desertion can be established only by action in the Native Divorce Court.

(2) Death of wife, without action taken, extinguished any claim for refund of dowry.

B. (1) In customary unions refund of portion of dowry is claimable only if wife dies childless within a year of marriage.

(2) No refund of dowry if wife died after a year of marriage.

(3) In this case marriage subsisted six years.

(4) Principle applied, *a fortiori*, in case of civil marriage.

Appeal dismissed.

Authorities: Jack Gidya *v.* John Yingwana 1944 (T. & N.).

Marsberg, P. (delivering the judgment of the Court):—

On 12th June, 1947, plaintiff, William Ntshumayelo, sued defendant, Lagaya Mbuli, in the Native Commissioner's Court at Vereeniging for an order for the return of his wife Leya, daughter of defendant or in default refund of £13. 10s. 0d. and three oxen paid as lobolo; or alternative relief and costs of suit, on an allegation that in or about 1940 the said Leya maliciously deserted him and despite repeated demands refuses to return to him.

Defendant pleaded that plaintiff and Leya were married by civil rights on the 28th June, 1940, that no lobolo was paid, that Leya did not desert but was chased away by plaintiff and that Leya died in June, 1946.

Before evidence was led, plaintiff, in view of the alleged death of the wife Leya, intimated that he would allow his claim to stand as it was and rely on the alternative claim, presumably return of the lobolo.

After hearing the evidence addressed by both parties the Assistant Native Commissioner dismissed the plaintiff's claim with costs.

Against this judgment plaintiff has appealed on the grounds that it is bad in law and wrong in fact in that sufficient evidence was adduced to find in favour of appellant (plaintiff).

It is not necessary for the purpose of this judgment to review all the evidence adduced in this case. The Assistant Native Commissioner found as proved facts that:—

(1) Plaintiff and the woman Leya were married by Christian Rites on 28th June, 1940.

(2) Leya died.

It is further not disputed that the marriage still subsisted at the time of her death, and that death occurred in June, 1946.

In the case of Jack Gidya *v.* John Yingwana (N.A.C., T. & N., 1944) the Court held that:—

(1) Whatever practice is practised by a particular tribe, the Court has a discretion not to sanction it if it is opposed to principles of public policy or natural justice and it is the function of the Court to interpret native law and custom in that light.

(3) To order refund of all the lobolo if a woman should die without having borne children does appear to be unjust, as her services and the marital privileges enjoyed by the husband must be taken into account.

(4) . . . . . a refund of a portion of lobolo may be claimed only if the wife dies childless within a year of the marriage and that no refund is claimable if her death occurs after a year . . . .

In the present case the marriage subsisted for about six years before Leya's death. There was no question of her barrenness. But appellant's argument was directed mainly to show that the alleged desertion of Leya had taken place before her death, thus affording him a cause of action. As the parties were married by Christian Rites desertion could be established only by a successful action in the Divorce Court. No such action was taken by plaintiff and Leya's death has now estinguished any right he may have had.

In view of the principles laid down in Jack Gidya's case, and *a fortiori* because this is a case involving a Christian marriage, plaintiff has no claim for the return of whatever lobolo he may have paid.

The appeal is dismissed with costs.

For Appellant: Mr Wiid of Messrs. Vorster, Carter and Steyn, Vereeniging.

For Respondent: Mr. Feinstein, instructed by Mr. P. Rose, Vereeniging.

OCCUPATION OF LAND: NATIVE RESERVE: RUSTENBURG DISTRICT.

CASE No. 2 OF 1948 (RUSTENBURG).

JOHANNA MOGAPI *v.* SAMUEL MOKUA.

JOHANNESBURG: 10th June, 1948. Before Marsberg, President, Morgan and Van Gass, Members of the Court (Central Division).

Occupation of land—Native Reserve—Rustenburg District, Transvaal—Rights of occupation—Land tenure is communal— Land vests in Chief in trust for tribe—Chief has right to allot land to members—Land reverts to commonage on death of allottee—Heirs do not inherit rights of occupation to particular allotments—Their rights are subject to other considerations in discretion of Chief.

Practice and Procedure—Appeal from Chief's Court—Government Notice No. 2258 *of* 1928, *Rules No.* 7 *and* 8*—On appeal Native Commissioner merely supplies that portion of case lacking in Chief's record, viz., the evidence—No provision for plea on Appeal—procedure for appeals from Chiefs' Courts is prescribed in Case No.* 32, *N.A.C.* (*T. and N.*), 1937, *Zibhebu Zwane* v. *Mangezwe Myeni.*

Claim: Order for restoration of residential site and arable land, inherited as heir late brother's estate.

Plea: Sites in question were allotted to respondent by Chief of tribe.

Judgment: For respondent.

Appeal:

(1) Proceedings before Native Commissioner, sitting as Court of Appeal on decision of Chief's Court, irregular, as no plea was filed.

(2) Bad in law: in that Native Commissioner held that plaintiff could not succeed as sole heiress.

(3) On questions of fact.

Held:

(1) Rules make no provision for pleas in proceedings before Native Commissioner in an appeal from Chief's Court.

(2) Land tenure in Native Locations, Transvaal, is communal. Land vests in Chief in trust for tribe. Chief has right to allot lands to members. Land reverts to commonage on death of allottee. Rights of inheritance are subject to other considerations. Plaintiff has failed to establish under what system of law she claims inheritance.

(3) Facts support Native Commissioner's findings.

Appeal dismissed.

Authorities:

G.N. 2255 of 1928. Rules 7 and 8.
Zibhebu Zwane *v.* Mangezwe Myeni, 1937, N. and T. Case No. 32.
Gabetlole *v.* Sikwe, 1945: P.H. R. 17.
Zulu *v.* Kwalele, 1944: P.H. R. 20.
Schapera: Tswana Law, pages 204–207.

Morgan, M (delivering judgment of the Court):—

The appellant (a widow) sued the respondent in the Court of James Molotlegi, Chief of the Bafokeng tribe, in the district of Rustenburg.

The claim was for the restoration of a residential site and an arable land which had been allotted to her late brother, Alfred Mokgatle, who died over 13 years ago, and was based on an alleged right of inheritance as heir to the late brother's estate.

The Chief's decision, which was in favour of the appellant, was reversed on appeal to the Native Commissioner.

Against the Native Commissioner's judgment an appeal has been lodged on the following grounds, viz.:—

(1) That the proceedings in the Native Commissioner's Court were irregular inasmuch as the Court failed to record the defendant's plea and the plaintiff was prejudiced in regard to the evidence to be led to meet defendant's case.

(2) That the judgment was against the evidence and the weight of evidence.

(3) That the judgment is bad in law inasmuch as :—

(*a*) That the Court erred in finding on the evidence and or evidence adduced that the Chief had actually re-allotted the land and site to defendant. The Court apparently relied upon uncorroborated and inadmissible evidence despite the findings of facts by the Chief's Court, on the detailed evidence there led.

(*b*) On the evidence the Chief could not lawfully re-allot as claimed and/or

(*c*) That the Court erred in holding that the plaintiff (now appellant) was not entitled to the allotment of her late brother Alfred Mokgatle, being his sole heiress.

(*d*) The grantee could not lawfully have been deprived of the grant on the facts and as the original grant stands the plaintiff (now appellant) is entitled to possession.

The appeal must fail on the first grounds, having regard to the fact that there is no provision for the recording of the plea in the Native Commissioner's Court in an appeal from a Chief's Court. Section 7 and 8 of the Regulations published under *Government Notice* No. 2255 of 1928, as amended, which set out the procedure to be followed in Appeals from a Chief's Court, read as follows:—

Rule No. 7. " The Chief on receiving any notice of appeal shall immediately report to the Clerk of the Court particulars of the claim lodged with him, the reply of the judgment debtor, if any, and his judgment or Order thereupon and reasons therefor which shall be recorded by such Clerk of the Court ".

Rule No. 8. " Upon the day fixed for the appearance of the parties the Native Commissioner shall hear and determine the case as if it were a case of first instance in such Court, and the successful party may take out the process of the Court of such Native Commissioner for the execution of the judgment or order ".

It is true that the Native Commissioner must hear and determine the case as if it were a case of first instance, but it has to be borne in mind that this requirement applies only to the hearing and recording of the evidence, since no summons is issued out of the Court of the Native Commissioner, in an appeal from a Chief's Court. A plea without a summons is difficult to envisage.

McLoughlin, P, in the case of Zibhebu Zwane *v.* Mangezwe Myeni (Case No. 32 of 1937, N. and T.) said: " An appeal from the Chief's Court involves consideration on appeal of—

(1) a specific claim in the lower Court;
(2) a judgment based on that claim;
(3) the Chief's reason for that judgment;
(4) the recording of the evidence *de novo*; and
(5) a new judgment on the foregoing ".

The learned Président in that case went on to say " the Native Commissioner merely supplies that portion of the case on appeal which is lacking in the Chief's record, namely the evidence. In recording this evidence the Native Commissioner is required to proceed as it it were a case of first instance based on the claim preferred in the Chief's Court ".

The Rules of both Courts, namely, the Chief's and the Native Commissioner's have been complied with in the present case, in that the procedure followed in both Courts has conformed with the pattern described above, with regard to which this Court can find nothing to criticise.

As regards the second ground of appeal, the Native Commissioner found that the late Chief August Mokgatle had actually re-allotted the residential site and the arable land occupied by the late Alfred Mokgatle to respondent. The evidence, which supports the Native Commissioner's finding, is that respondent was allowed by the late Alfred Mokgatle to live with him; that both Alfred and his wife (Ernistina) were in poor health and were nursed by respondent and his wife and later buried at the expense of the respondent; that respondent and his wife lived on the site, undisturbed, for thirteen years after the death of Ernistina, Alfred's widow, who died some years after her husband.

The appellant admitted that the plots were not allotted to her by the Chief while respondent stated that the Chief allotted them to him in the presence of men after the death of Ernistina. The length of time during which the Respondent has been in occupation of the plots strengthens his testimony that the late Chief had allotted them to him.

The submission contained in paragraph (*a*) of the third ground of appeal is unsupported by the evidence, or by argument before this Court. No portion of the record has been attacked by Appellant's Counsel on the question of inadmissibility of evidence, and some corroboration of the respondent's evidence can be found in the fact that his undisturbed possession of the plots over a number of years is consistent with his contention that the land was lawfully allotted to him. The onus of proof that he was in unauthorised occupation is on the appellant in the circumstances of the case.

Appellant has further failed to show in what way the Chief could not lawfully re-allot the land after the death of the previous grantee, Alfred Mokgatle.

The land comprising Native Locations in the Transvaal falls into two classes though in some cases the two classes co-exist in one location:—

(*a*) Land belonging to the natives themselves.

(*b*) Land not belonging to them.

Under (*a*) we have:—

Land acquired by joint purchase and specially reserved location land by the Government. Most of the "location" ground in the Rustenburg district was actually purchased by the tribes concerned.

The system of tenure in Native locations in the Transvaal is communal, and as such the land vests in the Chief in trust for the tribe. The Chief has the right to allot lands to individual members of his tribes (usually the heads of families) but an allotment automatically reverts to the tribe for re-allotment, or reverts to the commonage upon the death ot the allottee. When dealing with applications for allotment, however, the claims of the heirs of deceased allottees are generally taken into account.

But as already stated, the ownership of land in Native locations in the Transvaal is on a communal basis, which limits the rights of inheritance of an heir to a particular allotment. His rights are subject to other considerations. In the present case the appellant was living with her husband at Boons at the time of the death of her brother, Alfred and his wife Ernistina. She was still at Boons thirteen years ago when the plots were allotted to the respondent. It was only last year, when her husband died, that she moved to Phokeng in order, apparently, to claim a title to the plots. She stated in evidence that her two sons are occupying her home at Boons.

It is felt that the foregoing consideration outweigh any right to the plots which she might have had as heir in the estate, if, indeed, she could have established such right, and favour an allotment or "permission to occupy" in favour of the respondent.

The Native Commissioner's judgment is also attacked on the ground that he erred in holding that the appellant was not entitled to the allotment of her late brother, being his sole heiress.

The appellant in evidence stated "I want the land because it used to belong to my late brother Alfred". She stated also, "Alfred had no brothers. He had one sister who is dead and I am the only surviving sister. I claim the allotment with the house because Alfred was my brother." There is also evidence that Alfred's sons had died.

There is nothing on record, however, to show under what system of law the appellant claims to be the heir to her late brother's estate. She has failed therefore, to establish, firstly, that she is the heir and secondly that she is entitled to the property occupied by the respondent.

It is true that the Chief in his reasons for judgment, states that appellant is the sole heir in her late brother's estate and further states the respondent recognised her as such, but she cannot be regarded by this Court as the heir, *ipso jure*, on that account.

The appeal is dismissed with costs.

For Appellant: Mr. Adv. Kotze, instructed by Kotze and Duffy, Rustenburg.

For Respondent: Mr. A. W. Helman of Messrs. Helman and Michel, Johannesburg.

TRADING: "COMPANY"; "MANAGING DIRECTOR".

CASE No. 3 OF 1948 (JOHANNESBURG).

BANTU COAL & FUEL Co. (PTY.), LTD., *v.* EDWIN MOTHLODI.

JOHANNESBURG: 11th June, 1948. Before Marsberg, President, Morgan and Van Gass, Members of the Court (Central Division).

Trading—"*Company*"—"*Managing Director*"—*Professed orthodox trading concern—Actually voluntary association—True nature of relationship of parties relied on to determine issues—Profits earned—Debatement of accounts—Trading account—Onus of proof on "Managing Director" to establish working expenses and payments.*

Practice and Procedure—Viva voce *application to add additional ground of appeal—viz.* lis pendens—*point not raised at trail—moreover despite* lis pendens *parties joined issue and fully debated their affairs on same cause of action—Application refused—Substantial prejudice would be caused.*

Native Appeal Court Rule No. 19 *requires applications to be lodged in writing one clear day before commencement of session. Rule No.* 22 *limits parties to grounds specified in Notice of Appeal.*

Claim: Payment of £761. 8s. 0d. profits earned.

Plea: Denial.

Judgment: For plaintiff for £329. 13s. 0d. and costs.

Appeal:

(1) Questions of fact.
(2) *Viva voce* application to add further ground of appeal, viz. *lis pendens.*

Held:

(1) Facts generally support Native Commissioner's findings on debatement of accounts but minor adjustments are made. Judgment entered for plaintiff for £286. 11s. 6d. with costs. Appellant fails on all major issues.

(2) Refusing application, that despite *lis pendens* parties joined issue in this case and fully debated their affairs on same cause of action. Substantial prejudice would be caused if application allowed. Point not taken in Court below.

(3) Native Appeal Court rules—
Rule No. 19: Parties limited to grounds stated in Notice of Appeal.
Rule No. 22: Objections, exceptions or application to be supplied in writing one clear day before commencement of session.

Appeal dismissed with costs.

Authorities:

Cole *v.* Union Government, 1910 A.D. 263.
Van Pletsen *v.* Henning, 1913 A.D. 82.
Mahomed *v.* Lockhart Bros. & Co., Ltd., 1940, A.D. 245.
N.A.C. Rules No. 19 and 22.
Rex *v.* Dhlumayo S.A.L. Reports, June (11), 1948.
Gamble *v.* Hannah, 1912, O.P.D. 57.
Clark *v.* Durbach, 1912, O.P.D. 127.
Small *v.* van Rensburg, 1911, O.P.D. 36.

Marsberg, P. (delivering the judgment of the Court):—

In the Native Commissioner's Court at Johannesburg, plaintiff, Bantu Coal and Fuel Company (Pty.), Ltd., sued defendant, Edwin Mothlodi for the sum of £761. 8s. with costs of suit on the following allegations:—

(1) Plaintiffs state that the defendant was the Managing Director of the plaintiff company up to February, 1947 and was responsible for all the business transactions of the Company.

(2) Plaintiffs have sued the defendant for an order to produce all records of the Company, to furnish a full and proper statement of account, to pay to plaintiff all money belonging to plaintiff, and to show cause why the money standing to the credit of the defendant in the offices of the Colonial Bank and Trust Company should not be paid to plaintiff. The said action is still pending in this Honourable Court.

(3) During the period of his said office, defendant received and handled at least 2,256 tons of coal on behalf of plaintiff company.

(4) Plaintiffs now claim payment from the Defendant of the sum of £761. 8s. being the amount of surplus which the defendant should have in his possession

belonging to the plaintiff company, and being the difference between the cost price of the coal referred to above and the selling price thereof, and which sum defendant has failed to pay to plaintiffs.

Defendant in his plea denied the claim. After hearing lengthy evidence adduced by both parties, the Additional Native Commissioner gave judgment for plaintiff for £329. 13s. 9d. and costs.

Against this judgment defendant has appealed on the grounds that the judgment is against the evidence and the weight of evidence in that:—

(*a*) "The learned Commissioner erred in holding that the defendant had not proved that he was entitled to receive a remuneration as director of the plaintiff company of £2 per week, and to take defendant's claim, for such salary, into consideration when assessing the amount due by the defendant to plaintiff.

(*b*) The learned Commissioner erred in holding that defendant had failed to establish that he had disbursed on behalf of the plaintiff the sum of £28. in respect of casual labour.

(*c*) The learned Commissioner erred in holding that the sum of £23. 2s. 3d., being profits handled by the defendant during the period 1st December, 1946 to the 16th of January, 1947, was separate and distinct from the total profits of £127. 16s. alleged by the defendant to have been handled by him during the whole period which is the material and relevant period of the above cause of action.

(*d*) The learned Commissioner erred in completely failing to take into account the undisputed evidence given by the defendant that he had paid into plaintiff's banking account the sum of £130. 0s. 0d.; and had paid to plaintiff's book-keeper Mr. E. Leo, on behalf of plaintiff, the sum of £20. the former amount representing portion of profits which defendant received on behalf of plaintiff and paid to plaintiff.

(*e*) The learned Commissioner erred in finding for plaintiff in the sum of £329. 13s. 9d. with costs, and should have found that plaintiff was entitled to received a sum of £127. 17s. 9d. from defendant, as against which amount defendant is entitled to set off £234. 0s. claimed by defendant as salary, and should thus have dismissed plaintiff's claim with costs.

Alternatively, if the learned Commissioner was correct in holding that defendant was not entitled to claim £234. as and for a salary, he should have granted the plaintiff judgment for £127. 17s. 9d. and not £329. 13s. 9d.

At the outset before us, Mr. Merber for appellant applies to add an additional ground of appeal to this effect :—

(*f*) The Native Commissioner erred in allowing the present action to proceed in view of the fact that another action was pending between the same parties where the cause of action was the same and the ultimate relief claimed was the same."

Mr. Melman for respondent, strongly opposes the application.

In support of his application Mr. Merber quotes *Cole* v. *Union Government*, 1910, *A.D.* 263 and *Van Pletsen* v. *Henning*, 1913, *A.D.* 82. He urges that as this is a point of law covered by the pleadings, the authorities support his request to take the new point for the first time on appeal.

The point was not raised or taken in the Court below. In the case of Mahomed *v.* Lockhat Bros & Co., Ltd., 1940 A.D. 245 it is stated that " one of the objects of the requirements of the Magistrates' Courts Rules that grounds of appeal should specify what rulings of law are appealed against is to enable the party who was successful to abandon his judgment and so save costs of appeal."

The attention of Counsel is directed to the following provisions of the Native Appeal Court Rules:—

Rule No. 22. " In the hearing of an appeal the parties shall be limited to the ground stated in the notice of appeal, except where the appellant is not represented by a legal practitioner and was not so represented in the Native Commissioner's Court from which such appeal is brought."

Rule No. 19. " Written particulars of any objection or exception or of any application in connection with an appeal shall be filed in triplicate with the Registrar of the Native Appeal Court (or, in his absence, with the Clerk of the Native Commissioner's Court at the centre where the session of the Native Appeal Court is to be held) not less then one clear day prior to the commencement of such session."

The record of this case clearly indicates that despite *lis pendens* the parties joined issue and fully debated their affairs on the same cause of action.

We are satisfied that substantial prejudice would be caused, were this belated application to be allowed and accordingly we are not prepared to admit the further ground of appeal.

The issues in this case were simplified considerably by defendant's admission at the end of plaintiff's case that he received 2,256 tons of coal on behalf of the plaintiff company, that the gross profit per ton was 6s. 9d. and that he handled the gross profits amounting to £761. 8s.

Working on this information a Chartered Accountant, Mr. Torchitsky prepared a Trading Account which was handed into Court (exhibit " C ") during the course of his evidence as a witness for defendant. This Trading Account formed the main basis for argument by counsel before this Court. Having accepted liability to account to plaintiff company for the gross proceeds on the sale of 2,256 tons of coal, the onus was on defendant to establish clearly any expenses incurred in the disposal of the coal. This he attempted to do under the various headings of disbursements reflected in exhibit " C ". Only two items in the Trading Account were seriously contested namely:—

Casual labour, £28.

Further transport charges, £17. 15s. 6d.

Ground (*b*) of the Notice of Appeal relates to the item Casual Labour. We agree with the Native Commissioner that there is no evidence to support this item. It is clearly an arbitrary figure and does not tally with the number of trucks of coal handled as detailed in exhibits " A " and " B ". In our opinion the item was correctly disallowed.

The item £17. 15s. 6d. for Further Transport Charges was not a specific ground of appeal. As counsel for appellant conceded that this amount was correctly disallowed by the Native Commissioner there is no need for further comment.

Ground (*c*).—£23. 2s. 3d. We agree that the Native Commissioner erred in regard to this item. Although this was money collected after the 16th January, 1947, the date up to which the Trading Account was prepared it is part and parcel of the total amount (gross sales, £1,692) for which defendant has accepted liability.

Ground (*d*).—£130 paid by defendant into plaintiff's banking account.

Twenty pounds paid by defendant to Mr. Leo for services for examination of the company's books.

The Native Commissioner stated that it was not the function of the Court to come to a finding in regard to these two items.

In our view the item of £130 paid into the bank is liquidated within the ambit of the Trading Account (exhibit " C "). There is nothing on the record to indicate whether this sum is still lying intact to the company's credit or whether it was used to pay expenses appearing in the Trading Account. If defendant claims to set off this item he should have clear evidence in support. On the evidence it is impossible to arrive at a conclusion; we agree therefore that this item has properly been left out of reckoning.

In regard to the item of £20, however, we feel, that as this amount was expended on the company's business, the company should be liable. The amount was paid to Mr. Leo and should have been allowed.

Now in regard to the question of defendant's remuneration [Ground (*a*) of the Notice Appeal] counsel for appellant urged that on the probabilities the Managing Director of a company would be paid a salary, and that there was no onus on defendant to prove an agreement to pay him a salary. Realising there was possibly no specific agreement between the parties the Court was urged to consider the surrounding circumstances. Although the defendant and plaintiffs purported to stand in relation to each other as the " Managing Director " and " The Bantu Coal and Fuel Company (Pty.), Ltd. ", they were in fact, as disclosed by the evidence, an association of some ten or twelve persons who under the cloak of their cognomen purchased coal in bulk for resale to themselves for subsequent further sale or other disposal. In pursuance of this arrangement the defendant took over about 90 per cent. of the purchases of the company and resold the coal at a profit to himself of 1s. a bag. On the coal turnover admitted in this case his personal profits would be well over £1,000 within the period of two and a quarter years. By contrast according to exhibit " C ", the trading account of the company, the amount available for distribution as dividends or profits to the dozen shareholders was £127. 16s. for the same period. If the Managing Director's alleged remuneration be taken into account the company would have shown a loss of about £107. It may well be asked, therefore, what had the parties in contemplation when defendant became Managing Director? And perhaps the answer is to be found in the statements of some of the witnesses who said " We expected the defendant to work for nothing because he volunteered to do so. Defendant was entitled to some share of profits as other shareholders. We all volunteered to help the company without any payment ".

As pointed out in the Native Commissioner's reasons for judgment defendant originally made no counter claim for remuneration nor did he cross-question plaintiff's witnesses on this score. A further significant fact is that although he claims he should have been paid £2 a week, apparently he did not once draw salary over the whole period of more than two years. Had salary been payable it is most improbable that he would not have drawn it. His statement that there were no funds is not borne out by the Trading Account.

We agree with the Native Commissioner that defendant has not proved that he was entitled to remuneration. What may have been customary in an orthodox trading concern is no guide in the present case.

Finally, there is the last ground of appeal (*e*) relating to the total amount of the judgment. The only outstanding item not herein before mentioned is that of £133 due to MacDonald & Co. Counsel for appellant conceded that defendant must pay this amount.

The Native Commissioner gave judgment for £329. 13s. 9d. made up as follows:—

£	s.	d.	
127	16	0	nett profit, exhibit " C ".
133	0	0	due to MacDonald & Co.
23	2	3	collected after 16th January, 1947.
28	0	0	casual labour (exhibit " C ").
17	15	6	surcharge on coal.

On appeal we have disallowed the item £23. 2s. 3d.: [Ground (*c*) of Appeal] from the Native Commissioner's calculation and have allowed inclusion of the item £20 in respect of Mr Leo's professional charges.

To summarise the judgment will be arrived at as follows:—

£	s.	d.	
127	16	0	nett profits, exhibit " C ".
133	0	0	due to MacDonald & Co.
28	0	0	casual labour disallowed from exhibit " C ".
17	15	6	further transport charges. Disallowed from exhibit " C ".
£306	11	6	
20	0	0	*less* fees to Mr Leo allowed on appeal.
£286	11	6	

The Native Commissioner's judgment is altered to read " for plaintiff for £286. 11s. 6d. with costs". As appellant (defendant) has failed on all major issues of appeal he is ordered to pay the costs of appeal.

For Appellant: Mr. Merber, instructed by Messrs. M. Kramer & Tuch, Johannesburg.

For Respondent: Mr. Helman of Messrs. Helman & Michel, Johannesburg.

MARRIAGE BY CIVIL RITES: DELIVERY OF WOMAN.
CASE No. 4 OF 1948 (NIGEL).

SOLOMON MLANGENI *v.* ISAAC DHLAMINI.

JOHANNESBURG: 14th June, 1948. Before Marsberg, President, Morgan and Van Gass, Members of the Court (Central Division).

Marriage—Civil Rites—Order to deliver daughter in marriage, failing which repayment of £50 *paid on account of dowry—Settlement made Order of Court—Whether* contra bonos mores—*Statutory provisions commended as statement of public policy—Cape proclamation No.* 110 *of* 1879, *Section* 30—" *It shall not be lawful for any person to compel any woman to enter into a contract of marriage, against her wish*"—*Court cannot make order to hand over a woman in marriage.*

Dowry paid in anticipation of marriage remains property of payer until marriage or customary union takes place—Ownership of dowry passes to girl's father on day of marriage—Must be refunded if engagement broken off and no marital union takes place—Function of Court, not interested parties, to assess damages—Settlement seeking to fix liquidated damages for non performance of marriage contract contrary to Native law.

Claim: Order to deliver daughter in marriage, failing which refund of dowry paid in anticipation.

Plea: Immaterial.

Judgment: For defendant.

Appeal: Immaterial.

Held:

(1) Court cannot order parent to hand over daughter in marriage.

(2) Dowry paid in anticipation of marriage remains property of payer until marriage takes place.

(3) If no marriage takes place, dowry must be refunded.

(4) Settlement seeking to fix liquidated damages for non performance of marriage contract contrary to Native Law.

(5) It is function of Court, not interested parties, to assess damages.

Authorities:

L. Nzimande *v.* J. Sibeko, 1948 N.A.C. (C.D.).
Muyamana *v.* Lusiza Busakwe, 1944, N. & T. 78.
Cape Proclamation No. 110 of 1879, Section 30.
Mercantile Law—Wille & Milne, 10th ed. *p.* 48.
Warren *v.* Union Government, 1916, A.D. T.P.D.
Pearl Assurance Coy. *v.* Union Government, 1934, A.D. 560.
Dhlamini *v.* Dhlamini, 18th March, 1947, P.H. R. 22.
Transvaal Law No. 3 of 1897, Section 9.

Marsberg, P. (delivering the judgment of the Court):—

In the Native Commissioner's Court at Nigel, plaintiff, Solomon Mlangeni sued defendant Isaac Dhlamini on a claim that defendant be ordered to deliver his daughter Esther to plaintiff's son Eric, failing which the defendant to be ordered to pay to plaintiff the sum of £50 with costs of suit. For the purposes of this judgment it suffices to state that the action is based on a series of negotiations between the parties to arrange a marriage between Eric and Esther.

In the trial Court the trouble between the parties appears to have been canvassed in two cases No. 4 of 1945 and No. 8 of 1946 before the one now before us on appeal. On the 9th January, 1946 the parents of the children and their attorneys appeared before Mr. Towne, Native Commissioner and recorded the following settlement:—

(1) Eric and Esther will be married by Civil Rights in Nigel on Wednesday at 11 a.m. the 30th January, 1946. The banns to be put up to-day.

(2) Should Esther fail to appear on 30th January, 1946, defendant will refund the £50 to plaintiff and if Eric does not appear on the 30th January, 1946, the £50 is forfeited to defendant ".

Eric failed to appear at the appointed time and the marriage was not proceeded with. Summons was then issued in this case and after trial the Native Commissioner gave judgment for defendant with costs. The question whether the settlement was *contra bonos mores* was strenoously argued in the trial Court but the Native Commissioner did not give a finding on the matter. Had the Native Commissioner and the parties directed their attention to the case of Mnyamana *v.* Lusiza Busakwe (N.A.C., N. & T., 1944, page 78) it is probable that the case would not have been presented in its present form nor would the judgment have been recorded.

In Mnyamana's case the Native Appeal Court held:—

(1) That cattle paid in anticipation of a marriage remain the property of the payer generally the bridegroom until the marriage or customary union takes place, even if they be delivered to the girl's father; that ownership passes to the latter on the day of the marriage and must be refunded to the rightful owner if the engagement is broken off and no marital union takes place.

(2) That it is the function of the Court and not that of the interested parties to assess any damages which may have been suffered by the latter.

The Court further stated:—

> To allow a father of a girl who has been jilted by her lover te keep all the lobolo cattle which have been delivered to him would be unjust.

The Court will not countenance the forfeiture of cattle which have been delivered on account of lobolo where an engagement has been broken off before marriage, whether by the man or the girl.

That money has been paid in this case is immaterial.

We have been constrained in another case which has came before us this session (viz. Johannesburg Case No. 575 of 1947 between L. Nzimande and J. Sibeko, which will be reported in due course) to lay down that it is unlawful for a Court to make an order directing the father or guardian to hand over his daughter or ward for the purposes of marriage. The underlying principle is crystalised in an old Statutory Provision which we have commended as a statement of public policy.

Vide Section 30 of Cape Proclamation No. 110 of 1879:—

"It shall not be lawful for any person to compel any woman to enter into a contract of marriage, against her wish".

In this case the plaintiff claims that the defendant be order to delivered his daughter Esther to plaintiff's son Eric.

Manifestly the Native Commissioner could not have made a valid order to that effect in favour of plaintiff, even had he held that plaintiff had proved his case. The correct determination of the case should have been dismissal of the summons. In view of the decision in Mnyamana's case and in order to place the parties in proper relationship we order that the appeal be allowed with costs and the judgment of the Native Commissioner is altered to read absolution from the instance with costs.

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

For Respondent: Mr. L. Goodman of Johannesburg.

ESTATES: IMMOVABLE PROPERTY: ALEXANDRA TOWNSHIP. CASE No. 5 OF 1948 (JOHANNESBURG).

F. B. WESSELS, N.O. *v.* MICHAEL LUBNER, N.O.

JOHANNESBURG: 14th June, 1948. Before Marsberg, President; Morgan and Van Gass, Members of the Court (Central Division).

Estates—Immovable property—Alexandra Township, Johannesburg—Order to compel transfer—Alexandra Township Ltd., purporting to sell property to two different persons on same day—Effect of Registration in Deeds Office, Pretoria, of Deed of Transfer—Presumption of ownership of person in whose name registration effected—Onus on appellant to rebut presumption—Absolution from the instance—Failure to discharge onus.

Claim: Order to compel transfer of immovable property on grounds that defendant had registered the property in his own name, instead of in trust for a minor.

Plea: Denial.

Judgment: Absolution from the instance.

Appeal: On question of fact and interpretation of documents.

Held:

(1) That documents of agreement of purchase and sale, declaration of purchaser and declaration of seller disclose sale to two different persons on same day.

(2) Person in whose name property is registered is ostensibly the lawful owner.

(3) Therefore, plaintiff failed to prove his case.

NOTE.—Court draws attention to unsatisfactorily explained action of Alexandra Township, Ltd., in purporting to sell same property to two different persons on same day.

Certified copy of Declaration of Purchaser (Exhibit "F") is also defective on face of it.

Authorities: None.

Marsberg, P. (delivering the judgment of the Court):—

In the Native Commissioner's Court, Johannesburg, plaintiff, F. B. Wessels, representing the estate of the late Alpheus Tau, sued defendant M. Lubner, representing the estate of the late Josias Tau, for an order to compel defendant to transfer to plaintiff at the expense of the estate Josias Tau certain immovable property, being Stand No. 2078 in the Alexandra Township, Johannesburg. Plaintiff's essential averments are that:—

(1) On the 19th June, 1919, Alpheus Tau, bought Stand No. 2078 from Alexandra Township, Ltd., for £45.

(2) After Alpheus' death in 1920 his widow instructed Alexandra Township, Ltd., to pass title to Josias Tau, their eldest son, in trust for her minor son, John Tau, until the latter became of age.

(3) Alexandra Township, Ltd., passed transfer in the Deeds Office, Pretoria, in 1920, in the name of Josias Tau as out and out owner and not in trust for the minor John.

(4) Josias Tau died in 1940 and the widow Maria Tau claims the property.

(5) Stand No. 2078 is not the property of the estate Josias Tau, but the property of the estate Alpheus Tau.

Defendant denied the allegations.

Evidence for plaintiff only was heard when defendant applied for absolution which was granted.

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

(1) That the Judicial Commissioner erred in giving a judgment of absolution from the instance with costs and finding—

(*a*) that plaintiff had failed to prove the allegation in his summons;

(*b*) that there was no case for the defendant to meet;

(*c*) erred also in going into the merits of the case when he had only to decide whether plaintiff had produced any evidence in support of the claim in the summons.

(2) Erred in failing to appreciate the evidence that after the death of Alpheus Tau or Dau, that nobody was entitled to deal with his estate or of the ownership to the stand in dispute until a legal representative had been appointed by the Native Commissioner to administer the sale in conjunction with the Native Commissioner as required by law.

(3) Erred generally in the conclusions and deductions he arrived at from the evidence given.

(4) That the judgment is wrong in point of fact and law.

From the evidence it appears that on 19th June, 1919, an agreement of purchase and sale was made between Alexandra Township, Ltd., and one *Alvio Dau* (presumably Alpheus Tau) for the sale of Stand No. 2078.

This document was signed by Lillios Campbell for the sellers. On the 1st of October, 1920, *Josiah Tau* solemnly declared that on 19th June, 1919, he Josiah Tau, had purchased the same Stand from Alexandra Township, Ltd., and on 15th October, 1920, Lillios Campbell also solemnly declared that on 19th June, 1919, she, as agent for Alexandra Township, Ltd., had made the sale of this property to Josiah Tau. Under Deed of Transfer No. 17318 of 1920 on 22nd November, 1920, this property was transferred from Alexandra Townships, Ltd., to Josiah Tau and duly registered in the Deeds Office at Pretoria. From those documents, i.e. agreement of purchase and sale, declaration of purchaser and declaration of seller, The Alexandra Township, Ltd., purported to have sold Stand No. 2078 to two different persons on the 19th June, 1919.

Now obviously, this unusual action of the Alexandra Townships, Ltd., requires explanation. Efforts were made to secure the attendance in the Court below of Mrs. Campbell, the company's secretary, but on medical advice, she was not called. Without a satisfactory explanation of this vital transaction clearly the plaintiff can take his case no further. Josiah Tau is ostensibly the lawful registered owner of the property in question.

We agree generally with the Native Commissioner in his estimate of the further evidence adduced by plaintiff and find no good reason to disturb his judgment.

Should this case be brought on for further trial the Native Commissioner should take special steps to clear up some features which appear to us to be very unsatisfactory, e.g. the apparent sale to two different persons on the same day of the same property (see Exhibit " D " and " F "). Exhibit F also cannot be a true copy of the original Declaration of Purchaser. Executed in 1920, it refers to the Special Taxation Act of 1944.

The appeal is dismissed with costs.

For Appellant: Adv. Measroch, instructed by Mr. Lubner, Johannesburg.

For Respondent: Mr. Wessels of Johannesburg.

DEFAULT JUDGMENT: REFUSAL TO RESCIND.

CASE No. 6 OF 1948 (VEREENIGING).

IZAK THABENI *v.* DANIEL SISILANA.

JOHANNESBURG: 14th June, 1948. Before Marsberg, President, Morgan and Van Gass, Members of the Court (Central Division).

Practice and Procedure—Default judgment—Refusal by Native Commissioner to rescind—Applicant not giving explanation of his absence from Court but attacking default judgment as bad in law—Held to be novel but not a reasonable explanation of defendant's absence from Court—Native Commissioner's Court Rule No. 26 (*b*)—*G.N. No.* 305 *of* 1934—*Defendant in default*—" *The Court may enter judgment* consistent with such evidence as may be adduced "—*meaning of—Does not mean that no judgment can be given without evidence having been led—Court's discretion not fettered—practice in Magistrate's Courts compared and approved—Summons—nature of claim—contract—plaintiff, in law, not required to prove abatement of damage where defendant prevents fulfilment of contract.*

Claim:

Application for rescission of default judgment on grounds—

(1) Rule 26 of Native Commissioner's Courts not complied with.

(2) Plaintiff, on the summons, is in law required to prove abatement of damages.

(3) Judgment cannot be given without evidence being led.

Plea: None.

Judgment: Application to rescind refused.

Appeal: Same as claim.

Held:

(1) Attack on judgment as bad in law is not reasonable explanation of absence from Court.

(2) The words of Rule 26 (*b*), G.N. No. 305 of 1934 "The Court may enter jndge ment *consistent with such evidence as may be adduced*" do not mean that no judgment can be given without evidence having been led.

(3) Plaintiff, in law, is not required to prove abatement of damage where defendant prevents fulfilment *of contract.*

Authorities:

Government Notice No. 305 of 1934. Rule 26 (*b*).
Act No. 32 of 1944, Rule 16. 8 (i) (iii) and 8 (6).
MacDuff & Co., Ltd., *v.* Johannesburg Consolidated Investment Co., Ltd. (1924 A.D. 573).
Koenig *v.* Johnson & Co., Ltd. (1935 A.D. 262).
Schlosberg S.A. Cases and Statutes on Evidence (2nd Edition).

Marsberg, P. (delivering the judgment of the Court):—

In the matter between Izak Thabeni, plaintiff and Daniel Silisana, defendant, in the Native Commissioner's Court at Vereeniging, defendant has noted an appeal against the judgment of the Native Commissioner refusing an application for recission of a default udgment entered against defendant on 28th April, 1948, on the following grounds:—

(*a*) The requirements of Rule 26 were not complied with.

(*b*) The judgment is based on a summons in respect of which plaintiff is required in law to prove what steps he took to abate his damage, if any.

(*c*) The summons is vague and embarrassing and judgment cannot be given in respect thereof without evidence being led.

Rule 26 (*b*) as substituted by paragraph (*a*) of *Government Notice* No. 305 of 1934 reads as follows:—

> " If the claimant or applicant or his representative appears and the defendant or respondent is in default, the Court, if it is satisfied from evidence that the summons was duly served on the defendant or respondent, may enter judgment or make an order in favour of the claimant *consistent with such evidence as may be adduced*, together with an order for costs; or the Court may adjourn the hearing as it may deem fit ".

Mr. Helman for appellant, has argued very strenuously before us that the words underlined above debar the trial Court from entering judgment *unless* evidence has been adduced in support of the claim or, in other words, that no judgment can be given without evidence having been led. His contention would seek to divest the judicial officer of any discretion in adjudicating in the absence of the defendant.

The basic principle of practice in Courts of Native Commissioner is that justice shall be free from all technicalities. The rules are therefore designedly silent on many matters provided for more explicity in other Courts. But nevertheless on question of underlying principle recourse can profitably be had to consideration of the practice elsewhere. The relevant provisisions of practice in Magistrates' Courts on this matter do afford a guide. Rule 16 of the Magistrates' Courts Act No. 32 of 1944 provides *inter alia*, in regard to default judgment that the Court may—

> 8. (i) if a default judgment be sought call upon the plaintiff to produce such evidence either written or oral in support of his claim as it (ie. the Court) may deem necessary.
>
> (iii) enter judgment in terms of plaintiff's request or for so much of the claim as has been established to its satisfaction.

For an example where evidence must be led see Sub-section 6 of Section 8 (*ibid*).

This provision relates to the proof of damages, and ought with advantage to be followed in Courts of Native Commissioner.

It is impossible to read into this provision that the calling of evidence is obligatory. Rather, the Court's discretion to call such evidence as it may deem necessary is clear.

If then the legislature contemplated that no injustice would be done in dispensing with the calling of evidence in appropriate cases in the Magistrates' Courts can we assume that in Native Commissioner's Courts judgments are unlawful in similar circumstances? We think not. Consequently we hold that the words " consistent with such evidence as may be adduced " merely qualify such judgment or order as may be given. They do not mean that no judgment can be given without evidence having been led.

The first and third ground of appeal fail.

In regard to the second ground of appeal that the plaintiff was required in law to prove what steps he took to abate his damage, if any, it suffices to state that the claim, reading the summons fairly, is one for payment of the agreed contract price of £37 for work done by plaintiff in the building of a house for defendant. The allegation is that defendant failed to supply further material (as agreed) when the building was nearly completed. By withholding further materials defendant has prevented plaintiff from fulfilling his part of the contract and in law plaintiff is deemed to have fulfilled his part of the contract.

There appears to be no onus on plaintiff to prove abatement of damages.

MacDuff & Co., Ltd., *v.* Johannesburg Consolidated Investment Co., Ltd. (1924 A.D. 573).

Koenig *v.* Johnson & Co., Ltd. (1935 A.D. 262).

This point appears to us to be irrelevant, but be this as it may, the application to the Native Commissioner to rescind the default judgment was made on the ground that the said default judgment was granted by mistake inasmuch as the provisions of Rule 26(*b*) were not complied with. It was argued before us that the mistake was the Native Commissioner's. The suggestion that a judicial officer should be required to review and rescind a default judgment given by him by mistake is novel. The presumption of law that a judgment of a competent Court is correct excludes every proof to the contrary. Schlosberg S.A. Cases and Statutes on Evidence. (Second Edition.)

We cannot say that the Native Commissioner erred in refusing the application to rescind the default judgment, nor that the judgment was bad in law on the grounds stated in the Notice of Appeal before us.

The Appeal is dismissed with costs.

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

For Respondent: Mr. Maltz of Messrs. Maltz & Kaplan, Johannesburg.

LANDLORD AND TENANT.

CASE No. 7 OF 1948. (JOHANNESBURG).

ABSOLOM MTOMBENI *v.* MOTSANAYANE.

JOHANNESBURG: 16th June, 1948. Before Marsberg, President, Morgan and Van Gass, Members of the Court (Central Division).

Landlord and tenant—Arrear rentals—Stand Pimville Location, Johannesburg—Defendant disputing landlords title—Misjoinder—agreement in fraudem legis *with third party.*

Practice and Procedure—Application to Appeal Court to present petition of person not party to proceedings—Seeking to admit affidavit or hear evidence viva voce *before Appeal Court—Petition not filed of record at least one clear day before commencement of session.*

Native Appeal Court Rule No. 19*—Petition alleges bogus agreement—in* fraudem legis*—Petitioner's hands unclean—irrelevant to proceedings—application refused.*

Practice and Procedure —" test case "—several actions of similar purport—Evidence for one set of parties not evidence for others—Undesireable consolidate several actions for purposes of trial—Evidence in a test case should be confined strictly to issues relevant to parties concerned.

Claim: £23 arrear rentals.

Plea: Plaintiff not landlord—Existing agreement between plaintiff and third person to bluff municipal authorities—Third person real owner of property.

Judgment: For plaintiff for £23 and costs.

Appeal:

(1) Agreement between plaintiff and third party real owner should have been upheld.

(2) Rentals paid to third party.

(3) Action lay against third party.

(4) On questions of fact.

Held:

(1) Agreement *in fraudem legis* uninforceable—Third person was prime mover in fraudulent agreement—His hands are unclean—He can obtain no relief in Court.

(2) and (3) fall away.

(4) Evidence supports Native Commissioner's findings. Plaintiff acquired property by valid purchase.

Authorities:

Cassim *v.* Jajbhay, 1939 A.D.
Cassim *v.* Pietersen, 1940, W.L.D.
Richard Zulu *v.* Zebulon Vilikazi, 1945 N. and T. 106.
Native Appeal Court Rule No. 19.
Albertyn *v.* Kumalo and Others, 1946, W.L.D. 529, 538.
Ntisibi *v.* Dadhao, 1946, N.P.D. 787.
Mercantile Law Wille & Milne, 11th Ed. P. 27.
Levy *v.* Katz.
Clarke *v.* Nourse Mines, 1910 A.D.
Wessels Law of Contract. Vol. 1 para. 670, *p.* 226.
Maasdorp. Vol. III. 5th Ed., *p.* 18.
Truck and Car Coy. *v.* Matola.
Padiosky, 1942, T.P.D. 534.

Marsberg, P. (delivering the judgment of the Court):—

Plaintff Absolom Mtombeni, sued Mr. Malefane, Defendant in the Native Commissioner's Court, Johannesburg, for the sum of £23 arrear rent and costs of suit, on the grounds that plaintiff was the lessor and defendant the lessee of Stand No. 2405, Pimville Township, Johannesburg, and that defendant was in arrear with his rental of £1 per month from September, 1944 to July, 1946, both months inclusive.

In his plea defendant admitted that he was the lessee but denied that plaintiff was the lessor. He stated further that one Elias Nyembe was the lessor and that he had paid all rentals to the said Elias Nyembe.

After hearing evidence the Native Commissioner gave judgment in favour of plaintiff for £23 and costs. Against this judgment defendant has appealed on the following grounds:—

(*a*) That the judgment is bad in law and contrary to law in that—

(1) the Court erred in ignoring the agreement made between the plaintiff and his father with Elias Nyembe, the rightful owner of the property concerned in this action.

(2) It was not competent for the Court to give judgment against defendant for the amount of rents which had been duly paid with plaintiff's knowledge, to Elias Nyembe, the person who was duly authorised to collect such rentals.

(3) The plaintiff's action, if any, lay against Elias Nyembe, and not against defendant.

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

At the outset appellant applied for permission to present a petition on behalf of Elias Nyembe for an order to:—

(*a*) Admit the affidavit by one Alpheus Njikelana.

(*b*) Grant an order agreeing to take the evidence of the said Alpheus Njikelana *viva voce*; or

(*c*) Set aside the two judgments of the Native Commissioner, Johannesburg, in cases Nos. 588 of 1946 and 847 of 1946 and to order a retrial before a new Judical Officer.

This petition is dated 14th June, 1948, and reached us on 15th June, 1948. The session of this Court commenced on 10th June, 1948.

The purport of the affidavit embodied in the petition was that in order to nullify the effect of the possible order of the Native Divorce Court in an action between Mrs. Nyembe and Elias Nyembe, Simon Mtombeni and Alpheus Njikelana conspired with Nyembe and fraudulently induced the Municipal Authorities, by means of a bogus agreement of sale to transfer and register certain properties of Nyembe in the names of Alpheus Njikelana and Absolom Mtombeni, son of Simon Mtombeni. Appellant desired to produce this affidavit for consideration by us or to be granted leave to have the evidence of Alpheus Njikelana to this effect adduced before us *viva voce*.

Mr. Smits, in support of the petition relied on several authorities, particularly:—

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

Cassim *v.* Petersen, 1940 W.L.D.

The rule of law as laid down in Jajbhay's case is perfectly clear, viz. agreements which are prohibited by law or contrary to good morals or public policy cannot found an action to enforce them. The rule is absolute and admits of no exceptions. The exceptions considered in that case, based on *pari delictum*, afford appellant no relief because here he was the prime mover in the fraudulent agreements. His hands are manifestly unclean and this Court is not prepared to come to his aid. Moreover the alleged transaction between Nyembe and Njikelana is entirely irrelevant to the proceedings in the case now before us.

Furthermore, appellant, in presenting this petition has not complied with Rule No. 19 of the Native Appeal Courts Rules.

The application to present the petition is refused.

The appeal was then argued on the merits.

Soon after plaintiff commenced his evidence before the Native Commissioner the cross examination appeared to disclose that defendant was relying on an agreement not specifically stated in his plea and the Court then ruled that the onus lay on defendant to proceed. Most of the subsequent evidence related to this alleged agreement. Elias Nyembe then stated that " on 21st September, 1942, I transferred the lease of this stand to Mtombeni, the plaintiff. I did not sell the lease of the stand and building on it to plaintiff, he was holding it for me ". Nyembe stated further that he had made an agreement with plaintiff's father Simon Mtombeni, that he told the Native Advisory Board that the application to transfer the property was only a " bluff ", that the Board agreed it would bluff the Municipal Superintendent and that he entered into this agreement with Mtombeni because when he fell ill he feared that his wife would sell the property. He had done this to prevent her from selling it. If, in fact, Nyembe did enter into such an agreement with Mtombeni, it was clearly in *fraudem legis* and could not be enforced. The Native Commissioner does not appear to have considered this matter in this light. He rejected Nyembe's evidence that there was such an agreement because he had failed to discharge the onus to prove it.

Appellant has urged that the Native Commissioner has erred in ignoring the agreement made between plaintiff and his father with Elias Nyembe, the rightful owner of the property concerned in this action; but, as we point out above, the agreement should have been ruled out of Court as being fraudulent. Cassim *v.* Jajbhay, 1939 A.D. Elias Nyembe was clearly the party who perpetrated the fraud and can obtain no relief in Court.

The respondent, plaintiff, has claimed that he acquired the property by valid purchase. In this he is amply supported by the evidence. He had produced Nyembe's receipt for £70, the purchase price (exhibit " C "); application by Elias Nyembe to transfer the property to plaintiff, with municipal approval (exhibit " E "). Evidence was given by Municipal Authorities and members of the Native Advisory Board discrediting Nyembe's statements concerning the alleged bogus agreement.

The Native Commissioner has found that the evidence of defendant and his witnesses was untruthful and unconvincing. We agree that he had ample reason to arrive at that conclusion.

Mr. Smits argued strongly before us that Nyembe had transferred only the lease but not his rights in the buildings or his rights to collect the rentals. This contention can be disposed of very shortly. In the case of Richard Zulu *v.* Zebulon Vilikazi (1945, N.A.C., T. & N. 106) the Native Appeal Court pointed out that " A third party cannot obtain a right to the building as a completed structure with the concomitant right to use if that persons be not the lessee ".

The appeal is dismissed with costs.

We must point out a very undesirable practice which appears to be followed in the Native Commissioner's Court. In an explanatory note the Native Commissioner states that four cases viz. Nos. 585/46, 586/46, 587/46 and 588/46 were consolidated for the purposes of trial. Evidence was led in case No. 586/46 between plaintiff and Mr. Malefane. The appeal has been lodged by Mr. Motsanayano, defendant in case No. 588/46. Apparently this has been effected by agreement between the various parties, but to us this appears to be irregular. The evidence for one set of parties cannot be evidence in law for another set of parties. The proper course to follow where several actions of similar purport await trial and it is desired to avoid repetition of the evidence is to take one action to trial as a test and to confine the evidence strictly to the issues relevant to the parties concerned.

In the series of actions before us which apparently also includes the case between A. Mtombeni and Elias Nyembe, No. 847/46, though the nature of the action therein is quite different, our judgment has been based on the appeal between A. Mtombeni, plaintiff and Mr. Motsanayane, defendant. The appeal noted in case No. 847/46 was not argued before us but we were informed by counsel that this case stood or fell by the decision in the appeal between A. Mtombeni and Mr. Motsanayane.

For Appellant: Mr. Smits of Messrs. Smits and Smitheman, Johannesburg.

For Respondent: Mr. H. Helman of Messrs. Helman & Michel, Johannesburg.

CONTRACTS: AGREEMENT OF SALE.

CASE No. 8 OF 1948 (JOHANNESBURG).

JOHANNES MASEKO *v.* H. MBERE AND E. MTOBA.

JOHANNESBURG: 23rd June, 1948. Before Marsberg, President, Morgan and Van Gass, Members of the Court (Central Division).

Contracts—Agreement of sale—Immovable property, Evaton Township, Vereeniging—Joint and several liability or joint liability—Tender—Summons not served on second defendant—Non joinder.

Agreement of sale—ex facie *the document, in law, only joint liability of sellers could be presumed—Conceded by counsel for appellant and respondent—Judgment.*

Application to add new grounds of appeal—points of law—non-joinder—Joint or joint and several liability—Tender not a payment—Not taken in Court below—Application refused.

Practice and procedure—Appeal noted by unrepresented litigant but represented by counsel at hearing—Counsel applying viva voce *to modify or amend grounds of appeal—Rule* 10 (*b*) *of Native Appeal Court Rules—Procedure for future guidance of counsel prescribep*

—When counsel is briefed by unrepresented litigant he must decide whether a substituted notice of appeal is advisable—If so, a substituted notice of appeal, complying with the requirements of Rule 10 (*a*) *and* (*b*), *must be served* as early as possible *on respondent, together with four copies on the Registrar—Notice should also be given that application will be made to the Appeal Court for leave to submit the substituted notice of appeal.*

Application to add new grounds of appeal—points of law.

Judgment entered against first defendant only.

Claim: £100 against 1st and 2nd defendants jointly and severally deposited as part purchase price of £325 for property; in terms of agreement of sale £50 tendered to obtain possession—defendants' failing to give delivery of property or refund £100.

Plea: First defendant denies that full £150 paid—denied £100 paid by plaintiff.

Judgment: For plaintiff for £100 and costs.

Appeal: "Bad in law"—plus additional grounds which were refused.

Held:

(1) There being no service on second defendant he was not before the Court.

(2) On the agreement of sale 1st defendant was only jointly liable—i.e. for half of £100—Judgment therefore, as conceded by counsel for appellant and respondent, entered for plaintiff for £50 and costs.

(3) Application to add additional grounds of appeal refused.

(4) Procedure for future guidance of counsel prescribed—when briefed by unrepresented litigant who has filed notice of appeal personally, counsel must decide whether substituted notice of appeal is advisable—If so, must serve substituted notice on respondent *as early as possible* and four copies on Registrar—Substituted notice must comply with Rule 10 (*a*) and (*b*).

Authorities:

Rule 10 (*b*) Native Appeal Court Rules.
Rule 19, Native Appeal Court Rules.
Rule 22, Native Appeal Court Rules.
Rafara Mbongi *v.* Njaji Naviyo, 1936 (C. and O.) 85.
Jesse Ximba *v.* Bertha Ximba, 1938 (N. & T.) 78.
Shidiack *v.* Union Government, 1912, A.D. 656.
Marks, Ltd. *v.* Laughton, 1920, A.D. 22.
Van Pletsen *v.* Henning, 1913, A.D. 96.
Cole *v.* Union Government, 1910, A.D. 263.
Lydenburg Estates, Ltd. *v.* Maritz and Malan, 1926, T.P.D. 510.
Lydenburg Estates *v.* Palm and Schutte, 1923, T.P.D. 278.
Tucker and Another *v.* Corrithes, 1941, A.D. 254.
Buckle and Jones, Section 83, pages 159–171, Rule 47 (1), *p.* 403.
Melville Sugar Co. *v.* Sudor, 1926, N.P.D. 434.
Hugo *v.* Laubscher, 1920, C.P.D. 469.
Bredenkamp *v.* du Toit, 1924, G.W.L.
Molotu Ponya *v.* Keketla Sitabu, 1 P.H., 1944, R. 21.
John Moklanyana *v.* Elijah Manye, 1 P.H. 1937, R. 12.
Mlese Taubeka *v.* Sihilegu Bosi, 1 P.H., 1941, R. 20.
Frankford Radebe *v.* John Radebe, 1 P.H., 1943, R. 16.
Moralo *v.* Moralo, 1 P.H. 1947, R. 3.
Matikita Mkoba *v.* Bomani Mabindise, P.H. 1930, R. 23.
Van Ryn Wine and Spirit *v.* Chandlers Beers, 1928, T.P.D. 417.

Marsberg, P. (delivering the judgment of the Court):—

In the Native Commissioner's Court at Johannesburg, plaintiff, Johannes Maseko, sued defendants, H. Mbere and E. Mtoba, jointly and severally, the one paying the other to be absolved, for £100 and costs of suit on allegations that on or about the 15th June, 1946, plaintiff and defendants entered into an agreement of sale of certain Lot No. 1063, Evaton Township, district of Vereeniging for the sum of £325; plaintiff duly deposited £100 in terms of the agreement; on 8th April, 1947, plaintiff tendered the balance of £50 deposit against delivery of possession and notwithstanding demand defendants have failed to give delivery or return the £100 deposited.

There was no service of the summons on second defendant.

First defendant, H. Mbere, admitted the agreement of sale, the conditions in regard to deposits and that delivery of possession should be given when the full sum of £150 had been paid, but denied that £100 had been paid by plaintiff or that he refused to give delivery on fulfilment of the conditions of sale.

After trial the Native Commissioner gave judgment " for plaintiff against first defendant (H. Mbere) for £100 and costs ".

First defendant has appealed against the whole judgment and against the costs awarded against the defendant.

The grounds of appeal are:—

1. (*a*) That the judgment is against the evidence and probabilities of the case.
   (*b*) That there was no proof that the S.J.M. Company or defendant ever received any money, onus of proof was on plaintiff.
   (*c*) That there was no evidence that Sitha Investment Co., was ever appointed by defendant in his capacity as Managing Director for S.J.M. Property.
2. (*a*) That the judgment is bad in law.
   (*b*) That the Court erred in relying on hearsay evidence of Johannes Natlou

In representing the appeal to us, Mr. Lakier, for defendant stated that he was abandoning the first ground of appeal and would rely on the ground that the judgment was bad in law. Under this heading he desired to urge three additional grounds viz.:—

(1) *Non-joinder* of second defendant in the action. Each and every party to a contract must be joined and should be before the Court. Second defendant had not been joined.

(2) The Deed of Sale did not specify whether the defendants were sued jointly or jointly and severally. In the absence of that averment liability could be joint only and judgment could not have been given for more than £50.

(3) A tender of £50 was not a valid payment of the deposit.

Mr. Measroch for plaintiff, opposed the admission of further grounds of appeal and urged that appellant was restricted to those noted and having abandoned the first grounds of appeal he had nothing further to plea before this Court. Mr. Measroch urged also that he would be prejudiced by the admission of fresh grounds of appeal. Mr. Lakier, in reply pointed out that defendant was unrepresented in the Court below and having noted his appeal personally was entitled to the privilege of Rule 10 (*b*) of the Native Appeal Court Rules whereunder it sufficed to note an appeal against the whole judgment without specifying in detail the grounds of appeal raised and that ground 1 (*a*) of his Notice of Appeal sufficiently covered the point. He suggested that the onus was on respondent to lodge any objection or exception to the Appeal Court in terms of Rule 19.

As the point raised in argument was an important one, the hearing of the appeal was postponed to allow counsel to support their arguments with authorities. We are indebted to both counsel for their industry and help in this direction. After further argument on 23rd June, 1948, the point taken was reserved for consideration and counsel were heard on the merits of the appeal.

In dealing with this point taken *in limine* we have, in the absence of specific directions in the Rules, deemed it necessary to lay down for future guidance of counsel and practitioners the course to follow where a litigant was unrepresented in the Native Commissioner's Court and has noted his appeal personally but has instructed counsel or a practitioner to appear for him to argue the appeal. The Appeal Courts have been reluctant to admit additional grounds of appeal on application and in those cases where indulgence has been granted the decision was made in the light of circumstances peculiar to the appeal before it. The reasons for restricting appellants to the grounds specified in the Notice of Appeal were given in an early decision and may be re-stated briefly:—

(1) To enable the Judicial Officer to frame his reasons for judgment.
(2) To inform the respondent what he would be required to meet.
(3) To enable the Appeal Court to study the issues beforehand.
(4) To confine attention to the specific points likely to arise in argument on appeal and avoid unnecessary study of all other possible points not likely to be traversed.

Our system of judicial practice requires that all parties shall fully and without reserve submit their dispute for determination. It does not allow either party to retain a tactical advantage over the other by withholding at his discretion further grounds for attacking the judgment. Nor should the Appeal Court be left in any doubt as to the issues or be confronted suddenly with undisclosed fresh issues. Where therefore counsel or practitioners are briefed by litigents, hitherto unrepresented, to appear on their behalf before this Court they should take immediate steps to satisfy themselves that the Notice of Appeal sufficiently complies with the requirements of Rule 10 (*a*) and (*b*). If a substituted Notice of Appeal be advised such document should be served as early as possible on the respondent, together with four copies on the Registrar and notice that application will be made to the Appeal Court for leave to submit the fresh Notice of Appeal Though Rule 19 requires that such a notice be filed not less than one clear day prior to the commencement of the

session, service should be effected as early as possible after the time of briefing. In considering the application the Court will, in the exercise of its discretion, be guided by the circumstances of each case. We cannot hold that the indulgence granted in terms of Rule 22 to unrepresented litigants permits counsel appearing for appellants to exercise a discretion whether they will be bound by the Notice of Appeal lodged by the litigant or introduce a substituted or amended notice at the last minute. Permission was so granted in the case of Rafana Mbongi *v.* Njaji Naviyo (1936, C. & O, 85) but in view of the procedure which we have now prescribed, that authority will cease to have effect in this division.

The circumstances in which additional grounds of appeal may be admitted for the first time on appeal were set out in the case of Jesse Ximba *v.* Bertha Ximba (1938, N.A.C., T. & N 78). The following extract from the judgment may be quoted:—

> " The Appellate Division has in circumstances not unlike those of this case refused to allow an appellant to raise on appeal for the first time a defence which he should have taken *in limine*, holding that he had abandoned or waived that defence by his failure to do so at the hearing of the case in the lower Court—*see* Shidiack *v.* Union Government, 1912, A.D. at *p.* 656; Marks, Ltd., *v.* Laughton, 1920, A.D. at *p.* 22; van Pletsen *v.* Henning, 1913, A.D. at *p.* 96, setting out the ruling on the same point in Cole *v.* Union Government, 1910, A.D. 263.
>
> Summarsied the rule is that the new point raised on appeal, covered by the pleadings and if it does not depend upon facts incompletely investigated, and not waived or abandoned and if its consideration on appeal involves no unfairness to the party against whom it is directed, then it might be relied on by either of the parties even though raised for the first time at the appeal state.
>
> In the presence of these conditions a refusal by a Court of Appeal to give effect to a point of law fatal to one or other of the contentions of the parties would amount to the confirmation by it of a decision clearly wrong ".

Three new points relied on by Mr. Lakier, viz.—

(1) nonjoinder;
(2) joint or joint and several liability ;
(3) tender of £50 not a payment.

do not, to us, appear to fall within the scope of the rule summarised above, in the light of the evidence adduced in this case. Accordingly we are not prepared to admit the new points now raised before us.

Having abandoned ground (1) of the Notice of Appeal that the judgment was against the evidence and probabilities of the case, applicant had nothing further to urge before us. It was, however, conceded by both Counsel that, *ex facie*, the agreement of sale, judgment could not have been given for more than £50. On that agreement, in law only joint liability of the sellers could be presumed. Otherwise we see no good reason to distrub the judgment of the Native Commissioner.

The appeal is accordingly dismissed with costs, but the judgment of the Native Commissioner is altered to read " For plaintiff against first defendant (H. Mbere) for £50 and costs ".

For Appellant: Mr. Adv. Lakier, instructed by T. Ntwasa, esq., Johannesburg.

For Respondent: Mr. Adv. Measroch, instructed by Messrs. Drutman & Salokoff Johannesburg.

FORCED MARRIAGES ARE UNLAWFUL.

CASE No. 9 OF 1948 (JOHANNESBURG.

L. M ZIMANDE *v.* J. SIBEKO.

JOHANNESBURG, 18th June, 1948. Before Marsberg, President, Morgan and Van Gass, Members of the Court (Central Division).

Native customary union—order directing father to hand over daughter in marriage unlawful —Contrary to public policy—Statutory provisions commended as statement of public policy—Cape Procalmation No. 110 *of* 1879—" *It shall not be lawful for any person to compel any woman to enter into a contract of marriage, against her wish* "—*An order of Court would be coercive—depriving woman of free consent*—Ex mcru moto *Appeal Court sets aside all preceedings in Court below.*

Late noting of Appeal condoned.

Claim: An order directing defendant (father) to hand daughter to plaintiff—failing which return of dowry paid.

Plea: Immaterial.

Judgment: Default judgment—Defendant to hand Sarah Sibeko (daughter) to plaintiff on or before 15th September, 1947 failing which to pay £41 and costs.

Held: Judgment unlawful as being contrary to public policy—Judgment and all proceeding set aside—*ex meru moto* by Appeal Court.

NOTE.—The appeal was based on an interpleader action arising out of original case.

Authorities:

Sofika *v.* Gova (1, N.A.C. 7).
Ndleni *v.* Pezani (4 N.A.C. 212).
Mbonga *v.* Sikoloke, 1939 (C. & O.) 31.
Mpangelala *v.* Njijiwa (5. N.A.C. 14).
Whitfield, S.A. Native Law.
Cape Proclamation No. 110, 1879, Sec. 30.
Marriage Order in Council, September 7, 1838, Act No. 38 of 1927, Sec. 11 (1).

Marsberg, P. (delivering the judgment of the Court):—

This case comes before us by way of appeal from the judgment delivered by the Native Commissioner at Johannesburg in an interpleader action, flowing from a case between Lucas Mzimande, plaintiff and Jim Sibeko, defendant, in which a default judgment was entered by the Native Commissioner at Johannesburg on 27th August, 1947.

An application for condonation of the late noting of the appeal was made by Dr. Seme appearing for Lucas Nzimande, applicant in the interpleader action. Mr. Helman, for respondent, did not oppose the application. We are satisfied with the explanation offered by Dr. Seme and the late noting of the appeal is hereby condoned.

Ex meru moto the Court referred counsel to the proceedings and judgment delivered in the original case No. 575/47 and requested argument as to whether the judgment was a valid one. To the Court, reading the record as it stood, the claim, the prayer and the judgment appeared to be invalid as being contrary to public policy and repugnant to natural justice, in that it purported to force a woman into marriage without her free consent.

Counsel were heard in argument.

The particulars of the claim and prayer, quoted without alteration from the record, are as follows:—

(1) During or about February, 1947, plaintiff paid to the defendant an amount of £41. as lobolo for the Bantu Customary Union between plaintiff and defendants' ward, Sarah Sibeko.

(2) Prior to the date and during September, 1946, plaintiff paid to the defendant the sum of £5. as *vula mlomo.*

(3) Defendant has failed to hand to plaintiff his said ward, notwithstanding lawful demand.

(4) Plaintiff is entitled to receive the said Sarah Sibeko as his wife according to Bantu Custom, or alternatively to a refund of the amount of £46. paid to the defendant as aforesaid.

Wherefore plaintiff prays:—

(*a*) For an order directing the defendant to hand the said Sarah Sibeko to the plaintiff, failing which to return to the plaintiff the amount of £46.

(*b*) Alternative relief.

(*c*) Costs of suit.

On 27th August, 1947, when that case was brought on for trial defendant, Jim Sibeko was in default and after hearing short formal evidence the Native Commissioner entered the following judgment:—

> " Default judgment. Defendant to hand Sarah Sibeko to plaintiff on or before 15th September, 1947, failing which defendant to pay plaintiff the sum of £41. and costs ".

In appearance the prayer and judgment seem innocent enough particularly viewed in the light of daily Court judgments ordering the return of a wife or on her failure to comply return of the dowry paid, but what in substance is the effect of the Native Commissioner's order? Clearly, the guardian is ordered by a Court to hand over his unmarried ward to the man who has paid dowry for her.

One of the fundamental essentials of a Native marriage or Customary Union is the consent of the contracting parties and when we say consent obviously we mean free and voluntary consent. This principle has been laid down by the Native Appeal Court in innumerable decisions. In the earliest reported case of Sofika *v.* Gova (1, N.A.C. 7).

where the *man* was not a consenting party the Court held the arranged marriage to be invalid. In the case of a dissenting bride the Court will not and cannot disregard the absence of consent on the part of the bride to contract a Customary Union; Ndleni *v.* Pezani, 4 N.A.C. 212; Mbonga *v.* Sikoloke, 1939, N.A.C. (C. & O.) 31; Mpangalala *v.* Njijiva (5 N.A.C. 14).

Whitfield in the second edition of his work " South African Native Law " may be quoted with approval:—

> " In olden times, before the annexation of the Country to the British Empire, the father was not required to consult his daughter or obtain her consent to her marriage union, and occasionally girls were forced on to men for whom they have no desire, and to whom they had no wish to be united. The father or guardian would go the length of beating and coercing his daughter into the union; but it was necessary only in a few cases to proceed to such extreme measures, as generally, girls were compelled by public opinion and their training to accede obediently to the wishes of their guardians. Where, however, the girl determinedly or obstinately persisted in her refusal to marry the man of her guardian's selection, the father would, eventually, in many cases, give way to her. The mother of the girl, too, often exercised much influence in such matters with the girl's father, and she seldom gave her consent to the union unless she was satisfied that her daughter would be well taken care of by her intended husband. The girl, too, was not entirely without remedy as she had the right to appeal to the chief of the tribe, who often ordered or persuaded her guardian to abandon his project. Nowadays a forced marriage union is, of course, invalid and girls, knowing this, do not hesitate to appeal to Native Commissioners for protection, which is always forthcoming ".

The very idea of what is commonly known as forced marriages is repugnant to our civilized consicence. One of the earliest legislative enactments of the Governor of the Colony of the Cape of Good Hope when he embarked on the Government of the Native Territories on its borders enshrined this provision, among others: " It shall not be lawful for any person to compel any woman to enter into a contract of marriage, against her wish ", *vide* Section 30 of Proclamation No. 110 of 1879. Without specific legislative sanction the white man, wherever he extended his influence among the primitive peoples of South Africa, has, as pointed out by Whitfield, given this protection to females. In our own legal code the action to compel specific performance of the marriage contract, that is, for an order compelling the other party to enter into the marriage was abolished by the Marriage Order in Council of September 7th, 1838. Our guiding principle in applying the law to customs followed by Natives is that such law shall not be opposed to public policy or natural justice: Section 11 (1) of the Native Administration Act of 1927. It is not necessary for the purposes of this case to eliucidate the implications of Section 11 (1) of the Act or to decide whether the point raised is contrary to public policy or natural justice because legislative authority has already given a lead to indicate that the forcing of a party into marriage is unlawful. Moreover in this year of grace 1948 when large numbers of our primitive peoples have advanced in the scale of civilisation and many are endeavouring to aspire to our ways of life there can be no doubt whatever that public policy will guarantee to all persons irrespective of race, the exercise of fundamental human rights in relation to the marriage contract.

Now the very averment in paragraph three of the claim " Defendant has failed to hand to plaintiff his said ward, notwithstanding lawful demand " suggests a holding back of the woman or some impediment in the progress of the marriage negotiations. The woman's consent is essential free from duress, or coercion.

Can that free and voluntary consent be given under compulsion of any order of Court or as a result of whatever means the guardian may employ to comply with the order? Clearly the Court's Order is coercive.

Mr. Helman, has urged that the Court should not assume unwillingness or absence of consent on the part of the woman. It must, however, be realised that the marriage has not yet taken place and the interposition of the judgment of the Court now deprives her of the right of freedom of choice, without which the marriage would be invalid.

The plaintiff's prayer "for an order directing the defendant to hand the said Sarah Sibeko (a human being) to the plaintiff " and the Native Commissioner's judgment " Defendant to hand Sarah Sibeko to plaintiff on or before 15th September, 1947 " made in all innocence, we verily believe, are nevertheless so repugnant to our sense of natural justice and human liberty that we have no hesitation in exercising of our own motion our wide powers to order the setting aside of all the proceedings in case No. 575/47, together with the proceedings in the interpleader action which is before us on appeal.

It is ordered accordingly.

For Appellant: Dr. Seme, Johannesburg.

For Respondent: Mr. Helman of Messrs. Helman and Michel, Johannesburg.

SEDUCTION: DAMAGES.

CASE No. 10 OF 1948 (VREDE).

SWARTBOOI NHLAPO *v.* JOHN DHLADHLA.

KROONSTAD: 11th August, 1948. Before Marsberg, President; Pratt and O'Driscoll, Members of the Court (Central Division).

Seduction and pregnancy—Orange Free State—Areas outside tribal reserves—Scale of damages ranges between two and four head of cattle—Assessment of damages is in discretion of Native Commissioner—Tribal affinity of parties not to be assumed on mere statement that they are "Basuto", "Zulu" or otherwise.

Claim: Five head of cattle or £25 as damages for seduction and pregnancy.

Plea: Seduction admitted.

Judgment: Two head or £10 damages.

Appeal: Appeal Court asked to fix scale of damages.

Held:

(1) In Orange Free State in areas outside of tribal reserves scale for seduction and pregnancy ranges between two and four head of cattle.

(2) Native Commissioner has discretion to award damages within this scale according to circumstances of each case.

(3) Tribal afinity is not assumed on mere statement of parties, claiming to belong to particular tribe.

Authorities: Dhlamini *v.* Gatebe [1944 (C. & O), 69].

Marsberg, P. (delivering the judgment of the Court):—

In the Native Commissioner's Court at Vrede, plaintiff Swartbooi Nhlapo sued John Dhladhla, *inter alia*, for five head of cattle or their value £25 as damages for defendant's seduction and pregnancy of plaintiff's daughter Lettie. Defendant admitted the allegation.

The only point at issue, on appeal, is the amount of damages awarded by the Native Commissioner, viz. two head of cattle or their value £10. This question was decided in the case of Dhlamini *v.* Gatebe (1944, N.A.C., C. & O., 69), wherein the Court indicated that in areas in the Orange Free State outside the tribal reserves, such as in the instance now before us, damages would range between two and four head of cattle. The damages awarded by the Native Commissioner fall within this limit and it has not been shown to us that he has exercised his discretion unreasonably.

We have been asked to lay down a scale of damages for the Orange Free State, but we consider that sufficient guidance has been given on the authority of Dhlamini's case. The award of damages lies within the discretion of Native Commissioners and we consider that within the scale of two or four head of cattle Native Commissioners should be free to decide the issues according to the circumstances of each case.

In the case quoted the Court indicated that tribal affinity could not be assumed merely on the statement of the litigants that they were "Basutos" or "Zulus" or any other tribe. Though the Native Commissioner may have been influenced by the tribal affinity of the parties, his judgment is in our opinion, otherwise, correct.

The appeal is dismissed with costs.

For Appellant: W. G. Kleinschmidt, Esq., instructed by Messrs. Pretorius and Bosman, Vrede.

For Respondent: Mr. S. R. Hill, instructed by Mr. J. L. Uys of Vrede.

NATURELLE-EGTELIKE VERBINDING.

SAAK No. 11 VAN 1948 (FRANKFORT).

JAMES MPILO *teen* STEFAN TSHABALALA.

KROONSTAD: 11 Augustus 1948. Voor Marsberg, President, Pratt en O'Driscoll, Lede van die Hof (Sentrale Afdeling).

Naturelle-egtelike verbinding—Oranje-Vrystaat—Gebied buite stamreserwe—Verlating van vrou—Vorm van eis—Nie behoorlik om te dagvaar vir „ontbinding van huwelik"

—Of om vrou te dagvaar as party tot aksie—Dat in Natal en Zoeloeland alleen prosedure ooreenkomstig die bepalings van die Natalse Wet Boek van Naturellereg—Proklamasie No. 168 *van* 1932*—In Oranje-Vrystaat en res van die Unie is die juiste vorm van aksie vir die man om die bruidskathouer te dagvaar vir die terugkeer van sy vrou en by gebreke hiervan terugbetaling van die bruidskat.*

Kraalhoof verantwoordelikheid—Erfgenaam neem verantwoordelikheid op na afsterwe van sy vader—Hy word kraalhoof en is aanspreeklik aan eggenoot vir teruggawe van sy suster of terugbetaling van bruidskat wat aan sy vader betaal was.

Bruidskathouer—Man mag persoon, aan wie bruidskat betaal was dagvaar, of hy die natuurlike voog is of nie—Persoon wie bruidskat ontvang het kan aanspreeklikheid afweer indien hy die hof kan tevrede stel dat hy rekenskap van die bruidskat wat hy ontvang het gegee het aan die ware voog.

Verlating van vrou—Eggenoot is nie belet om 'n aksie in te stel, indien hy nie in staat is om na 'n redelike soektog om sy vrou terug tot by haar voog te spoor nie—Eggenoot is nie verplig om vrou terug te neem na voog voordat 'n aksie ingestel word—Genoegsaam as hy alle redelike stappe doen om haar op te spoor.

Regstelsel wat moet toegepas word—In afwesigheid van spesiale ooreenkoms is die regstelsel wat moet toegepas word die waar verweerder woon—Artikel 11 (2) *Wet No.* 38 *van* 1927*—Stam-aan-verwantskap kan nie toegevoeg word nie op 'n blote verklaring van 'n party wat daarop aanspraak maak dat hy aan 'n sekere stam behoort—In afwesigheid van 'n spesiale ooreenkoms kan „Zoeloe" reg nie toegepas word nie op naturelle wat in die Oranje-Vrystaat woonagtig is.*

Praktyk en prosedure—Onreëlmatighede in regsgeding—pleidooi nie aangeteken—Artikel 26 (*a*) Goewermentskennisgewing No. 2253 *van* 1938*—Aan die einde van die verhoor word die saak uitgestel* sine die*—geen rede word aangevoer—Naturellekommissaris mag uitspraak voorbehou maar behoort dit te gee sonder onnodige vertraging—Artikel* 28, Goewermentskennisgewing No. 2253 *van* 1928*—Nietemin byna 'n jaar later word die saak op versoek van 'n party heropen en verdere getuienis word toegelaat—daarna word uitspraak aangeteken.*

Appèlhof neem kennis van onreëlmatighede, maar daar geskilpunte tenspyte hiervan betwis word sal appèlhof nie tussenbeide tree nie—Artikel 15 *van Wet No.* 38 *van* 1927*—*

Alle betrokke persone word uitgenooi om behoorlike aandag te skenk aan die elementêre reëls van prosedure.

Eis: „ Ontbinding van die Huwelik " of terugbetaling van die bruidskat.

Pleidooi: Nul.

Uitspraak: „ Ontbinding van die huwelik "; terugbetaling van £40 en koste.

Appèl:

(1) Dat verweerder nie die kraalhoof was nie en daarom nie verantwoordelik was vir die terugbetaling van die bruidskat nie.

(2) Dat die vrou ook gedagvaar moes gewees het as 'n medeverweerder.

(3) Dat verweerder namens sy vader opgetree het.

(4) Dat die vrou na haar voog terug geneem moes word.

(5) Op feitelike vrae.

Beslis:

(1) Erfgenaam aanvaar kraalhoof verantwoordelikheid met afsterwe van vader.

(2) Vrou word alleen onder Natal en Zoeloeland prosedure ook gedagvaar —ooreenkomstig die Naturellereg-kode—Proklamasie No. 168 van 1932.

(3) Verweerder faal om net agentskap te bewys.

(4) Nie verpligtend op eggenoot om vrou terug te neem. Hy moet egter alle redelike stappe doen om vas te stel waar sy haar bevind.

(5) Feite steun Naturellekommissaris se bevinding.

(6) Uitspraak verander om te lees:—

Vir eiser vir die teruggawe van sy vrou op of voor 11 Oktober 1948, en in gebreke hiervan terugbetaling van £40 bruidskat wat betaal is.

Outoriteite: Nul.

Let Wel.—Hierdie saak word gepubliseer om aan te toon hoe 'n saak NIE gevoer moet word nie.

Marsberg, P. (lewer uitspraak van die hof):—

In die hof van die Naturellekommissaris te Frankfort,-Oranje Vrystaat, het eiser James Mpilo van Stefan Tshabalala, verweerder geëis:—

(*a*) Ontbinding van die huwelik tussen eiser en Lesiah, verweerder se pupil;

(*b*) Terugbetaling van £50 wat betaal is as bruidskat;
(*c*) Koste van die saak op die bewerings dat—

Ongeveer September 1946, eiser 'n huwelik volgens Naturellegewoonte met Lesiah aangegaan het deur dat £50 as lobolo betaal is en dat ongeveer Oktober 1946, Lesiah van eiser weggeloop het, sonder rede en wederregtelik en weier om na hom terug te keer.

Aan die begin moet ons wys op verskeie onreëlmatighede wat op die rekord verskyn:—

(1) Stefan Tshabalala is gedagvaar om te antwoord op 'n eis van Stefan Tshabalala. Dis duidelik dat dit nie korrek kan wees nie.
(2) Ooreenkomstig Artikel 26 (*a*) van *Goewermentskennisgewing No.* 2253 van 1928 is daar geen antwoord op die eis van die verweerder op rekord gebring nie. Sonder so 'n antwoord kon die geskilpunte in die hof van verhoor nie duidelik wees nie.
(3) Op 10 Julie 1947 aan die einde van die getuienis vir die eiser en vir die verweerder en nadat die hof deur die partye toegespreek is, is die saak "sine die" uitgestel. Geen verduideliking waarom die saak uitgestel is word aangeteken nie. Na afsluiting van saak moes die Naturellekommissaris aangegaan het met die uitmaak van sy uitspraak ooreenkomstig Artikel 28 van *Goewermentskennisgewing* hierbo genoem. Hy kon, natuurlik, indien dit sy begeerte was, die saak uitgestel het om sy uitspraak te oorweeg, maar die uitspraak moes so spoedig moontlik gegee gewees het.
(4) Nietemin, byna 'n jaar later, op 3 Junie 1948, het verweerder verteenwoordig deur 'n prokureur vir die eerste keer aansoek gedoen om verdere bewys te lewer en die getuie Lukas Thsabalala is weer geroep en het verdere verklarings vir die verweerder gemaak.

Daarna het die Naturellekommissaris ten gunste van eiser uitspraak aangeteken vir:—

(*a*) Ontbinding van die huwelik;
(*b*) Terugbetaling van £40;
(*c*) Koste.

Terwyl ons, as 'n Hof van Appèl, die kwessie van onreëlmatighede oorweeg het, het ons die proviso van Artikel 15 van Wet No. 38 van 1927 waardeur ons gelei word en wat as volg lees in ag geneem:—

"Met dien verstande dat geen vonnis of verrigting weens 'n onreëlmatigheid of gebrek in die notule of geding in teenoorgestelde sin verander of vernietig mag word nie, tensy aan die Appèlhof blyk dat werklik nadeel die gevolg daarvan is".

Daar dit blyk dat die Hof van verhoor en die partye nie bewus was van hierdie onreëlmatighede nie, maar andersinds voortgegaan het om die saak af te handel, is ons nie van plan om hierdie grond aan te roer nie. Vir hulle wie dit mag aangaan, sal dit egter raadsaam wees om strenger op die elementêre reëls te let wat die behartiging van sake in Naturellekommissarishowe oorheers en in die vasstelling van die geskilpunte voor hulle, groter presiesheid aan die dag lê.

Uit die getuienis blyk dit, dat een van die geskilpunte was, of die juiste persoon in sy hoedanigheid as kraalhoof voor die hof was. Indien daardie saak as geskilpunt voorgelê was, en 'n formele pleidooi op die aanspraak van eiser verkry was, sou die saak heeltemal op 'n verskillende basis voortgegaan het. Volgens die rekord is dit nodig om te veronderstel dat die verweerder hoofsaaklik alle en enige aanspraak van eiser ontken het.

Die verweerder het teen die uitspraak op die volgende grond ge-appelleer:—

(1) Dat die Naturellekommissaris ten onregte beslis het dat verweerder die kraalhoof en voog is van die vrou Lesiah en dat hy aanspreeklik is vir die teruggawe van die lobolo.
(2) Dat hy ten onregte beslis het dat Lesiah nie gedagvaar hoef te word nie in 'n saak waar die eiser van kraalhoof ontbinding van die huwelik eis.
(3) Dat hy ten onregte nie rekening gehou het met die aangevoerde bewyse waaruit dit duidelik blyk dat verweerder deurgaans vir sy vader Abraham geageer het.
(4) Dat hy ten onregte beslis het dat dit volgens Naturellereg nie nodig is dat die naturellevrou in enige naturelle-egtelike verbintenis in die kraal van haar kraalhoof hoef terug te wees nie vir teruggawe van die lobolo aan haar man nie.
(5) Dat die beslissing teen die deurslaggewende krag is van die meerderheid van die aangevoerde bewyse is.
(6) Dat hy ten onregte beslis het dat daar 'n werklike Naturelle-egtelike verbintenis ontstaan het.

Uit die rekord is dit nie duidelik nie deur watter stelsel van Naturelle-reg die geskilpunte vasgestel was nie. In die saak van Dhlamini *v.* Gatebe (1944, N.A.H., K. & O. 69) wat 'n oorsprong gehad het uit 'n plek dieselfde as die van hierdie saak, het die hof aangedu dat stamverwantskap nie vermoed kan word hoofsaaklik op die verklaring dat die gedingvoerende partye „Basoetoes" of „Zoeloes" of van enige ander stam is nie. In areas in die Oranje-Vrystaat, buite die stamreserwes en in afwesigheid van 'n ooreenkoms tussen die partye oor die besondere stelsel van reg wat moet toegepas word, sal die reg wat gehandhaaf word die wees van die plek of woning van die verweerder. In hierdie geval sal dit wees die reg wat in die algemeen toegepas word in die Provinsie. [Vergelyk Artikel 11 (2) van Wet No. 38 van 1927]. Daar is geen aanduiding van die verweerder se verwantskap in die rekord nie en in afwesigheid van 'n spesiale ooreenkoms, is dit duidelik dat dit onvanpas is om Zoeloe-reg in die oplossing van hierdie saak toe te pas.

In die algemeen, kan dit aangevoer word dat Naturelle-reg, soos toegepas deur die howe, die gebruik is om teen die bruidskat-houer 'n eis in te stel vir die teruggawe van die vrou en in gebreke hiervan die vergoeding van die bruidskat of lobolo. Die kwessie van watter stappe gedoen moet word deur die man teneinde sy vrou terug te kry, was oorweeg in die sake van Mapeyi *v.* Rarai (1937, N.A.G., K. & O. 148) en Qalindaba *v.* Mpilana (1942, N.A.G., N. & O. 93). Daardie sake dui daarop dat die man alle moontlike en redelike stappe moet doen om sy vrou op te spoor, maar sodra hy haar by haar voog se kraal gespoor het, is daar geen verdere bewyslas meer op hom om verder te gaan nie. In die herwinning van sy lobolo, skyn dit nie 'n *sine qua non* te wees dat hy haar daar in persoon moet neem of sekerheid verkry dat sy na sy kraal terugkeer nie. Seer sekerlik is daar baie gevalle, besonderlik buite stam-reserwes, waar dit onmoontlik sou wees om 'n vrou wat weggeloop het terug te kry. Om 'n man te straf net omdat hy nie sy vrou wat weggeloop het kan toon nie sou duidelik onregverdig wees. Die aard van die eis in die geding tewete: ontbinding van die huwelik d.i. egskeiding, en die grond van appèl dat die vrou ook gedagvaar moes gewees het as 'n party in die saak, dit is duidelik, het 'n verwysing na die vorm van prosedure neergelê in die Natalse Wet Boek van Naturelle-reg, Proklamasie No. 168 van 1932, maar daardie reg is alleen in die provinsie van Natal en Zoeloeland in werking en dit kan op geen ander plek toegepas word nie. (Simon Zwana *v.* Lesaya Zwana en Paul Twala, 1945, N.A.H., N. & T. 59).

Met die oog op voorafgaande uiteensetting van die reg moet gronde (2) en (4) van die appèl van die hand gewys word.

Met betrekking tot grond (1) dat verweerder nie die kraalhoof was nie is dit aanvaarde Naturelle-reg dat die man geregtig is om 'n eis in te stel teen die person aan wie die lobolo betaal was, afgesien van die feit of die vrou onder sy kontrole was al dan nie, maar laasgenoemde kan aanspreeklikheid ontduik as hy die hof kan tevrede stel dat hy aan die persoon geregtig op die lobolo rekenskap gegee het. Die regsmiddel wat deur die Naturelle-reg voorsien is is dat die man die persoon aan wie hy die lobolo betaal het moet dagvaar vir die terugkeer van sy vrou indien sy weggeloop het of onder dwang aangehou word deur die persoon wat daarop aanspraak maak dat hy haar vader of voog is; in gebreke hiervan, die teruggee van die lobolo wat die ontbinding van die huwelik as gevolg het. Alternatief is daar 'n aksie deur die werklike voog vir haar lobolo wat gerig kan word teen die persoon wat haar bruidskat ontvang het toe die bruidskat geneem was ter goedertrou en omgekeerd.

Ons stem saam met die Naturellekommissaris dat die getuienis duidelik aandui dat die lobolo aan Stefan Tshabalala betaal was en aan die vrou wat Lesiah aan eiser in Pretoria oorhandig het. Hierdie vrou was die vrou van Stefan. Die bewyslas was op die verweerder om die hof tevrede te stel dat hy rekenskap van die lobolo gegee het aan die persoon wat daarop geregtig was, as dit die geval was en ons is tevrede dat hy in gebreke gebly het om hom van die bewyslas te bevry.

In hierdie verband is die verwysing van die Naturelle-kommissaris na die addisionele getuienis wat gelei is op 3 Junie 1948 ter sake. Daardie getuie moet met suspisie bejeen word en opmerklik is dit dat die brief, Bewysstuk " M " nie deur getuie Lukas ingedien kon wees nie. In ons opinie faal ook grond (1) van die Appèl.

Grond (3) moet ook faal want die bewyslas was op verweerder om te bewys dat hy vir sy vader ageer het. Dit blyk, hoewel die getuienis nie te duidelik is nie dat hy die oudste seun van Abraham was en na Abraham se dood sou hy normaal weg sy plek ingeneem het. Die Naturellekommissaris het Lukas se getuienis wat ook insluit 'n verwysing na verwantskap, van die hand gewys en ons het goeie rede om nie met hom saam te stem nie. Lukas, hoewel hy daarop aanspraak maak dat hy die ware voog van Lesiah is skyn glad nie genoem te word in die huweliksonderhandelings nie.

As hy die ware voog was, soos beweer sou sy regsmiddel wees soos hierbo gemeld, teen daardie persone wat die lobolo ontvang het.

Op gronde (5) en (6) is ons tevrede, dat volgens die getuienis, die Naturellekommissaris geregtig was om ten gunste van eiser te beslis, maar dat dit nodig sal wees om sy uitspraak te verander om in te pas by die reg wat in sy area van krag is.

Die appèl word van die hand gewys met koste maar die uitspraak is verander om te lees: Uitspraak vir eiser vir die terugbesorging van sy vrou Lesiah op of voor 11 Oktober 1948 of by gebreke daaraan terugbetaling van lobolo £40 met koste.

Vir Appellant: Mnr. S. R. Hill, onder opdrag van Mnr. G. F. van L. Froneman, Frankfort.

Vir Respondent: Mnr. J. E. Fullard, onder opdrag van Mnr. T. G. Skeen, Frankfort.

JUDGMENT BY CONSENT: RESCISSION.

CASE No. 12 OF 1948 (BENONI).

JOSEPH HLATSHWAYO *v.* ADAM MOSHENENE.

JOHANNESBURG: 7th October, 1948. Before Marsberg, President, Visser and Van der Watt, Members of the Court (Central Division).

Judgment by consent—Application for rescission—Settlement—Alleged mistake common to parties—Rule 30, *Native Commissioner's Court Rules—Client's instructions to attorney—Contingent indemnity by third person in favour of party.*

Claim: Application for rescission of judgment entered by consent on grounds that there was a mistake common to the parties—i.e. failure of third party to implement indemnity of party.

Judgment: Application refused, as not falling, in fact, within provisions of Rule 30.

Appeal: Native Commissioner erred.

Held: Parties were *ad idem* when settlement was recorded as the judgment—At that stage attorney had not misunderstood his instructions. Subsequent failure by third party to implement indemnity to party not a ground for setting aside the settlement—That failure constitutes a separate cause of action.

Appeal dismissed.

Authorities:

Rule 30 Native Commissioner's Court Rules.

De Vos *v.* Calitz and de Villiers (1916, C.P.D. 465).

Marsberg, P. (delivering the judgment of the Court):—

Defendant, Adam Mashenene, has appealed against a decision of the Native Commissioner at Benoni refusing to grant an application to rescind a judgment entered by consent in the case in which plaintiff, Joseph Hlatshwayo, sued defendant for damages arising out of a motor car collision. When the case came before the Native Commissioner on 6th January, 1948 the parties, who were both represented by attorneys, advised the Court that they had arrived at a settlement. Judgment by consent was entered accordingly and both parties, defendant being present intimated that the judgment which was recorded in detail was correct.

When a warrant of execution was subsequently taken out by plaintiff on 29th April, 1948, defendant applied for rescission of the judgment. The application does not state the grounds on which the rescission should be made but in the accompanying affidavit defendant states, *inter alia*—

> "I immediately took the summons to my ex-employer, Ephraim Motsepe, accompanied me to his attorney, Mr. Lovell of Benoni.
>
> I was informed that I need not worry about the case as my employer, Ephraim Motsepe, would accept full responsibility for the matter and that I would only have to appear formally in the Native Commissioner's Court on the date of hearing, namely the 6th January, 1948.
>
> That without my being consulted, a settlement was arrived at between the attorneys, which was made an Order of Court.
>
> That the Order of Court was read out to me in Court but I did not object thereto, as I was still under the impression that all responsibility would be accepted by Ephraim Motsepe.

That in any event I have a *bona fide* defence to the above action in that the accident was not due to my reckless or negligent driving and that if I were negligent the plaintiff's negligence contributed to the accident ".

When the application was dealt with defendant's attorney argued that the judgment was based on mistake common to the parties. The Native Commissioner held that the application did not fall within the provisions of Rule 30 of the Native Commissioner's Rules of Court, and dismissed the application with costs. The grounds of appeal are that the Native Commissioner erred in so deciding.

The only ground in this case on which rescission could have been applied for was mistake common to the parties. At the hearing of the application neither party wished to lead evidence. The affidavit, therefore, was the only evidence before the Court.

Now, to succeed on his request for rescission of the judgment entered by consent. which is akin to any other agreement and subject to the same requisites, the defendant would, on the authority of De Vos *v.* Calitz and de Villiers (1916, C.P.D. 465), have to prove that his attorney had misunderstood his instructions in agreeing to the settlement arrived at in this case, thereby indicating that the parties concerned were not *ad idem*. But what in effect do the allegations in his affidavit suggest? There is no ambiguity. Defendant was assured that his *ex* employer, Ephraim Motsepe would accept full responsibility and with that knowledge he agreed to the settlement which was made an Order of Court. The parties were in full agreement and acknowledged that the judgment was correct. The attorneys were present. At the time therefore when the judgment was entered there was no misunderstanding. Had Ephraim Motsepe fulfilled his agreement to indemnify defendant, apparently the judgment would not have been called in question. And that is the crux of the matter. It is not the judgment which is at fault but Motsepe's failure to implement his undertaking. It is impossible to construe the facts alleged in the affidavit, taken at their face value, as a mistake common to the parties. Defendant's remedy seems to lie in another direction.

We agree that the judgment of the Native Commissioner, though not so explicitly worded, is correct.

The appeal is dismissed with costs.

For Appellant: Adv. S. G. Rein, instructed by Messrs. Basner and Jaffe, Johannesburg

For Respondent: Mr. I. Seligmann of Johannesburg.

NATIVE CUSTOMARY UNION.

CASE No. 13 OF 1948 (VEREENIGING).

JOHN MATUMBU *v.* WILLIAM RANGAZA.

JOHANNESBURG: 8th October, 1948. Before Marsberg, President, Visser and Van Gass, Members of the Court (Central Division).

Native customary union—Wife's desertion—Claim for return of wife or " dissolution of customary union " *and custody of children—Counterclaim by father of woman for* " *dissolution of marriage* " *and forfeiture of lobolo on grounds of husband illtreatment of wife—Previous judgment by consent between same parties for payment of balance of dowry*—Res judicata—*consent judgment in effect established* (1) *subsistence of customary union*—(2) *that father was holding cattle as dowry, not fine* (3) *that children already born belonged to husband and not to father—Improper to sue for* " *dissolution of customary union* "*—Correct form of action is to sue dowry holder for return of wife, failing which refund of dowry—Action by father of woman for* " *dissolution of marriage* " *unknown in Native Law—Only wife may institute action for dissolution of union.*

No appearance by attorney of record at hearing of appeal—Registrar to call for explanation of absence.

Claim: For return of wife, failing which " dissolution of customary union " and custody of children, on grounds of wife's desertion.

Counter Claim: By father of woman for " dissolution of marriage " and forfeiture of lobolo on grounds of plaintiff's illtreatment of wife.

Judgment: Not material.

Appeal: Not material.

Held:

(1) *Res judicata*—previous consent judgment established that customary union subsisted, that defendant was holding cattle as dowry and not a fine and that minor children belonged to plaintiff.

(2) That defendant had no *locus standi* in judicio to sue for dissolution of his daughter's marriage.

(3) That defendant had a subsisting judgment in his favour for balance of dowry.

(4) That both claim and counterclaim as couched were unenforceable.

Both claim and counterclaim altered to read : summons and claim in reconvention dismissed.

Appeal allowed with costs.

Authorities:

Bovotyane *v.* Jack (1944, C. & O. 9).

Rosilina Manana *v.* Luke Masuku (1947, N. & T. 116).

Marsberg, P. (delivering the judgment of the Court):—

In the Native Commissioner's Court at Vereeniging plaintiff John Matumbu sued defendant William Rangaza for an order for the return of his wife Mita, failing which dissolution of the customary union and custody of the two minor children on allegations that during or about December, 1946 the wife Mita wrongfully and unlawfully deserted him. Defendant, father of the woman Mita counterclaimed for dissolution of the marriage and forfeiture of the lobola still owing on the grounds of plaintiff's conduct, treatment and neglect of the said Mita. In a previous action decided on 11th September, 1946, between the same parties, wherein William Rangaza was the plaintiff and John Matumbu was the defendant judgment by consent was entered, the effect of which was that John Matumbu was ordered to pay 8 head of cattle or their value £24 to William Rangaza, being the balance of dowry owing in respect of the customary union between John Matumbu and Mita, daughter of William Rangaza. It is necessary here to note the implications of this judgment. In effect it decided firstly that a customary union subsisted between John Matumbu and the woman Mita, secondly that the father William Rangaza was holding *as dowry or lobolo* three head of cattle about which there had been a dispute and thirdly that, in accordance with Native Law, the children born of Mita and John Matumbu belonged to the husband John Matumbu and not to her father William Rangaza. To that extent these issues were *res judicata*.

Had the parties directed their attention to the judgment in the case of Bobotyane *v.* Jack, 1944, N.A.C., C. & O. 9, possibly a great deal of the confusion which has resulted in this case may have been avoided. In Bobotyane's case it was stated:—

> "In Native Law a customary union is a contract not only between the 'husband' and 'wife', but also between the family groups as was fully indicated in Sila and Another *v.* Masuku (1937), N.A.C. (T. & N.) 121. The keystone of the union is the lobolo, and while the lobolo is retained by the wife's group the union continues to subsist. During the husband's lifetime all the children borne by the woman belong to him. No other man can contract a valid union with her even by payment of lobolo while the first lobolo remains with the father or his heir, unless the husband has publicly repudiated her and forfeited the lobolo. After the hudsband's death this result continues in Native Law, for death does not dissolve the marriage as was wrongly stated in Magqongo *v.* Zilimbelo, 3 N.A.C. 186, purporting to follow Mansoweni *v.* Nbeno, 6 E.D.C. 71, which did not decide that issue although it did decide (contrary to Native law) that it left the widow free to 'remarry', i.e. to contract a valid customary union and thus terminate the first union notwithstanding the retention of the first lobolo by her father. Until she 'remarries' her progeny accrue to her first husband's estate while her lobolo remains with her father. Native law does not recognise a dissolution of the union by mere desertion of the wife or the husband, by abandonment, or even by bare repudiation, for these are all eventualities provided for by the lobolo cattle; while the wife can always claim support from their holder, and the husband can always putuma his wife after any length of absence; the wife or widow can always return to her husband's kraal or more usually to that of her son, his heir (after his death) and resume her former status. All these indicate that Native law required something more than a mere private unilateral act or repudiation to terminate the union. On the part of the husband he has the right to repudiate the wife, with forfeiture of his lobolo if the act be unjustified in Native law, but before the wife can act on such repudiation and remarry, it is necessary either to return all or some of the lobolo, or to take the matter before the headman or chief and obtain a public repudiation by the headman. On the part of the wife, a repudiation can become effective only by restoration of the lobolo or part thereof,

for there is no corresponding practice known to Native law which gives the wife a right similar to the husband's of public repudiation with resultant forfeiture of lobolo. It may happen that a father or his representative may decline to restore the lobolo and frustrate the woman's desire to terminate a customary union. Custom apparently pictured her driving back her dowry herself, but our Courts have come to vest a fuller ownership in those cattle in the dowry holder than did Native law. Hence she is today compelled to seek the aid of the Court for an order compelling the dowry holder to make proper refund and the Native Commissioner's Court is bound to grant her such order in a proper case, her husband being joined in the action to dissolve the union ".

In actions, as established by Native Commissioners' Court practice in all parts of the Union except Natal and Zululand, where a husband sues in respect of his deserting wife, he prays for an order on her dowry holder for return of the wife, failing which refund of the dowry (*not dissolution of the marriage*). Again, an action by the father or dowry holder against the husband for dissolution of the marriage is unknown in Native law. As indicated in Bobotyane's case the wife may institute certain proceedings to dissolve the union but her father or guardian has no such right of action. In the light of the foregoing statement of the law both the prayer in the claim and that in the counterclaim are defective and are incapable of enforcement. (Rosilina Manana, duly assisted *v.* Luke Masuku, 1947, N.A.C., N. & T. 116). In the circumstances it is unnecessary to go into the merits of this case.

The appeal is allowed with costs in this Court and the Native Commissioner's judgment is altered to read: " Claim in convention—summons dismissed. Clain in reconvention—claim dismissed. There will be no order as to costs ".

As the matter now stands defendant, William Rangaza, has a judgment in his favour against plaintiff John Matumbu for payment of eight head of cattle or their value £24, being the balance of lobolo.

When this appeal was called on before us there was no representation by the respondent or his attorney of record. The Registrar is directed to call on the defaulting party to furnish an explanation.

For Appellant: Adv. B. Shtein, instructed by Mr. H. Slomowitz, Vereeniging.

For Respondent: No representation.

URBAN NATIVE LOCATIONS: STANDS: EJECTMENT.

CASE NO. 14 OF 1948 (GERMISTON).

JACOB NYEMBE *v.* JOB MASITENG.

JOHANNESBURG: 11th October, 1948. Before Marsberg, President, Visser and Van Gass, Members of the Court (Central Division).

Urban Native Locations—Alberton Location, Germiston—Purchase of premises on stand—Ejectment of occupier—Occupier claiming rights of occupation—Site permit cancelled—Alberton Health Committee Regulations—Administrator's Notice No. 314 *of* 12 *July*, 1933—*Sale of premises by Messenger of Court in execution of judgment of Court Judgment debtor refusing to vacate—Sale by Messenger of Court passes title to purchaser—If purchaser satisfied certain conditions imposed by Regulations Superintendent of Locations must issue site permit to owner of property.*

Notice of Appeal couched in argumentative terms.

Claim: Order of ejectment on purchase at execution sale of defendant's rights of occupation of premises.

Plea: Denial that right of occupation was sold.

Judgment: Order of ejectment granted.

Appeal: Various based on alleged rights retained by debtor.

Held:

(1) Notice of Appeal does not comply with Rule 10 (*b*) of Native Appeal Court Rules. Notice must not be argumentative but must state specifically what points of law are involved and why Native Commissioner was wrong.

(2) Regulation No. 22 (2) of Administrator's Notice No. 314 of 1933 justifies and compels Superintendent of Location to issue site permit to a person desiring to occupy buildings belonging to him (subject to Superintendent being satisfied as to certain conditions).

(3) Plaintiff did acquire through Messenger of Court the right to occupy the premises.

(4) When defendant ceased to own property he ceased to have rights to a site permit.

Authorities:

Rule 10 (*b*) Native Appeal Court Rules.
Administrator's Notice No. 314 of 1933, Reg. 22 (2).
Administrator's Notice No. 237 of 1947.
Mazebuko *v.* van Coller, N.O. and Roos, N.O., S.A. Law Reports, 1947 (2), April, 273.
Lindile Makinana *v.* Gxotiwe Makinana, 1936 (C. & O.) 7.
Molatu Ponya *v.* Kekitla Sitote, 1944 (C. & O.) 13.
Greshon Tsorana *v.* Emily Rune, 1936 (C. & O.) 2.
Act No. 32 of 1944, S. 14.
Tshander *v.* City Council, Johannesburg, 1947 (1), 496, S.A. Law Reports.
Truck and Car Coy. *v.* Matola, 1939, T.P.D., *p.* 447.
Johanna Mahonga *v.* Knot Nakonaka, 1945 (T. & M) 21.
Richard Zulu *v.* Zabulon Vilikazi, 1945 (T. & N.) 105.
Alfred Dhlamini *v.* Kortman Kunene, 1938 (T. & N.) 125.
Molife *v.* Superintendent of Locations, 1931, A.D. 19.
Isaac Chili *v.* Harry Spotane, 1937, N. & T. 134.

Marsberg, P. (delivering the judgment of the Court):—

Plaintiff, Jacob Nyembe, sued Defendant Job Masiteng for an order of ejectment from the premises on Stand No. 136, Alberton Location on the grounds that he, plaintiff, bought the house on the stand on 1st May, 1948 and wishes to take possession. Defendant refuses to leave the premises although warned to do so.

In his plea defendant stated that he is not liable to be ejected. His right of occupation had not been sold. He is the holder of a site permit, which has not been cancelled and he has not been told that it has been cancelled. If plaintiff bought the house as a moveable he can break it up and take it away. Plaintiff has not acquired any moveable rights in the property. In terms of the Regulations of Alberton Location the defendant has got right to occupy the site.

The facts of the case are that the buildings on the site belonged to defendant, that at an auction sale in execution of a judgment debt against defendant the buildings were purchased by plaintiff from the Messenger of the Court. In the Health Committee's Location Register the defendant's site permit was cancelled and the stand is now registered in the name of plaintiff as site permit holder. Ample notice has been given to defendant to vacate the buildings but he refuses to do so.

Against the Native Commissioner's order of ejectment defendant has appealed on the following grounds:—

(1) " The Native Commissioner erred in holding that the notice to vacate was legally valid and that defendant was obliged to vacate the premises in pursuance of the said notice and prior to plaintiff's removal of the buildings.

(2) The Native Commissioner erred in finding that defendant admitted that plaintiff was entitled to the immediate possession of the buildings.

(3) The Native Commissioner erred in finding that the authority of the Location Superintendent to cancel the stand permit was not disputed.

(4) The Native Commissioner erred in holding that it was the duty of the defendant to have notified the Messenger of the Court that his house is not subject to attachment and that he should have stopped the sale.

(5) The Native Commissioner erred in holding the defendant should have vacated the premises before trial, that plaintiff's purchase of the buildings gave him any right of occupation and that plaintiff was entitled to an ejectment order against defendant ".

At the outset we were constrained to draw counsel's attention to the fact that the notice of appeal does not comply with the provisions of Rule 10 (*b*). The Appeal Courts have indicated in a number of cases that where appeal is noted on points of law the appellant must state specifically the grounds of appeal. It is not a compliance with the rule to state that the Native Commissioner erred or was wrong in his findings on questions of law. The whole case for defendant appears to have been conducted on the assumption of his possession of alleged legal rights and both the plea and notice of appeal, in substance, consist of mere argument without any reference to the specific rights relied on. We have allowed the appeal to be argued but we must direct Counsel's attention to the reports of the Native Appeal Courts for his future guidance in this respect. Among other cases reference should be made to:—

Lindile Makinana v. Gxotiwe Makinana, 1936 (C. & O.) 7.

Molatu Ponya *v.* Kekitla Sitote, 1944 (C. & O.) 13.

Greshon Tsorana *v.* Emily Rune, 1936 (C. & O.) 2.

For the solution of this case it suffices to quote Regulation 22 (2) of the Alberton Health Committee's Regulations published under Administrator's Notice No. 314 of 12th July, 1933, The material words read:—

> " Every person desiring to occupy any site in the location upon which are erected buildings *belonging to him* shall apply to the Superintendent for a permit in terms of those regulations and the Superintendent (if satisfied as to certain conditions) shall issue to him such permit ".

In the case of Mazebuko *v.* van Coller N.C. and Roos, N.O., S.A. Law Reports, 1947 (2), April, page 273 it was held that a Native who had become the owner of buildings on such a site, as heir to the previously registered holder, was entitled to a site permit. This decision was based on the provisions of Regulation No. 22 (2) above quoted. As soon, therefore, as any person becomes the owner of any existing buildings on a site he is entitled, within the conditions mentioned in the regulations, to have a permit issued to him to enable him to reside therein. And it may be said here that the Alberton Regulations do not contemplate the occupation of sites except for residential purposes. Now, in the case before us, that is plaintiff's object. He acquired the property by purchase through the Messenger of the Court from defendant and it is trite law that the Messenger of the Court in execution of a judgment of the Court can pass valid title in the property of the execution debtor. When defendant ceased to own the property he ceased to have any rights to a site permit. On the authority of Mazebuko's case the Superintendent was justified and indeed compelled, to issue the site permit to plaintiff.

The appeal fails and is dismissed with costs.

For Appellant: Adv. S. G. Rein, instructed by Basner & Jaffe, Johannesburg.

For Respondent: Mr. Samuel Wade of Germistion.

LANDLORD AND TENANT: IMPLIED TERMS OF LEASE.

CASE No. 15 OF 1948 (JOHANNESBURG).

SAMUEL MOLIFE *v.* TOM MABASO.

JOHANNESBURG: 11th October, 1948. Before Marsberg, President, Visser and Van Gass, Members of the Court (Central Division).

Landlord and tenant—Rental—Tenancy—rights and duties implied by law—Purchaser of property becomes new landlord—Landlord's title cannot be disputed—In absence of special agreement, rental is payable in arrear—monthly tenancy presumed if rental paid monthly and no special agreement to contrary.

Claim: £6 rental outstanding at £1 per month payable in advance.

Plea : Denial of agreement with plaintiff—Claims room was rented from a third person.

Judgment: Absolution from instance.

Appeal: There was no onus on plaintiff to prove agreement.

Held:

(1) As most important rights and duties are implied by law, no onus on plaintiff to prove them—mere fact of tenancy imposes rights and duties on parties.

Judgment could have been given for amount of rent, payable in arrear on presumption of law.

Appeal allowed and case returned for further disposal.

Authorities:

Wille and Milne, Mercantile Law, 11th edition, *pp.* 188–189, 194–195, 21–22.

Mtombeni *v.* Motsanayana (C.D.), case No. 7.

Marsberg, P. (delivering the judgment of the Court):—

In the Native Commissioner's Court at Johannesburg, plaintiff, Samuel Molife, sued Tom Mabaso defendant for £6 outstanding rental for the period 1st October, 1947 to 31st March, 1948 in respect of the lease of one room of premises on stand No. 3225/26, Bell Street, Pimville Location, Johannesburg. Plaintiff alleged that he acquired by purchase

the rights of the former registered owner of the stand viz. Aaron Dube, on 27th September, 1947, under Transfer Permit No. 28 of 1947, issued by the Johannesburg Municipality and that he gave due notice thereof to the defendant.

Defendant denied that he had leased the room from Aaron Dube or that the tenancy was a monthly one of £1 payable in advance on or before the 7th day of each month, but stated that the plaintiff and one Malulika were both claiming to be entitled to the rent which defendant was required to pay in virtue of an agreement of tenancy which he entered into with Malulika. In consequence of such claims he had brought an interpleader action to have it determined which of the parties was entitled to receive the rental. Pending the decision of the Court, he, defendant was paying the monthly rental into Court.

At the end of plaintiff's evidence, defendant asked for absolution from the instance which was granted.

In his reasons for judgment the Native Commissioner states:—

> "The onus of proof was on the plaintiff and in order to succeed on his claim of £6, he had to prove the contract of tenancy on which his claim was based. Plaintiff had to prove that the contract of tenancy was a monthly one, that the rent was £1 per month and that the rent was payable monthly in advance. This the plaintiff completely failed to do. Plaintiff closed his case without calling any evidence whatsoever to prove the contract of tenancy and the Court accordingly entered judgment of absolution from the instance with costs".

Plaintiff has appealed against this judgment on the grounds:—

(1) "That the judment is bad in law and contrary to law in that—

(*a*) the Court erred in granting an order absolving the defendant from the instance, with costs.

(*b*) the Court erred in holding that there was an onus on the plaintiff to prove or establish an Agreement of Tenancy between the defendant and Aaron Dube, and further, that the defendant had failed to prove any agreement of tenancy between defendant and A. Dube.

(2) that the judgment is against the evidence and against the weight of evidence"

As soon as a lease has been entered into, each party obtains certain rights against the other and becomes in turn bound to carry out corresponding duties or obligations in favour of the other party. The most important rights and duties are *implied by law* that is, the respective parties obtain the rights, or are subject to the duties, from the mere fact of being parties to a lease and without the necessity of making any agreement on the point. One of the *implied* duties of a tenant is to pay the rent. If a landlord sells the leased property and transfers it to the purchaser, the consequence is that the purchaser steps into the shoes of the landlord and the relationship of landlord and tenant is continued between him and the tenant. At the same time the purchaser succeeds to the rights of the former landlord and can claim from the tenant the rental payable from the date he became owner of the property.

In the absence of a special agreement to pay rent in advance, the law implies that it is payable in arrear and if no agreement has been made in regard to the length of the tenancy, but rental is paid monthly, a monthly tenancy is implied.

The evidence clearly established, as found by the Native Commissioner, that—

(1) the plaintiff became the registered permit holder of stand No. 3225/26, Pimville Location on 27th September 1947, he having purchased the stand from the previous registered lessee, Aaron Dube.

(2) when the plaintiff became the registered lessee of the stand, defendant was a tenant of the property and is still a tenant on the property and is still so resident thereon.

From the defendant's plea a further fact could have been established viz. that he was paying the *monthly* rental into Court.

Now, in view of the general statement of the law quoted above, and the implications which must be legally read into the mere fact of tenancy, the Native Commissioner would have been fully justified in holding that the plaintiff had, *prima facie*, established the contract of tenancy between plaintiff and defendant on a monthly basis. The law assumes, in the absence of proof to the contrary, that the rental would be payable in arrear. The law would also imply that the rental would be payable to the new landlord. If defendant alleged that there was a special agreement in regard to the payment of the rent or that it was legally payable to another, the onus of proof would be on him.

At the end of the plaintiff's case, therefore, the onus in so far as it lay on plaintiff had, in view of the legal implications in his favour, been discharged. The question as to how much rental was due to the plaintiff would depend on whether the Native Commissioner found that it was payable in advance or arrear.

Before us, on appeal, Mr. Helman for defendant has argued that plaintiff failed entirely to establish the allegations in paragraphs 1, 2 and 3 of the summons, particularly that there was any proof of the agreement of tenancy, or that it was on a monthly basis or that the amount was £1 per month or that the rental was payable in advance on or before the 7th day of each month. But the only points on which he has created any doubts are that the amount was £1 and that it was payable in advance. As we have pointed out above no proof is required that there was an agreement or that rental was payable or that rental was payable on a monthly basis because these provisions are implied by law and can be inferred from defendant's admissions. There was a lawful demand for rental at £1 a month, confirmed under oath by plaintiff, so that there was at least *prima facie* evidence of that fact. We agree that there is no proof that the rental was payable in advance, but that fact would not exclude a judgment for the amount of rental payable in arrear. The plaintiff is entitled to payment of rent but if defendant's contention be upheld, he (plaintiff) would not receive payment at all merely because there was a doubt whether rental was payable in advance or arrear. That is the effect of the Native Commissioner's judgment.

Ambiguity also appears in the drafting of defendant's plea. We cannot regard the general denial of the agreement of tenancy referred to in paragraphs (1) and (2), as being distinct from the further averments mentioned in paragraph (3). We read the whole plea as complementary, in substance an attack on the landlord's (plaintiff's) title. Defendant is now seeking to circumvent judgment against himself solely on the ground of doubt in regard to the amount of the rent and whether it was payable in advance or arrear. On all other points, on the evidence as it now stands, the plaintiff has discharged the onus resting on him. On the amount of the rent there is *prima facie* evidence in his favour. If no further proof be adduced on the point whether the rental was payable in advance a judgment could be entered for the amount found to be due.

We agree that the Native Commissioner erred in granting absolution from the instance which judgment is set aside and the case is returned for further disposal.

The appeal is allowed with costs.

For Appellant: Mr. B. A. Smits of Messrs. Smits and Smitheman, Johannesburg.

For Respondent: Mr. Helman of Messrs. Helman and Michel, Johannesburg.

COMPANY: PERSONA DISTINCT FROM MEMBERS.
CASE No. 16 OF 1948 (VEREENIGING).

AFRICAN TRADE IMPROVEMENT CO., LTD., *v.* JOSEPH NGWENYA.

JOHANNESBURG: 14th October, 1948. Before Marsberg, President, Van Gass and Pretorius, Members of the Court (Central Division).

Interpleader action—Company—Company is a persona distinct and apart from its members —" Director " alleging goods were his personal property—On appeal, by implication, alleging goods were property of Company and seeking to attack original judgment— Held that appellant in interpleader action, in his personal capacity, was not a party to original case which proceedings do not concern him—No locus standi *to argue appeal.*

Appeal noted by unrepresented litigant—Substituted notice by attorney before Appeal Court admitted.

Claim: Interpleader action to have goods seized by Messenger declared not executable.

Judgment: Goods declared executable.

Appeal: That Native Commissioner had no jurisdiction to try a case in which a " Company " was a party. His jurisdiction is limited to actions between natural Natives.

Held: Without deciding the issue raised, that appellant appeared in his personal capacity to attack a judgment given against a company. That appellant and the Company as a persona were not one and the same person. That in his personal capacity he was not concerned in the affairs of the Company as a persona. That he therefore had no *locus standi* to argue the appeal.

Appeal dismissed.

Authorities:

Rule 10 (*b*) Native Appeal Court Rules.

Dadoo, Ltd., and others *v.* Krugersdorp Municipal Council (1920, A.D. 530).

S. T. Pretorius (Member) delivering the judgment of the Court:—

This is an appeal from the judgment of the Assistant Native Commissioner, Vereeniging, on an interpleader action, heard on the 19th May, 1948.

The record of the original proceedings which culminated in this action is not before us, but for the purpose of this judgment it is sufficient to repeat the history of this matter as was given by Mr. Smullen who apparently appeared for the judgment creditor in the interpleader action.

He stated as follows:—

> "Judgment by consent for £411. 11s. 8d. granted on 10th June, 1947. Defendant counterclaimed and the claim dismissed. Thereafter Warrant of Execution issued for £411. 11s. 8d. on the 11th June, 1947, and Messenger of Court accounted to plaintiff for £188. 0s. 1d. being plaintiff's *pro rata* share in the execution. A writ for the balance of £223. 11s. 7d. was re-issued and Messenger made a further attachment on the 8th April, 1948 when certain goods in defendant's shop were attached. Claimant now claims these goods as his and not of the defendant's. The goods are enumerated on the interpleader summons".

It is necessary to state that the parties to the original action were one Joseph Ngwenya, plaintiff, and The African Trade Improvement Co., Ltd., defendant. The claimant in the interpleader action was one L. E. S. Gama who is now the appellant. He is also a Director of the African Trade Improvement Co., Ltd.

The claimant Gama testified before the Assistant Native Commissioner to the effect that the goods attached on the 8th April 1948 belonged to him personally and not to the Company who had by then, under a General Power of Attorney, authorised him to act on its behalf. The Assistant Native Commissioner dismissed his claim and declared the goods executable.

It is against this judgment that the claimant now appeals.

On the 8th of June, 1948, Gama the claimant filed notice of appeal in the following terms :—

> "Take notice that on the 19th day of May, 1948, judgment was entered against me as claimant on the above matter and that I this day hereby make application for appeal against such judgment as as a whole".

As the appellant was not represented by a legal practitioner in the Court below this notice is in order by virtue of the provisions of Rule 10 (*b*) of the Rules of this Court

On the 11th October, 1948, appellant consulted Messrs. Emanual Gluckman and Son, attorneys at Johannesburg. Following upon that interview the attorneys addressed a letter to the Registrar and to respondent's attorneys which is here quoted in full:—

> "We have the honour to inform you that we have to-day been instructed by the above claimant to appear for him in the above appeal, which has been set down in your Court for the 14ht instant.
>
> "Out client has submitted to us a copy of the Record, and after carefully perusing same, we have advised him to withdraw the appeal insofar as it is based on the grounds set out in his grounds of appeal.
>
> "We further advised him that, in our opinion, the Court which granted judgment against African Trade Improvement Co., Ltd. had no jurisdiction to grant a judgment against the Company, for the reason that its jurisdiction is limited to cases between Natives only, and that the Company is not a Native.
>
> "We have accordingly been instructed by the appellant to withdraw his original grounds of appeal, and to pray for leave to substitute the new ground of appeal".

The respondent being in default the only argument addressed to us at the hearing of the appeal was that by the attorney for the appellant who urged that the original judgment of the Court below is *void ab origene* because the African Trade Improvement Co., Ltd., being a limited liability company, is not a Native within the meaning of Section 10(1) of Act No. 38 of 1927.

Now we must accept, *ex facie* the record before us and in the absence of anything raised to the contrary, that the African Trade Improvement Co., Ltd., is a duly incorporated and registered company. It follows therefore that it is a *persona* separate and distinct from its members of whom the present appellant is one. (Dadoo Ltd. and Others *v.* Krugersdorp Municipal Council, 1920, A.D. 530).

It is necessary to consider the implications of the letter of the 11th October, 1948 addressed to the Registrar, as this letter which has already been set out above is now the basis of this appeal before us.

First of all this amended notice of appeal, if we may be permitted to call it such, purports to withdraw "the original grounds of appeal". Now the original notice did not contain any specific grounds of appeal, but on the argument on behalf of the appellant we must conclude that what this letter intended to convey was that the appellant no longer claimed the goods attached and set out in the interpleader summons as his own property

and by implication conceded that they were executable and belonged to the judgment debtor namely the African Trade Improvement Co., Ltd.

Having done this the appellant then proceeded to attack, for want of jurisdiction, the judgment between the present respondent and the African Trade Improvement Co., Ltd., given in the Court of the Native Commissioner, Vereeniging on the 10th June, 1947.

Taking the proceedings as a whole, from 10th June, 1947 to the present time, we find that the appellant is only a party to it insofar as the Interpleader action is concerned and there only because of the fact that he claimed ownership of certain goods which were attached.

In view of the fact that we have concluded that the appellant no longer claims such ownership we must necessarily find that he has, by his own implied admissions, withdrawn from the proceedings insofar as it affected him. This being the case we must consider the relationship of the appellant to the present proceedings where he seeks to upset the original judgment of the 10th June, 1947.

The appellant was not a party to the original judgment, for, as we have already stated, the judgment was between the present respondent and a limited liability company which is distinct from its members. The appellant has furthermore, in his amended notice of appeal, withdrawn from that part of the proceedings in which he was at one time interested.

For these reasons we are bound to conclude that the appellant has abandoned the right to seek interference with the proceedings and that his appeal, in its present form, is an attempt to intervene in a matter in which he is not concerned.

The appeal is accordingly dismissed.

When this appeal came before us there was no representation for the respondent. The Registrar is instructed to request the attorney of record for respondent to furnish an explanation of his default.

For Appellant: Mr. P. Gluckman of Messrs. Gluckman & Son., Johannesburg.

For Respondent: No representation.

DEFAULT JUDGMENT: RESCISSION:
CASE No. 17 OF 1948 (VEREENIGING).

IZAK THABENE *v.* DANIEL SILISANA.

JOHANNESBURG: 14th October, 1948. Before Marsberg, President, Van Gass and Pretorius, Members of the Court (Central Division).

Default judgment—Rescission—Refusal of—Second application to rescind on further grounds—Res judicata—*Requisites discussed.*

Grounds of Appeal "Bad in law"—Not a compliance with Rule 10 (*b*) *of Native Appeal Court Rules—Amplification reluctantly allowed.*

Affidavit handed in by appellant, not timeous as required by Rules—Filed of record but not considered as relevant.

Claim: Application to rescind default judgment (See case No. 6 of 1948).

Judgment: Application refused.

Appeal: "Bad in law" in that Native Commissioner erred in his discretion in refusing to allow application.

Held: In limine that matter was *res judicata.* Having failed on one set of arguments, appellant could not be heard to attack the Native Commissioner's decision on another set of arguments.

Appeal dismissed.

Authorities: Broom's Legal Maxims.

Marsberg, P. (delivering the judgment of the Court):—

On the 7th April, 1948, defendant, Daniel Silisana applied to the Native Commissioner at Vereeniging "to set aside the default judgment" granted by him on 18th June, 1947 in the absence of the defendant, in the case No. 57 of 1947 between Izak Thabene, plaintiff and defendant. The explanation which defendant elected to give to the Native Commissioner in reference to his absence at the trial of the case on 18th June, 1947 was to this effect: "I explain my absence from the Court by saying that you (the Native Commissioner) made a mistake in giving judgment". In his reasons for judgment

the Native Commissioner stated: " Applicant has given no reason or explanation why he was in default and the Court therefore rightly presumed that he was in wilful default ". The Native Commissioner refused to rescind the default judgment. The Native Commissioner's action was confirmed by this Appeal Court on 14th June, 1948 on appeal against his decision.

Nevertheless, on 21st July, 1948, defendant again applied to the Native Commissioner at Vereeniging " to set aside the default judgment " granted against him on 18th June, 1947, on further grounds set out in an accompanying affidavit. When this application was heard plaintiff objected that the matter was *res judicata* but the Native Commissioner held otherwise, and proceeded to deal with the matter on the affidavits filed and again refused to rescind the default judgment. An appeal is now before us against that decision on the grounds that the judgment is " bad in law ".

A notice of appeal couched in those terms is not a compliance with Rule 10 (*b*) of the Native Appeal Court Rules. We have been constrained to point out very strongly to Mr. Dison who has appeared for defendant that a valid notice is not before us and have reluctantly agreed to allow him to amplify it by adding the words: " in that the Native Commissionererred in the exercise of his discretion in refusing to allow the application to rescind the default judgment ".

Mr. Maltz, for plaintiff (respondent) requested permission *in limine* to argue the question of *res judicata*. We were of opinion also that this point should first be argued and accordingly argument was heard.

Notwithstanding the peculiar line of approach in the applications for rescission, their general purport, in terms of the three requisites required in a plea of *res judicata*, is the same, viz.:—

(1) the same parties.

(2) to set aside a judgment granted in the absence of the defendant.

(3) because the Native Commissioner erred in the exercise of his discretion.

In determining what are real grounds confusion can follow on failure to distinguish between argument and the real issue. Defendant was obliged to explain his absence from Court. Having elected to give the reasons advanced in support of his first application and having failed to satisfy the Native Commissioner, he cannot again be afforded a further opportunity to attack the same judgment by advancing another set of arguments. The salutory rule of law that a person cannot be vexed twice for the same cause is a wise one. The Courts have gone so far as to state the position thus: If an action be brought and the merits of the question be discussed between the parties and a final judgment obtained by either, the parties are concluded, and cannot canvass the same question again in another action, although perhaps, some objection or argument might have been urged upon the first trial which would have led to a different judgment. In such a case, the matter in dispute having passed in *rem judicatam*, the former judgment, while it stands, is conclusive between the parties, if either attempts, by commencing another action, to reopen that matter; and for this rule two reasons are always assigned: the one, public policy, for interest *rei publicae ut sit finis litium*; the other, the hardship on the individual that he should be twice vexed for the same cause.

In our opinion the Native Commissioner should have held that the objection of *res judicate* had been well taken and should have dismissed the application accordingly. In the circumstances it is not necessary to consider the case in the light of the affidavits filed in the second application.

After argument Mr. Dison handed in an affidavit by defendant, Daniel Silisane to which Mr. Maltz has objected. We have read and filed the affidavit of record. In our opinion it has no bearing upon the question in issue and no further comment is necessary. This document was not filed with the Registrar and was handed to us at 2.25 p.m. on 14th October, 1948.

The appeal is dismissed with costs.

For Appellant: Adv. L. R. Dison, instructed by Messrs. Helman and Michel, Johannesburg.

For Respondent: Mr. Maltz, instructed by Messrs. Smits and Malan, Vereeniging.

SEDUCTION.

CASE No. 18 OF 1948 (HARRISMITH).

SAMUEL GATEBE v. SAMUEL SELEPE AND NKONI SELEPE.

KROONSTAD: 1st December, 1948. Before Wronsky, Acting President, O'Driscoll and Van Gass, Members of the Court (Central Division).

Seduction—Damages—Kraal head responsibility—Native customary union—Essentials.

Form of action indicative of trial under Native Custom—Native Commissioner ordering determination under common law.

Scale of Damages for seduction in Orange Free State—Five head of cattle or £25 awarded against both defendants by default—Default judgment against first defendant only rescinded—Ex mero motu *Appeal Court varies judgment to read three head or* £15 *against both defendants—Experts on Native Custom.*

Claim: Six head of cattle or £30 for seduction of plaintiff's daughter.

Judgment: By default against second defendant. For five head or £25 against first defendant after trial.

Appeal:

(1) There was no valid Native customary union between natural parents of second defendant.

(2) Amount of damages not according to scale.

Held:

(1) As no dowry was paid, there was no customary union of parents of second defendant.

(2) Scale of damages at Harrismith: three head or £15.

(3) Native Commissioner erred in holding that case was to be determined by Common Law.

(*a*) Under Common Law, Kraalhead responsiblity cannot be invoked.

(*b*) Under common law the woman sues for seduction.

(4) Appeal Court in duty bound to correct irregularity resulting in substantial prejudice. Therefore default judgment against second defendant amended to conform to main judgment, as varied by Appeal Court.

Authorities:

Minister of Native Affairs in *re* Yoko *v.* Beyi.

S.A. Law Reports (Jan.), 1948, *p.* 388.

Morake Motloung *v.* Isak Motsoeneng, 1939 (*ex* o), *p.* 127.

Act No. 38 of 1927, Sec. 15.

R. Wronsky, Acting President (delivering judgment of the Court):—

In this matter plaintiff sues the defendants for six head of cattle or their value £30 for the seduction of his daughter Julia. Samuel, Selepe first defendant is the head of the kraal in which second defendant is said to reside and consequently responsible for his torts in accordance with Native Law and Custom.

Judgment by default as prayed by plaintiff was granted against both defendants jointly and severally on 23rd January, 1948. On the application of the first defendant the judgment against him was rescinded on 13th May, 1948 and the case against him set down for hearing on 9th June, 1948. It appears that after the close of defendants' evidence the Court called Ezekias Khatala and thereafter at the request of the attorneys further witnesses were called. In the course of their evidence the Court announced that Native Law and Custom could not be applied in this case and that this fact should be taken into account when further evidence was called and in arguments. After argument judgment was entered in favour of defendant No. 1 with costs. Against this judgment an appeal has been noted on the grounds mentioned in the Notice of Appeal. The main point taken in argument was whether or not a valid marriage according to Native custom subsisted between Miriam Selepe and Alfred Tshabala, the natural parents of the second defendant.

In regard to the alleged marriage between Miriam Selepe and Alfred Tshabalala—evidence was led that an agreement had been entered into between the parents of the parties mentioned to the effect that the latter should enter into a customary union and that lobolo should be paid. It is not disputed that notwithstanding this agreement no lobolo was in fact transferred.

" For plaintiff against both defendant jointly and severally for three head of cattle or £15 with costs in the lower Court.

The first defendant to pay the costs of appeal in this Court ".

The essentials of a valid customary union have been repeatedly laid down in decisions of this Court as being—

(1) the consent of the contracting parties;

(2) payment of lobolo; and

(3) the delivery of the bride.

As in this case no lobolo was transferred this Court holds that there can be no question but that a customary union has not been entered into. Moreover, it is significant that when Alfred Tshabalala was approached in regard to the payment of the lobolo following the death of his father he repudiated the agreement in its entirety nor is there any indication on record that Samuel Selepe as kraalhead ever took any steps to recover the lobolo in respect of Miriam.

It is observed that the Native Commissioner at a late stage of the proceedings arbitarily decided to apply Common Law instead of Native Custom in this case. In this connection attention is drawn to a recent decision given in the Appellate Division, *vide* S.A. Law Reports, *p.* 388, January, 1948, Minister of Native Affairs in *re* Yako *v.* Beyi where a ruling is given that in any case in which the point in question depends on or is governed by Native Law the capacity of any Native whose right is in question is to be decided by Native Law.

Notwithstanding the evidence of the two witnesses called as experts on Native Custom the following factors indicate that the parties had no intention of departing from their original customs:—

(1) They proposed that the marriage between Miriam and Nkoni should be by Native custom and that lobolo should be paid—there was no mention of a Christian or civil marriage.

(2) The summons was issued in terms of Native custom, i.e. the kraalhead being sued as joint co-defendant. In Common Law only the responsible party could be sued.

(3) If it was intended to invoke relief under the Common Law—Julia should have sued in her own name.

(4) The whole proceedings and nature of the claim point to Native Law and Custom and not Common Law, and there is nothing whatsoever to indicate that the parties desired any other but customary law to be applied. It may here be conveniently recorded that although Bennett Takana may have some knowledge of Native Law and Custom—possibly gained by long association with the Court—he apparently has no intimate experience in Native law and his evidence consequently does not carry much weight. The evidence of Cornelius Sankge may be deserving of more consideration—but he too by no means lays down hard and fast customs practiced in the Harrismith Location—he states that not all residents follow Native Law and Custom and in this respect there is nothing to indicate in what category the parties to this action fall, except that by their actions and the nature of the proceedings it would appear that they desired to apply Native Law and Custom. This Court is consequently of opinion that the Native Commissioner erred in directing that the case should be decided in accordance with Common Law and feels that he was erroneously influenced to this end by the evidence given by Bennett Takana and Cornelius Sankge.

There remains the question of the amount of damages claimable for seduction in the O.F.S. In this respect reference should be made to the case of Marak Motloung *v.* Isak Motsoeneng, 1939, N.A.C. (C. & O), *p.* 127—where the assessors from Witzieshoek indicated that the fine for deflowering a girl in the O.F.S. followed by pregnancy is three head of cattle.

Although there is no appeal in respect of the judgment against the second defendant the Court is required to analyse the entire record in arriving at a final decision, and in accordance with the powers conferred upon it in terms of Section 15 of Act 38 of 1927, it feels in duty bound to correct any gross irregularity which may result in substantial prejudice to the parties.

It is obvious that the Native Commissioner erred in giving judgment against the second defendant as indicated above, the correct judgment should have been for three head of cattle or £15 as laid down in the case of Marak Motloung *v.* Isak Motsoeneng quoted above.

The judgment against the second defendant for five head of cattle or £25 with costs is accordingly amended and the judgment in favour of the first defendant with costs is set aside and the judgment of this Court is now entered to read:—

For Appellant: Mr. W. G. Kleinschimidt, instructed by Mr. R. ver Loren van Themaat, Harrismith.

For Respondent: Mr. R. Louw of Messrs. Du Randt and Fullard, Kroonstad.

URBAN NATIVE LOCATIONS: BETHLEHEM, O.F.S.

CASE No. 19 OF 1948 (BETHLEHEM).

PIET MAKOEDI *v.* LUCY ZENGILA (DULY ASSISTED).

KROONSTAD: 1st December, 1948. Before Wronsky, Acting President, O'Driscoll and Van Gass, Members of the Court (Central Division).

Urban Native Location—Bethelhem, O.F.S.—Administrator (O.F.S.), Notice No. 103 *of* 1940*—Declaration of rights to and ejectment from stand—Plaintiff married to widow—Defendant daughter of widow by previous marriage—Property registered in widow's name—By virtue of marriage to registered holder, plaintiff did not become owner of the rights of occupation* ipso jure *on death of registered holder—Therefore cannot eject defendant.*

But, improvements are capable of acquisition by inheritance—Government Notice No. 1664 *of* 1929, *as amended by Government Notice No.* 939 *of* 1947*—Estate of spouse married by Christian or Civil rites—In absence of Ministerial direction estate devolves according to Native law if marriage was without ante-nuptial contract or declaration in terms of Section* 22 (6) *of Act No.* 38 *of* 1927*—Act No.* 13 *of* 1934 *not applicable—Under Native Law woman's property accrues to husband—Plaintiff, therefore entitled to succeed to improvements on stand.*

Claim: Declaration of rights to stand in Municipal Location and ejectment of defendant.

Plea: Stand belongs to her mother.

Judgment: For defendant.

Appeal:

(1) Plaintiff entitled to improvements in own name.

(2) By virtue of marriage to registered holder plaintiff entitled to sue for: (*a*) ejectment of defendant and (*b*) for the improvements.

Held:

(1) Facts against plaintiff claiming in his own name.

(2) (*a*) Plaintiff did not *ipso jure* acquire rights of occupation on death of his wife, the registered holder of site permit. He therefore could not eject defendant.

(*b*) He acquired by inheritance from his wife any property (improvements) on the stand registered in her name. Site permit cannot be transferred without consent of dominus, i.e. Municipality. But improvements can be disposed of.

Authorities:

Aaron Mtyoli *v.* Lena Siyengo (1945, T. & N. 88).
Mahanti Seken Kelana *v.* Nongiji Ngenkana (1947, C. & O. 9).
Administrator's (O.F.S.) Notice No. 103 of 1940.
Government Notice No. 1664 of 1929, as amended by Government Notice No. 939 of 1947.
Act No. 38 of 1927, Sec. 22 (6).
Act No. 13 of 1934.

R. Wronsky, Acting President (delivering judgment of the Court):—

In the Native Commissioner's Court at Bethlehem plaintiff sued defendant Lucy Zingela assisted by Leo Zingela for a declaration of rights and for ejectment from Stand No. 78 situated in the Municipal Location at Bethlehem, O.F.S.

The summons alleges that plaintiff is the surviving spouse of the late Ettie Mtambu alias Maggie Mtambu to whom he was married by Christian Rites on 16th July, 1931. At the time of the marriage Ettie was a widow and the defendant is her daughter by the previous marriage. Ettie died during 1945. During 1937 whilst Ettie and plaintiff were living together but before their marriage, plaintiff through Ettie purchased the improvements on Stand No. 78 and instructed her to arrange for the registration of the site permit in his name. She, however, registered the permit in her own name. On the death of Ettie, defendant her daughter, stayed with plaintiff at this stand from which plaintiff was subsequently wrongfully and unlawfully expelled; the defendant claiming the improvements on the stand as belonging to her mother, and denied plaintiff's claim to the property.

In her plea defendant denies that Leo is her husband and claims that the stand was purchased by her mother with funds derived from her grandfather.

The Native Commissioner entered judgment in favour of defendant declaring that plaintiff had no right of ownership in the property and further that he had no right to eject defendant from the property. Against this judgment plaintiff now appeals.

The questions in this matter to be decided as set out in Clause 6 of the grounds of appeal are—

(1) is plaintiff entitled to the improvements on Stand 78 in his own right; or

(2) Is he by virtue of his marriage to Ettie Mtambu in whose name the stand is registered entitled to sue for—

(*a*) ejectment; or

(*b*) for the improvements.

In regard to (1) the evidence is conflicting. Plaintiff alleges that he provided the money with which to purchase the improvements, but admits that Ettie Mtambu worked and contributed towards the cost prior to their marriage. Nora, one of the daughters of Ettie, states that the money was derived from her grandfather, and further that her lobolo money was used for this purpose. There is evidence that the Superintendent was approached in this regard, but no serious effort appears to have been made by plaintiff until recently to definitely establish his rights. There were during Etties' lifetime also arguments in regard to the ownership of the stand.

It might be mentioned at this stage that if it can be established that money derived from Nora's lobolo was used to contribute towards the purchase of the stand, plaintiff would possess no claim to the stand as he undoubtedly would have no right to receive in his own name lobolo paid for Nora. For these reasons plaintiff cannot succeed in regard to his claim to such right.

In regard to 2 (*a*) reference is made to the case of Aaron Mtyali *v.* Lena Siyengo, 1945 N.A.C. (T. & N.), *p.* 88, in which the Court reiterated its previous decisions namely that the registration of a stand is *prima facie* proof of occupational rights in a Municipal location stand. The decisions have also illustrated that the site permit as such i.e. the right to occupy is not a right capable of being transferred without prior consent of the dominus i.e. the Municipality acting through its Superintendent. The decisions have further shown that a site permit is a permit held by the holder as a personal right and that on the death of the holder, the estate of such person does not *ipso jure* become the holder of the site permit. The decisions also make it clear that the site holder has the right during the tenancy to demolish and remove any structure put up by such site holder.

These decisions become more apparent if reference be made to the regulations governing the Bethlehem Location where the stand is situated, namely Administrator's Notice (O.F.S.) No. 103 of 1940. The site can only be reallocated to an approved applicant in terms of the abovequoted notice. The permit in this case cannot accordingly be claimed by plaintiff merely by virtue of his having been married to Ettie Mtambu. It is clear that an estate as such does not have a continuing right of occupation of a stand and although defendant is virtually an irregular occupier she may not be expelled from the stand by anybody except the Municipal authority. Plaintiff's claim for ejectment must accordingly fail.

In regard to 2 (*b*) the improvements, according to the decisions mentioned above, may be treated separately and are capable of being demolished and disposed of either by sale or inheritance.

It is important to note that Government Notice No. 1664 of 20th September, 1929 has recently been amended by Government Notice 939 of 1947 which materially alters some important decisions previously given in regard to the manner in which estate property is to be dealt with on the death of one of the spouses married by civil or Christian rights. One of the effects of the amendment is that in the absence of a ministerial direction under paragraph (*d*) of the quoted Government Notice, an estate will devolve in terms of Native law and custom if the deceased in survived by a partner of a marriage which was without an ante-nuptial contract and without a declaration in terms of Section 22 (6) of the Native Administration Act, 1927. This is the position of the parties in this case.

Furthermore it has been decided in a number of cases where parties are married as indicated above that the provisions of Act No. 13 of 1934 are not applicable. *Vide* Mahanti Sekenkelana *v.* Nongeji Ngcukana, N.A.C. (C. & O.) 1947, page 9.

It is common cause that in accordance with Native Law and Custom a married woman, with the exception of personal belongings, cannot own property and that any property accruing to her during the marriage accrues to the husband. It has been held that the property in this case should devolve according to Native Law and Custom. It follows that plaintiff must succeed in his claim insofar as the improvements on the stand is concerned and which may be removed in terms of the Municipal regulations.

The first portion of the judgment which reads—

" Dat eiser geen besitreg op die eiendom erf 78 het nie "

is set aside and the judgment is altered to read—

" Judgment for plaintiff in respect of the improvements only on Stand No 78 in the Bethlehem Location ".

The judgment as amended will now read :—

" Judgment for plaintiff in respect of the improvements only on Stand No. 78 in the Bethlehem Location. Plaintiff has no right to eject defendant from the the stand. Plaintiff to pay costs in the lower Court ".

No order as to costs in this Court will be made.

For Appellant: Mr. Basil Kelly, instructed by Mr. E. F. Smuts, Bethlehem.

For Respondent: Not represented.