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SELECTED DECISIONS

OF THE

NATIVE APPEAL

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Part II

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BIGAMY : DAMAGES.

CASE No. 1 OF 1949 (JOHANNESBURG).

EVA SIFO *v.* GEORGE SIFO.

JOHANNESBURG: 22nd February, 1949. Before Marsberg, President, Morgan and van Gass, Members of the Court (Central Division).

Bigamy—Damages—Bigamy per se *is an unlawful act and therefore* an injuria.

Claim: £200 damages for bigamous marriage.

Plea: Defendant knew of prior marriage and therefore suffered no injuria.

Judgment: For Plaintiff for £15 damages.

Held:

(1) That bigamy is an unlawful act *per se* and therefore an injuria.

(2) That as a natural right every person is protected in the possession of unimpaired person, dignity and reputation.

(3) That it is not necessary in order to find that there was *animus injuriandi* to prove ill will or spite. It is quite immaterial what the motive was. It is sufficient that the injuries were inflicted not accidentally or negligently but with deliberate intention. When aggression is proved, the law presumes that the aggressor had in view the necessary consequences of his act.

Appeal dismissed.

Authorities:

Rex *v.* Stander, 1939 T.P.D. 27.
Rex *v.* Howell, 1917 N.P.D.
Youngelson's Case, S.A. Law Reports, 1948 (1), Page 822.
McKerron on Delicts, Pages 66-67.
Viljoen's Case, 1944 C.P.D. 147.
Rex *v.* Holliday, 1927, C.P.D. 394.

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

In the Native Commissioner's Court at Johannesburg, plaintiff, Eva Sifo, sued defendant, George Sifo, for £200 damages sustained as a result of defendant having married plaintiff when he was lawfully married to another woman.

The basis of argument before us has varied materially from the pleadings and the grounds of appeal. Defendant, against whom judgment was given for £15 damages and costs, has argued that plaintiff has suffered no injuria and is not entitled to any damages. Mr. Measroch, for appellant, contended that a bigamous marriage in itself did not constitute an injuria, that the onus was on plaintiff to establish a claim for damages and that in view of her character and reputation and the circumstances of this case she had suffered no damages. With his contention that a bigamous marriage in itself does not constitute an injuria we are unable to agree. In our law it is fundamental that every person as a matter of natural right is protected in the possession of an unimpaired person, dignity and reputation and cannot wilfully be exposed to the hatred, ridicule or contempt of his or her fellowmen. An action will lie against any person doing an act which offends against these protective provisions. Several examples were quoted to us, based on criminal injuria, where injuria is presumed by the Courts even where the complainant has been unaware of the injuria to her person, e.g. the cases of "peeping Toms". Rex *v.* Holliday (1929 C.P.D. 395). "It is not necessary", said *Solomon, J.*, in Whittaker *v.* Roos, "in order to find that there was *animus injuriandi* to prove any ill-will or spite on the part of defendants towards the plaintiffs; and it is quite immaterial what the motive was or that the object which the defendants had in view was a laudable one. It is sufficient

that the injuries suffered by the plaintiffs were inflicted by the defendants, not accidentally or negligently but with deliberate intention." As *Innes, J.*, points out in the same case: "When an unlawful aggression has been proved, the law presumes that the aggressor had in view the necessary consequence of his conduct; that is, that he had the intention to injure, the *animus injuriandi*". A bigamous marriage is in itself an unlawful act and the presumption is that defendant knew the consequences of his act. Mr. Measroch accepted the fact that plaintiff did not know of defendant's subsisting marriage. There is clearly, then, an aggression on plaintiff's rights to the dignity of person and reputation and in our opinion she has suffered damages.

As the quantum of damages awarded by the Native Commissioner was not contested before us it is unnecessary to consider the question.

The appeal is dismissed with costs.

For Appellant: Adv. Measroch, instructed by Mr. T. J. J. Ntwasa, Johannesburg.

For Respondent: Mr. Lockhoff, instructed by Messrs. Lowenberg and Son, Johannesburg

URBAN NATIVE LOCATION : RIGHTS TO SITES.

CASE NO. 2 OF 1949 (JOHANNESBURG).

SIMON MTOMBENI *v.* **JACK BEHRMAN, N.O.**

JOHANNESBURG: 22nd February, 1949. Before Marsberg, President, Morgan and van Gass, Members of the Court (Central Division).

Urban Areas—Native Location—Pimville, Johannesburg—Administrator's Notice No. 94 of 1925—Sale of improvements by registered site permit holder—Heir or representative of estate does not ipso jure *acquire ownership of improvements on death of registered holder—They have merely a personal right to succeed to improvements, subject to approval of dominus, i.e. the Municipality—Estate has no continuing right of occupation or right to expel any unauthorised occupier whilst occupying the stand, nor benefit from any act of such unauthorized occupier whilst occupying the stand—effect of interdict by representative of estate against purchaser of improvements discussed*—De facto occupation by representative *of estate—Purchaser suing for value of improvements—Method of assessing value of improvements—doctrine of non-enrichment applied.*

Claim: Order for payment of £131. 0s. 6d., value of improvements erected by purchaser of stand.

Plea: Denial that plaintiff in bona fide occupation or that improvements were effected.

Judgment: For plaintiff for £131. 0s. 6d.

Appeal: Not relevant.

Held:

(1) That the representative of the estate of the late registered holder did not *ipso jure* acquire continuing occupation of the site on death of registered holder.

(2) That he had placed himself in *de facto* occupation of the estate, confirmed by interdict.

(3) That, dissenting from judgment delivered on the interdict, defendant was not the *de jure* occupier.

(4) That plaintiff was restrained from exercising his rights of removal of improvements.

(5) That he had effected improvements to value of £160.

(6) That on doctrine of non-enrichment he was entitled to claim the value of improvements.

(7) That, on the peculiar position which obtains in relation to personal rights of occupation in respect of stands held in Municipal Native Locations, the method of assessment of value was a fair and reasonable estimate of the improvements as a going concern.

(8) That the Native Commissioner's estimate was not unreasonable.

Appeal dismissed.

Authorities:

Alfred Dhlamini *v.* Kortman Kunene, 1938 (N. & T.).
Richard Zulu *v.* Vilikazi, 1945 (N. & T.), 105.
Truck & Car Coy. *v.* Matola.
Aaron Mtyeli *v.* Lena Siyango, 1945 (N. & T.) 88.
John Mahonga *v.* Knot Nabanoba.
Administrator's Notice No. 94 of 1925.
Native Urban Areas Act, No. 21 of 1923.
Wille—Principles of S.A. Law, page 144.
Wille & Milne: Mercantile Law, page 306.
Lee: Roman Dutch Law, page 443, 1925 A.D. 536.

JOHANNESBURG: 22nd February, 1949. Before Marsberg, President, Morgan and Van Gass, Members of the Court (Central Division).

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

In the Native Commissioner's Court at Johannesburg, plaintiff, Simon Mtombeni sued defendant, Jack Behrman, N.O., in his capacity as the representative of the estate of the late Solomon Kunene for an order for payment of £131. 0s. 6d. and costs of suit on allegations that:—

(1) About the year 1939 plaintiff became the *bona fide* occupier of Stand No. 1943, Sibiya Street, Pimville, Johannesburg, of which he was in *bona fide* occupation until the death of Solomon Kunene.

(2) During the course of the occupation plaintiff affected improvements on the stand to the value of £131. 0s. 6d.

(3) Defendant now claims the rights of occupation as part of the assets in the estate of the late Solomon Kunene and refuses to refund to plaintiff the amount of £131. 0s. 6d.

Defendant denied that plaintiff was in *bona fide* occupation of the premises and denied that he had effected repairs or improvements in the sum of £131. 0s. 6d. He further alleged that plaintiff as agent for the late Solomon Kunene did from 1939 to about August, 1943, collect rentals on the said property and after the death of Solomon Kunene in 1943 wrongfully and without the consent of the representative of the estate of Solomon continued to collect rentals; alternatively that plaintiff collected the rentals as agent or on behalf of the late Solomon Kunene and that in law he was collecting rentals for and on behalf of Solomon Kunene, all of which amounts were never paid to Solomon Kunene or to his estate. Defendant counter-claimed for an order to compel plaintiff to furnish a statement of account of all rentals collected, debatement of the said account and judgment in the amount found to be due to defendant. Plaintiff generally denied all the allegations in defendant's counter-claim.

After trial of the issues the Native Commissioner entered judgment in favour of plaintiff for £131. 0s. 6d. with costs and dismissed the counter-claim with costs.

Defendant has appealed against this judgment on a number of grounds. It will not be necessary for us to give serious consideration to these grounds of appeal because, had all concerned in this litigation given due regard to the purport of the full judgment in the case of Aaron Mtyali *v.* Lana Siyengo (1945, N.A.C. N. & T. 88), which was quoted by Mr. Behrman in support of defendant's appeal, no difficulty should have been experienced and indeed there should have been no litigation between the parties. We are at a loss to understand why Mr. Behrman quoted this case in support of his argument because it appears to us to be directly and wholly against him. That case is on all fours with the present one. It will suffice to quote the following extract from Mtyali's case, viz.—

> "It seems to this Court perfectly clear from the regulations governing the Pimville Location where these stands are situated, namely Administrator's Notice No. 94 of 1925, framed under section 23 (3) of the Native Urban Areas Act of 1923, that the site permit is a permit held personally 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 executor of the estate is entitled to liquidate the assets, if any, of the deceased, and to this end he may dispose of the improvements in the manner approved by the regulations, as set out in the decisions above referred to, i.e. he may dispose of the right to remove and actually remove the improvements. Thereafter it would become a matter of approval by the dominus, i.e. the Municipality, of the person or heir to the estate as successor to the deceased in occupation as a personal right, a right not directly linked with the estate.
>
> On this reasoning it follows that the estate as such does not have a continuing right of occupation or right to expel any unauthorised occupier whilst occupying the stand, *nor benefit from any act of such unauthorised occupier whilst occupying the stand.* That is a matter between the dominus and the irregular occupier.
>
> The position as this Court views it in the present case, is that the late Nomandzi disposed of the structures on this site and these structures were removed during her lifetime, i.e. during the period of her tenancy.
>
> There remains thus nothing in the estate capable of liquidation or capable of sale, and for this reason the plaintiff in the Lower Court must fail, not on the ground that he has no *locus* standing, but on the ground that there is no cause of action.
>
> The estate has nothing which can form the subject of an action against the defendant in the circumstances."

Now, in the case before us the late Solomon Kunene disposed by way of sale to plaintiff, Simon Mtombeni all his rights in Stand No. 1943 and on his death there was nothing which could form an asset for liquidation by the representative of his estate. In our opinion the evidence amply supports the facts that Solomon Kunene sold this property to Simon Mtombeni and that the latter effected improvements on the stand. Following the decision in Mtyali's case the representative of Solomon Kunene's estate had no cause of action against plaintiff. The defendant has put himself in *de facto* occupation of the stand, but *de jure* he has no rights of occupation. The rights of the parties appear to have been contested in an action, by way of interdict, which was taken on appeal to the Native Appeal Court, Natal and Transvaal Division at Pretoria where on the 18th September, 1947, Jack Behrman, N.O., was confirmed in his occupation of the property. With great respect to our sister Court we must disagree with the judgment given which, in our opinion is in direct conflict with its own decision in Aaron Mtyali's case.

The position before us now is that defendant Jack Behrman, N.O., is in *de facto* occupation of the property but is not the *de jure* occupier. In view of the judgment standing against plaintiff he has unfortunately no other means of redress. He has therefore limited his action to a claim for repayment of the sum expended by him for improvements, viz. £131. 0s. 6d.

On the question of the value of improvements argument was directed to us on the position of bona fide occupiers, mala fide occupiers and lessees, but in view of the peculiar position which obtains in relation to the personal rights of occupation in respect of stands held in Municipal Native Locations we are of opinion that the value of improvements in the case before us must be assessed by other means.

The Native Commissioner arrived at his decision thus:—

"Cost of material of old structure £35
New timber and iron in reconstruction ... £32
Paid builder Nkosi £32
Paid Tshabongo for making bricks £28
Cost of sand, earth and stone ... ... £21.

These 5 items amount to £148 and do not take into account £4. 10s. for hinges, screws and other small items, the burnt bricks used and plastering, paint and painting, wire fence £6, etc.

The Court, largely guided by the evidence of the builder, Nkosi, who has experience and knowledge arising from his trade and occupation has come to the conclusion that the sum of £131. 0s. 6d. claimed by the plaintiff is not excessive."

The property as it stands to-day is a six-roomed dwelling bringing in regular rentals by sub-letting. By virtue of the judgment against him, plaintiff cannot demolish and remove his materials. *De facto* the defendant is enjoying the rights of occupation. A competent builder has estimated the value of the improvements at £160. Bearing in mind all the factors in this case we cannot say that this is an unreasonable estimate of the value. Defendant has possessed himself of something to which he is not legally entitled and applying the doctrine of non-enrichment he cannot now be heard to resist the claims of plaintiff.

The Native Commissioner has awarded an amount below what we accept as a fair valuation and his judgment cannot be disturbed.

On the authority of Aaron Mtyali's case the defendant had no cause of action on the counter-claim.

The appeal is dismissed with costs, both in respect of the main claim and the counter-claim.

For Appellant: Mr. J. Behrman, of Messrs. Behrman & Behrman, Johannesburg.

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

LANDLORD AND TENANT : TENANT IN UNLAWFUL OCCUPATION.

TITOS MOTSUSI *v.* MAMOLOI LOI GADEBE.

CASE No. 3/1949 (Johannesburg).

JOHANNESBURG: 12th October, 1948, 18th October, 1948, and 25th February, 1949. Before Marsberg, President, Morgan and van Gass, Members of the Court (Central Division).

Landlord and tenant—Orlando Township, Johannesburg—Ejectment—Tenant in unlawful occupation—Rents Act not applicable to Orlando Township—Due notice to vacate premises given—One month's notice sufficient—If parties are in pari delicto *tenant is in no better position than if lease was lawful.*

Claim: Order of ejectment on grounds that defendant was in unlawful occupation of premises and received one month's notice to vacate.

Plea: Defendant placed in occupation by caretaker of plaintiff.

Judgment: For defendant (?)

Appeal: Immaterial.

Held:

(1) Orlando Township does not fall within provisions of Rents Act.

(2) It was lawful for plaintiff to give one month's notice to defendant to vacate premises.

(3) Assuming parties were *in pari delicto* defendant was in no better position than if lease was lawful.

(4) Due notice is vacate was given to defendant.

Appeal allowed and Native Commissioner's judgment altered to read " For plaintiff and prayed ".

Authorities:

Rents Act No. 33 of 1942.

Natives (Urban) Areas Act, No. 21 of 1923.

Kelly *v.* Wright and Kok, S.A. Law Report, A.D. 1948 (3), August, page 522.

De Villiers & McIntosch: Law of Agency, page 76.

Theron *v.* Leon, 1928, T.P.D. 719.

Proclamation No. 227 of 1945 as amended by Proclamation No. 88 of 1946.

Jajhbay *v.* Cassim, 1939 A.D. 557.

Welsh on Urban Areas.

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

In the Native Commissioner's Court at Johannesburg, plaintiff Titos Motsusi sued defendant Mamoloi Loi Gadebe for an order for ejectment from premises on Stand No. 4845, Orlando, Johannesburg, on allegations that the plaintiff was the registered lessee of the premises and defendant wrongfully and unlawfully occupied the premises in the year 1947 and despite demand refuses to vacate the premises.

It is common cause that Orlando is a Municipal Location under the control of the Municipality of Johannesburg and therefore falls outside the scope of the Rents Act. It is governed by the provisions of the Natives (Urban) Areas Act No. 21 of 1923.

It appears that defendant obtained occupation of the premises through an agent of plaintiff whom the latter had placed in charge of the property while he was absent at Zeerust and that the defendant was in occupation for several years paying the monthly rental to the municipal authorities in the name of plaintiff. The written permission of the Location Superintendent was not obtained to the sub-letting of the premises to defendant and to that extent the occupation of defendant was unlawful. Assuming that Masilase was plaintiff's agent it appears that she went beyond the scope of her mandate in sub-letting the property to defendant. Moreover, had there been a mandate to sub-let in contravention of the Location regulations such mandate would itself have been illegal and void and not binding. At most, defendant was a mala fide occupier and the evidence bears out that she was aware of her position. The case of Kelly *v.* Wright and Kok [S.A. Law Reports A.D. 1948 (3), August, page 522], has been mentioned. It is unfortunate that the full report was not available to the Native Commissioner as his reasoning may have proceeded on a different basis. In Kelly's case the ejectment order was refused because proper notice on the lessee to vacate had not been given, not for the reason stated by the Native Commissioner in this case. At page 527, Kelly's case, *Tindell, A.C.J.,* states: " the plaintiff would have been entitled to ejectment if she had given the defendant a month's notice.

The lessee in such a case having received the same notice as he would have been entitled to if the lease had been valid, *ceteris paribus* there is no reason of equity or public policy in favour of allowing the lessee to retain possession on the ground that the parties are in *pari delicto*. In the present case defendant alleged in evidence that she had not received notice to vacate the premises and in fact did not know the plaintiff. She is not, however, borne out by the witness Henry Mtuki, who resided with her on the premises. In evidence he stated: "Prior to ejectment the plaintiff came and claimed to be the owner of the house. He gave us one month's notice to vacate the place. In fact we did not receive a month's notice in writing." "I drew defendant's attention to receipts being in name of Titus (plaintiff). I did this often." Location Superintendent McFadyen stated: "Plaintiff has been trying for a considerable period prior to October, 1947, to get occupation of the house. Plaintiff and defendant appeared before me. I told defendant that she had no right to occupy the house." Plaintiff stated: "I gave defendant verbal notice to leave before I issued summons. I gave defendant the notice in August, 1947."

Now, assuming in favour of defendant that she was lawfully in occupation of the premises it was equally lawful for plaintiff to give her notice to vacate, and failing he compliance therewith to seek an order of Court of her ejectment. On the facts we are satisfied that defendant received the notice to vacate and failed to vacate the property. Plaintiff is therefore entitled to the ejectment order.

The appeal is allowed with costs and the Native Commissioner's judgment is altered to read: For plaintiff as prayed with costs.

For Appellant: Adv. G. P. Kotze, instructed by Mr. van Leggelo, Johannesburg.

For Respondent: Mr. Susser of Messrs. Behrman & Behrman, Johannesburg.

AGREEMENT : DEAF AND DUMB PARTY.

CASE No. 4 OF 1949 (ZEERUST).

REUBEN MOAGI *v.* **CLEOPHAS MOAGI & OTHERS.**

JOHANNESBURG: 2nd June, 1949. Before H. F. Marsberg, President, to W. J. M. Norton and F. P. van Gass, Members of the Court (Central Division).

Written agreement—Deaf and dumb party—Claim to set aside on grounds that party did not know or understand contents of agreement—Question of fact whether party understood—Precautions and procedure where party is deaf and dumb.

Claim: Order to set aside certain written agreement on grounds that plaintiff was deaf and dumb and did not know or understand what he was signing.

Plea: Denial.

Judgment: For defendants.

Appeal: On questions of fact.

Held: Whether or not a deaf mute understands what he is doing is a question of fact. Onus was on plaintiff. Evidence discloses that everything possible was done to explain by signs to deaf mute what was being transacted. Trial Court was satisfied that plaintiff did understand the agreement and failed to discharge onus on him. All facts and surrounding circumstances considered by trial Court. Native Commissioner was on guard to satisfy himself that deaf mute understood what was put to him.

Appeal dismissed.

Authorities considered or quoted:

Nathan's Common Law, section 2468.
Scoble on Evidence.
Ex parte van Dyk, 1939 C.P.D. 292,
Morrison *v.* Lennard, 3 C. & P. 127.
Halsbury's Laws of England, 2nd Ed., 277.
Wille & Milne Mercantile Law, 8th Ed., page 51.
Pheasant v. Warne, 1922 A.D. 481.

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

In the Native Commissioner's Court for Marico held at Zeerust plaintiff Reuben Moagi sued defendants Cleophas Moagi, Absolom Moagi, Mathew Moagi and Roger Moagi for an order setting aside a certain written agreement executed at Zeerust on 29th October, 1947, between plaintiff and defendants in respect of the farm Witkleigat No. 273, Zeerust, on allegations that he, plaintiff, is both deaf and dumb, is unable to read or write and that he did not know or understand the contents of the agreement at the time when he signed it nor would he have subscribed to it had he been aware of the contents of the agreement.

From the record it appears that on the 27th October, 1947, plaintiff and defendants and others, mostly all connected by family relationship, appeared in the office of Mr. Robert Baird Warren, an attorney practising in Zeerust in connection with certain disputes and litigation pending between the parties with a view to compromise or settlement of their differences. Mr. Warren was acting for plaintiff Reuben and Advocate Gordon for defendants. Apparently the morning was spent in preliminary discussions between the practitioners and in the afternoon all concerned were concerted together in Mr. Warren's office to thresh out an agreement. The parties were together from 2 p.m. to sunset when the final proposals were reduced to writing and signed by plaintiff and defendants. This is the agreement which plaintiff now seeks to repudiate. (Exhibit "C" and "H".)

Certain principles relating to deaf mute litigants have been propounded by text writers. Persons who are deaf and dumb are regarded as being in full possession of their mental faculties as far as capacity to control their acts is concerned and in this respect differ from insane persons and infants under seven years of age. Consequently they are fully responsible for criminal acts committed by them. (Mat., p. 29.) Nathan's Common Law, section 2468, page 2421. A deaf mute is a competent witness provided he is able to express himself adequately by writing or by signs and symbols and is shown to understand the nature of an oath. Scoble on Evidence. There should be testimony that the matter has been properly explained to the deaf mute by somebody who is in a position to explain it to him and having been explained to him it appears that he fully understood and consented thereto. In this case the deaf mute could read and write and had been educated. *Ex parte* van Dyk, 1939 C.P.D. 202. Though the mode of examining a deaf and dump witness by means of signs made with the fingers is a mode receivable even in capital cases yet where the witness can write (Semble) it would be better to make him write his answers to the questions put to him. *Best C.J.* remarked 'I have been doubting whether, as this lad can write, we ought not to make him write the answers. We are bound to adopt the best mode. I should certainly receive the present mode, even in a capital case; but I think, when a witness can write, that is a more certain mode."

Morrison *v.* Lennard, 3 C & P. 127. There is one further injunction, viz. that the judicial officer trying the issues should be on his guard to satisfy himself that the deaf mute understands what is put to him.

Now, it will be clear from the foregoing that the question whether or not a deaf mute understands the proceedings is one of fact, to be inferred from the circumstances and from the common experience of men in matters of this nature. The method of communication with the deaf mute concerned will be the one best known and practised by and with him. Communication by signs is such a method. Explanations by diagrams and sketches would be very appropriate. The employment of near relatives or persons accustomed to communicate with the person by signs or other means would ensure a high degree of safety and accuracy in the communication of ideas. In the case now before us all these factors were present. In the meeting at which the agreement was drawn up the plaintiff was accompanied by close family relations associated intimately with him over many years and able to communicate with him. The proceedings were not marked by undue haste. On the contrary, negotiations occupied the whole afternoon. According to the evidence there were many proposals and counter proposals. Many sketches were drawn and discussed. The plaintiff has at all times been intelligent. His interests were being watched by Mr. Warren, an attorney who has acted for him for a long time. Eventually, plaintiff appeared before the Native Commissioner as a witness in this case. In his reasons for judgment the Native Commissioner remarks that "The Court was struck by the intelligent way in which he (plaintiff Reuben) handled the sketch (Exhibit "F"). It was clear that such sketches were not new to him. The signs used by the interpreter and plaintiff were so suggestive that in parts the Court interpreter interpreting from Setswana into English and *vice versa* did not wait for the relatives to interpret the signs but gave an interpretation immediately. He was stopped and instructed to wait for the interpretation of the signs by the relatives. There was difficulty at times to make the plaintiff understand but the questions were put over and over to him and the Court was quite satisfied that plaintiff clearly understood what was going on." Mr Warren also testified that he took special care that plaintiff took part in the discussions at the conference and that everything was interpreted to him.

It appears to us that everything possible was done by those concerned to explain carefully to plaintiff what was taking place. The Native Commissioner satisfied himself that plaintiff did understand the agreement to which he subscribed. We are in no better position than the Native Commissioner to draw inferences from the facts and circumstances surrounding the transaction and unless we were satisfied that there was a failure to take the ordinary precautions when dealing with a deaf mute we are not in a position to interfere. The onus of proof rested on plaintiff as it was he who alleged the inability to understand the agreement. In our opinion he has not discharged this onus.

The appeal is dismissed with costs.

For Appellant: Adv. Lakier, instructed by Messrs. Gratus, Sacks & B. Melman, Johannesburg.

For Respondent: Adv. Gordon, instructed by Messrs. Basner & Jaffe, Johannesburg.

ADMINISTRATION OF ESTATES : GOVERNMENT NOTICE NO. 1664/1929.

CASE No. 5 OF 1949 (VEREENIGING).

In re **ESTATE LATE EMMA TUNZI.**

JOHANNESBURG: 9th June, 1949. Before Marsberg, President, Norton and van Gass, Members of the Court (Central Division).

Inquiry—Administration of Estates—Section 3 of Government Notice No. 1664 of 1929—Declaration of heir—Customary union—Christian marriage—Children of deceased—ranking of heirs—Whether Native custom or common law to be applied—

Immovable property acquired by women after death of man with whom she associated—If common law applies, all her children, whether legitimate or otherwise share in property—Native Commissioner's certificate of appointment of heir to administer estate—certificate based on Death Notice and Inventory—Proof of marriages.

Appeal: Native Commissioner's finding not justified by evidence. (Native Commissioner found that James Tunzi was sole heir to Emma Tunzi.)

Held:

(1) Evidence discloses that Benjamin Tshabalala was a son and James Tunzi was a grandson of Emma Tunzi.

(2) That the property in the estate was acquired by Emma Tunzi after the death of the three men with whom she associated.

(3) That if common law is applied both should succeed to her property on maxim that a woman makes no bastard.

(4) That the inquiry has not been fully pursued.

(5) That further investigation should be made.

(6) If necessary, directions should be sought from Minister of Native Affairs for distribution of property.

(7) Record to be returned to Native Commissioner for further investigation.

(8) No order as to costs made on appeal.

Authorities:
Scoble on Evidence, 2nd ed., p. 26.
Whitfield, S.A. Native Law, *p.* 339.

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

This is an appeal against the finding of the Native Commissioner of Vereeniging in an inquiry held in terms of section 3 of Government Notice No. 1664 of 1929 into the Estate of the late Emma Tunzi. The inquiry was stated to be one to determine the heir to the estate and the validity of certain claims by Benjamin Tshabalala to certain property therein. The inquiry resolved itself into a dispute between Benjamin Tshabalala and the representative of the estate of the late William Tunzi, a son of Emma Tunzi. Benjamin claimed that he was a son of a Native Customary Union between Emma and Thomas Tshabalala, while the representative of William Tunzi claimed that William Tunzi was a son of a subsequent marriage by civil or Christian rights in community of property between Emma and James Tunzi. After hearing evidence the Native Commissioner found as follows:—

> "On the information and evidence available at this inquiry I am of the opinion that Benjamin Tshabalala has not established his claim to succeed to the above-mentioned estate and that the rightful heir thereto is William Tunzi, only son of the deceased, Emma Tunzi. I find accordingly. There will be no order made on the estate in regard to the costs incurred by Benjamin Tshabalala in this inquiry. 11th November, 1948."

Several questions must have confronted the Native Commissioner in arriving at his decision.

Was there a customary union between Emma and Thomas Tshabalala?

Was Benjamin a son of Emma and Thomas Tshabalala?

Was there a civil marriage in community of property between Emma and James Tunzi? Was William Tunzi a son of this marriage?

In regard to Benjamin's claim the Native Commissioner in the facts found proved states:—

"8. That the evidence adduced in support of his (Benjamin's) claim is lacking in definiteness, being so replete with discrepancies, inaccuracies, hearsay statements and contradictions as to be almost entirely unconvincing and valueless".

If these remarks related only to the question whether a customary union had been contracted between Emma and Thomas Tshabalala there may be substance in the opinion of the Native Commissioner as to the quality of the evidence adduced on Benjamin's behalf. But does it answer the question whether Benjamin was a son of Emma and Thomas Tshabalala? In his reasons for judgment the Native Commissioner refers extensively to Emma being the mother of Benjamin. Counsel for both parties and the members of this Court have been unable to discover any references in the record to suggest that Benjamin was not a son of Emma and Thomas Tshabalala. In fact all the evidence does suggest that he was a son of Emma, and this does not appear to be disputed by any of the witnesses heard. We have, therefore, been unable to reconcile the evidence with the Native Commissioner's finding that William Tunzi was the only son of the deceased Emma Tunzi.

Further facts proved were:—

"1. That William Tunzi who was born about 1880 was the son of a marriage contracted legally between Emma Tunzi and James Tunzi, who died in 1890.

4. That Emma Tunzi's estate was not administered until 1942, when, on the information then available, the Native Commissioner, Vereeniging, decided that William Tunzi's parents were legally married and that he was her sole heir."

In his reasons for judgment the Native Commissioner states:—

"Apparently a move towards the administration of the estate was made in 1938 when Benjamin and William visited the Native Commissioner's office, Johannesburg, where a certain Mr. Scott was the Estates Clerk. Mr. Scott advised them to interview the Native Commissioner, Vereeniging. No action was taken by either party in pursuance of this advice until 1942, when William reported the estate of Emma Tunzi at the Native Commissioner's office, Vereeniging. In the documents completed by him no mention was made of Benjamin Tshbalala and on the information furnished the Native Commissioner authorised the transfer to William of the fixed property it the estate."

Now, the only documents produced in this inquiry relating to William's report of the estate to the Native Commissioner, Vereeniging, in 1942. are the usual Death Notice and Inventory. These documents describe Emma as a widow, give no reference in regard to her marriage, and state that William Tunzi is the child of deceased. No reference is made to Benjamin. It must be noted that although Mr. Scott advised both Benjamin and William to report to the Native Commissioner, only William did so. In a covering report the Native Commissioner has informed this Court that he assumed that his predecessor had independant documentary or other satisfactory evidence of the marriage. Apparently, on the death notice and inventory the Native Commissioner of Vereeniging in 1942 issued a certificate in which *inter alia* he stated:—

"1. That William Tunzi, son of deceased, is the only heir in the intestate estate of the late Emma Tunzi (born Kumalo) a Native widow who died at Ladysmith on 3rd November, 1915, and who had been married by Christian rites in community of property to James Tunzi, a Native."

On the strength of this certificate certain of the fixed properties were transferred to James Tunzi.

At the inquiry the Native Commissioner appears to have accepted this certificate as proof of the Christian marriage in community of property between Emma and James Tunzi. There is no other evidence whatever to support this finding. No marriage certificate was produced. It is interesting to note that a marriage certificate, dated 1888, was produced by the witness, Lucy Kumalo, in proof of her own marriage. In his reasons for judgment the Native Commissioner has not given any further reasons for supporting the allegation relating to the Christian marriage. The bulk of his criticism relates to the claim of Benjamin and his reasons for discrediting his evidence. As we have pointed out above his criticism may have been opposite so far as the alleged customary union was concerned but one fact has not been discounted, that is that Benjamin was also a son of Emma.

It is common cause that the properties in Emma's estate were acquired by her own efforts (except the property in Natal which she inherited from her parents) after the death of the three men with whom she associated according to the evidence.

Now, assuming that Emma and James Tunzi were lawfully married by Christian rites in community of property, there can be no justification for the finding of the Native Commissioner. If her estate is to devolve by common law to her children, then all her children, whether legitimate or illebitimate, must succeed in equal shares, according to the well established rule that a woman begets no bastards. Even if the Native Commissioner found that the marriage had been proved he could not exclude Benjamin from his part inheritance. That is the difficulty which has confronted Counsel and this Court.

We feel that there is scope for further investigation in this matter. An opportunity should be afforded both sides to adduce whatever evidence may be available. If the Native Commissioner can suggest in what manner further elucidation of the points in issue can be made he should take steps to have the necessary evidence placed before him. In view of the doubts which have been raised whether a Christian marriage was contracted between Emma and James Tunzi, an effort should be made to obtain a reference from the marriage register. It might also be advisable to ascertain whether there is any record of a civil marriage or registered Native customary union between Emma and Thomas Tshabalala. If no further information can be laid before the Native Commissioner he should again direct his mind to the evidence and give thought to the following questions:—

> Was there a customary union between Emma and Thomas Tshabalala?
>
> Was Benjamin a son of Emma?
>
> Was there a lawful marriage in community of property between Emma and James Tunzi?
>
> Is this estate to be administered by common law or Native Custom?

The implications of the last question should be fully appreciated. It must be remembered that this is an inquiry under the administrative provisions of the Native Administrative Act relating to the administration of estates. One of the underlying provisions is that justice and equity must not be overlooked. If the Native Commissioner should feel that devolution in one or other way may lead to wholly unexpected or unequable results, it might be advisable to approach the Minister of Native Affairs for directions in regard to the distribution of the property. The parties are enjoined to render whatever assistance may be possible to aid the Native Commissioner in arriving at a proper solution of this dispute.

The appeal is allowed, the Native Commissioner's finding is set aside and the record is returned for further investigation as indicated in our judgment.

After careful consideration we feel that in the circumstances of this case it would be inappropriate to make an order as to costs.

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

For Respondent: Adv. G. G. A. Munnik, instructed by Messrs. Smit and Malan. Vereeniging.

LANDLORD AND TENANT : RENTS ACT NO. 33 OF 1942.

CASE No. 6 OF 1949 (JOHANNESBURG).

ANDRIES MSLEKO *v.* **TITUS MOKOENA.**

JOHANNESBURG: 3rd March, 1949. Before H. F. Marsberg, President, K. D. Morgan and J. W. van der Watt, Members of the Court (Central Division).
V. d. Watt (Member):—

Landlord and tenant—Rents Act, No. 33 *of* 1942—*Excessive rental collected by landlord on Rent Board determination—Landlord unknowingly collecting excess rental—Whether lessee has remedy to recover excess rental by civil action under common law—Remedy provided by section* 9 *of Act—Plea of set-off.*

Claim: Payment of arrear rentals.

Plea: Overpayment of rental—claim for excess rental as set off against plaintiff's claim for lawful rental.

Judgment: Native Commissioner held on a point of law that defendant is debarred from claiming the overcharge of rental in a civil action, his only remedy being that provided by section 9 of Rents Act.

Appeal: That Native Commissioner erred in law in so holding.

Held:

(1) Section 9 of Rents Act is applicable only to cases where landlord *knowingly* collects rental in excess of Rent Board determination.

(2) In cases where the landlord overcharges in circumstances not within the scope of section 9, an action may be brought by the lessee under the common law by way of action.

(3) Lessee could claim refund of excess rental paid by way of set-off.

Appeal allowed and remitted for trial.

Authorities considered or quoted:

Rents Act, No. 33 of 1942.
Wage Act, 1937. Sec. 22, 23.
Froneman *v.* Lartz, S.A. Law Reports, 1949, March (1).
Act No. 31 of 1917. Sec. 363.
Maxwell: Interpretation of Status: 9th Edn. pp. 134-135.
Coetzee *v.* Fick & Anr., 1926 T.P.D. 215.
Manoin *v.* Veneered Furniture Mfrs., 1934 A.D. 237.
Martin *v.* D'Almeida, 1936 A.D. 129.
Rosenouw's: Rents Act, p. 48.
Berman *v.* Purcell & Ors., 1921 C.P.D. 419.
Smith *v.* Cameron, 2. P.H. M.18, 1927.
Act No. 30 of 1921. Sec. 1 (*d*).
Wage Act, 1924.
Wille & Milne: Mercantile Law, p. 35.

Wolverhampton New Water Works *v.* Hawkesford, E.R., Vol. 141, p. 495.
Doe *v.* Bridges, E.R., Vol. 109, p. 1006.
Passmore & Ors. *v.* Oswald Thistle Urban District Council, 1898 A.C. 394.
Crays on Statute Law, 3rd Edn., p. 217.
Kelly *v.* Kok, S.A. L. Reports, 1948 (3) p. 530.

V. d. Watt (Member):—

In this case Titus Mokoena, described as Native Landlord sued Andries Msleko for:—

(1) Payment of arrears of rentals amounting to £5.

(2) Ejectment of defendant from the premises in question.

The defendant in his plea admitted that he owed plaintiff rental for four months as claimed, but pleaded further that the plaintiff in contravention of a Rent Board determination had overcharged him an amount of £10. 10s., which amount he wanted to set off against the £5 rental, and therefore counterclaimed the £10. 10s.

In his replication the plaintiff (defendant in reconvention) explained how he bought the property in October, 1946, and that he was only informed in May, 1948, what the rental for the room in question as determined by the Rent Board was. He does not deny that he had overcharged defendant, or that he had refused the amount so overcharged, but merely pleads that defendant (plaintiff in reconvention) " is debarred from claiming the overcharge of rental in a civil action ", and asked that the counterclaim be dismissed with costs.

The Native Commissioner without hearing evidence, after hearing argument ruled that the defendant (plaintiff in reconvention) was debarred from claiming overpayment of rental in a Civil Court and entered judgment for plaintiff for £5 arrear rental as claimed, and dismissed the counterclaim.

It is against the dismissal of the counterclaim that the defendant (plaintiff in reconvention) is appealing.

The first point that arises is whether the defendant could have availed himself of a plea of set-off in this matter. The essentials of a set-off are that—

(1) the debts which it is sought to set off against one another shall be mutual, that is, debts actually due and subsisting between exactly the same persons;

(2) that the debt to be set off must be certain, unconditional and liquidated; and

(3) that it must be actually due.

Now, let us examine the facts which appear from the pleadings to determine whether the alleged debt of £10. 10s. is of such a nature that it can be set off against plaintiff's claim of £5 arrear rental, by complying with the essential requirements set out above.

The defendant (plaintiff in reconvention) stated in his plea that the rental for the room occupied by him had been fixed at £1. 5s. and that he paid plaintiff £1. 15s. and so overpaid an amount of £10. 10s. The plaintiff (defendant in reconvention) did not deny this and the Native Commissioner seemed to have accepted that there was an overcharge of £10. 10s. Plaintiff (defendant in reconvention) in his replication admitted that the rental had been determined by the Rent Board in terms of the provisions of Act No. 33 of 1942.

Section 8 of the Rents Act (Act No. 33 of 1942), provides that an order under this Act to reduce the rent for a dwelling or a refund of an amount in excess of a reasonable rent, shall have the effect that no rent in excess of the amount to which it had been reduced shall be payable by the lessee or subsequent lessee to the lessor or subsequent lessor, and the production of the order or a certified copy thereof shall be a complete defence to any legal proceedings by or on behalf of such lessor against such lessee to recover in respect of that dwelling any amount in excess of the amount to which the rent had been reduced.

Where the Rent Board orders a refund of an actual amount a writ of execution can be issued by the Clerk of the Magistrate's Court on production of such order, for the lessee to recover the amount from the lessor.

In case now under consideration it is clear that rent had been fixed at £1. 15s. per month and that plaintiff, as lessor, for a number of months overcharged the defendant an amount of 10s. per month, i.e. from October, 1946 to June, 1948, that is, this amount overcharged became a debt which is certain, unconditional and liquidated, and rests on a clear right, the amount having in this instance been ascertained by a confession made by defendant in reconvention. The amount overcharged could forthwith and readily have been rendered liquidated by the trial Court.

The amount in dispute was in respect of rentals overpaid to defendant in reconvention from October, 1946, to June, 1948, and this amount was certainly therefore due to be refunded to defendant (plaintiff in reconvention) in June, 1948, and also when the summons was issued in October, 1948.

It is held, therefore, that—

(1) there is mutuality between the debt of £5 arrear rental claimed by plaintiff in convention and the £10. 10s. overpayment of rental claimed by defendant (plaintiff in reconvention);

(2) that the debt of £10. 10s. overpayment has been ascertained by the admissions of plaintiff (defendant in reconvention) or that this amount could readily be rendered liquidated by the trial Court; and

(3) that the £10. 10s. was actually due to defendant (plaintiff in reconvention) when he made his counterclaim.

Consequently, it is held that defendant could plead set-off to plaintiff's civil claim for arrear rent. Is there any substance in the argument that defendant's (plaintiff in reconvention) only remedy is under Section 9, Act No. 33 of 1942? This section provides that if, a lessor *knowingly* required or permitted a lessee to pay a rent exceeding the amount determined he shall be guilty of an offence and the Court which convicts the lessor *may* order him to refund the amount overcharged to the lessee. On the pleadings it is likely that plaintiff as lessor did not knowingly overcharge the defendant and therefore there is probably no contravention of section 9, Act No. 33 of 1942. In any case why should plaintiff in reconvention be called upon to set in motion the relatively combersome machinery of a criminal court merely to obtain an order which would have the effect of a civil judgment, which he would then be able to set off against plaintiff's claim?

In the criminal court he must prove that he was overcharged knowingly by lessor and even if the lessor is then convicted the Magistrate may, or may not make the refund order.

It was argued by Mr. Vermooten on behalf of plaintiff, that this was defendant's only remedy, because the Rents Act had created a new liability and that the lessee who had been overcharged would have no redress other than that provided by the Act in question.

But by reading section 9 of the Act it becomes clear that where the lessor unknowingly overcharged rent he cannot be convicted and the lessee could therefore not avail himself of this remedy. He must have some remedy to recover the amount overpaid to lessor and the lessee should be allowed to have recourse to the civil courts, to state his plea of set-off and to prosecute his counterclaim.

It is held that the Native Commissioner erred in ruling that defendant could not file a plea and in dismissing the counterclaim. He should have heard evidence if necessary to provide defendant an opportunity to establish his plea and to prove his counterclaim.

Marsberg (President):—

I agree with the judgment prepared by my learned Brother van der Watt. I wish to add a few remarks on the main argument which was directed to us, viz. whether a lessee who has been charged excess rental has no remedy except that provided for in section 9 of the Act. It is clear that section 9 provides for one contingency only, that is, in the case where a lessor *knowingly* charges excess rental. There must be in the nature of things other instances where unknowingly excess rentals are charged or paid. This particular case, on the pleadings, is such an one. Defendant would be unable to obtain redress under the provision of section 9 of the Act. The object of the Act is that rentals shall not be demanded or paid in excess of the amounts fixed by a Rent Board. On principle, therefore, if excess rental might be reclaimed in a case where the landlord had knowingly required or permitted a lessee to pay the excess rental, *a fortiori* should there be relief where the element of culpability is absent. Such relief could be sought only by way of civil action outside the scope of the Rents Act. I am of opinion, therefore, that in cases which do not fall within the scope of section 9 of the Act, a lessee may have recourse to a Court by way of civil action. If he be sued, he can avail himself of any of his defences, such as set-off. On the other hand if the lessee should sue to reclaim the excess rental, the landlord might resist the claim with any defence in accord with the circumstances of the case, such as, that the parties were in *pari delicto* or perhaps in the instances referred to in section 13 of the Act. But these issues cannot normally be determined except by way of trial.

In my opinion the Rents Act does not exclude a lessee's common law right to seek redress by way of action in a civil court.

The appeal is allowed with costs, the judgment of the Native Commissioner is set aside and the case is remitted for trial.

For Appellant: Adv. E. R. N. Titren, instructed by C. van Leggelo, Johannesburg.

For Respondent: Adv. D. O. Vermooten, instructed by C. F. Clur, Johannesburg.

REVIEW : GROSS IRREGULARITY.

CASE No. 7 OF 1949 (JOHANNESBURG).

MICHAEL MSIMANGO *v.* **R. L. GWILT AND ANDRIES MASIEA.**

JOHANNESBURG: 2nd March, 1949. Before H. F. Marsberg, President, K. D. Morgan and J. W. van der Watt, Members of the Court (Central Division).

Review—Gross irregularity—Action against person not "real" defendant—Real, defendant not called on to answer the claim or permitted to cross-examine witnesses—"Real" defendant not properly before Court—Mistaken identity—Attorney not representing "real" defendant participating in proceedings—Proceedings set aside.

Claim: Review of proceedings on grounds of gross irregularity.

Judgment: Held that Applicant was not properly before the Court, as he had not been called on in original case to plead or answer the claim and had not taken part in the proceedings.

Held that the attorney who conducted the defendant's case had no mandate to appear for real defendant.—Proceedings set aside.

Authorities:
Maduna *v.* Pitso, 1942 (N. & T.) 66.
Jones & Buckle, 5th edn., p. 341-p. 66.
Clarkes Dairy (Pty.), Ltd., *v.* Sentrale Melkery, 1939 T.P.D. 326.
Magistrate's Court Act, Rule 22, and pp., 289-290.
Cantamerra's Case Gardiner & Lansdown, *p.* 62.

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

This is an application for review, on the grounds of gross irregularity, of the proceedings in Case No. 703 of 1947, between Andries Masiea, plaintiff, and Michael Seemi, defendant, heard before the Native Commissioner of Johannesburg.

The application is brought by Michael Msimango as plaintiff and the Native Commissioner and Andries Masiea are cited as first and second defendants respectively. Michael Msimango, the applicant, alleges that the Native Commissioner committed the following gross irregularities, viz.—

(1) That he conducted a full three-day trial against Michael Msimango when the latter was not properly before the Court.

(2) That he entered judgment against Michael Msimango when he was not properly before the Court.

(3) That he allowed an amendment to Andries Masiea at the trial by substituting the name of Michael Msimango for one Michael Seemi without applicant's knowledge or consent and without affording the applicant an opportunity to object to the amendment.

In this affidavit the Native Commissioner states:—

"Piet Seemi (a brother of the applicant) and plaintiff (i.e. applicant, Michael Msimango) were both sitting in Court when second defendant (i.e. Andries Masiea, the plaintiff in Case No. 703/1947) began to lead his evidence. Shortly afterwards, at Mr. Miller's request (Attorney for Andries Masiea), I ordered all witnesses to leave the Court. Plaintiff (i.e. Michael Msimango) then left the Court and Piet Seemi remained seated, whereupon the second defendant (i.e. Andries Masiea) pointed out that the defendant (i.e. in Case No. 703/47) was the person who had gone out, and not the one (Piet Seemi) who remained in Court. When plaintiff in this case (Review) was called back into Court he said his name was Michael Msimango. Second defendant (i.e. Andries Masiea) said that plaintiff's (applicant) name was Michael Seemi but that plaintiff (applicant) also used the name of Msimango and second defendant's attorney (i.e. Mr. Miller) then applied to amend plaintiff's (i.e. applicant) name accordingly. I deny that the amendment was made to the pleadings so as to bring plaintiff (i.e. applicant) before the Court. As far as I was concerned Michael Seemi was always before the Court, and at that stage the only evidence before me indicated that he was the man who was outside. I allowed the amendment only in order that plaintiff (i.e. presumably applicant) should be fully described by all his names. I was satisfied by the evidence that the plaintiff (i.e. applicant) was the person whom the second defendant (i.e. Andries Masiea) intended to sue and that he was properly before the Court."

In the relevant notes in the minutes of the proceedings the Native Commissioner has recorded:—

Page 22—"At this stage the Native who left the Court is called back. This Native states his name is Michael Msimango."

"Court rules that both Natives Piet and Michael are to remain in Court."

"For the purposes of this case the Native Michael Msimango, *alias* Michael Seemi, is referred to as the defendant."

Page 28—"At this stage Mr. Miller applies to amend his summons by the addition after defendant's name whenever it appears in the summons and pleadings of the words 'also known as Michael Msimango'". After argument the amendment was granted.

Page 41—"At this stage Mr. Miller asks Court to place on record that Michael Msimango was present in Court during the hearing of the case on 22nd June, 1948, and 1st July, 1948.

Mr. Salakoff (Attorney for defendant in Case No. 703/49) objects to this on the grounds that it is irregular for the Court to record evidence after the close of the case.

The objection was overruled.

It is accordingly placed on record that Michael Msimango was present in Court during the trial of the matter on 23rd June, 1948, and 1st July, 1948.

At the request of Mr. Salakoff it is hereby placed on record that Michael Msimango was never called upon to plead to the summons. Mr. Salakoff contends that Michael Msimango is in no way a party to the action."

Now, it appears that the original summons on defendant "Michael Seemi" was served by being affixed to the door of premises in Moroka Township. There is no evidence as to the identity of the person who received the summons. It must be presumed, therefore, that this person was the man, Piet Seemi, who appeared before the Native Commissioner. The identity of the real defendant was disclosed only after the plaintiff, Andries Masiea, commenced his evidence on 22nd June, 1948, when the witnesses were ordered to leave the Court. Plaintiff then stated that the man sitting in Court as defendant was not the person he was suing but that the real defendant was Michael Msimango (applicant) who had left the Court. The Native Commissioner and both parties appeared to be in agreement on this point. From that stage the proceedings were highly irregular and we are unable to exonerate either the Native Commissioner or the opposing attorneys.

Mr. Miller, for plaintiff, should have conceded that the defendant, Piet Seemi, had substantiated his defence that he was not the proper person to be sued and should have taken appropriate steps, had he so considered, to join issue with the real defendant, Michael Msimango.

Mr. Salakoff who appeared for Piet Seemi had no mandate whatever to act for or represent Michael Msimango and his subsequent participation in the proceedings is inexplicable.

The amendment which was allowed to the pleadings did not cure the uncertainty in regard to defendant's name. Two separate persons were involved and it was clear from the plaintiff's identification which of the two was intended. We do not doubt that the Native Commissioner in his own mind was clear as to the identity of the real defendant, but he did not afford this person, Michael Msimango, an opportunity to state his defence in answer to the claim and to conduct his case. Although Michael Msimango sat in Court he does not appear to have taken part in the proceedings. Mr. Salakoff clearly did not represent him. The Court's order that Piet and Michael were to remain in Court did not make Michael (applicant) a party to the proceedings.

In our opinion grounds (1) and (2) of the application for review have been well taken and we must hold that applicant, Michael Msimango, was not properly before the trial Court.

From this decision it follows that the point argued by Mr. Levy for second defendant, Andries Masiea, that applicant's proper course was to have applied to the Native Commissioner for rescission of a judgment given in his absence does not commend itself to us.

We accordingly order that all the proceedings in Case No. 703 of 1947, subsequent to and including those of the 22nd June, 1948, be and they are hereby set aside.

The costs in these review proceedings before us are to be paid by second defendant, Andries Masiea, in favour of plaintiff (applicant) Michael Msimango.

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

For Respondent: Adv. D. S. Levy, instructed by Mr. S. Miller, Johannesburg.

NATIVE CUSTOMARY UNION—DOWRY.

CASE No. 8 OF 1949 (JOHANNESBURG).

DAVID HLONGWANE *v.* SIMON THOMAS MNCUBU.

JOHANNESBURG: 2nd June, 1949. Before H. F. Marsberg, President, W. J. M. Norton and F. P. van Gass, Members of the Court (Central Division).

Native Customary Union—Custody and delivery up of two minors—Dowry—Custom of "telaka".

Claim: Order for custody and delivery up of two minor children.

Plea: None taken.

Judgment: For plaintiff for an order for the custody and delivery up of two minor children with costs.

Appeal:

(1) Judgment against evidence and weight of evidence.

(2) That Native Commissioner erred in law in holding that defendant had not established that a lawful marriage existed between defendant and plaintiff's daughter and that therefore plaintiff was not entitled to custody of the children.

Held:

(1) That evidence proves that a customary union did exist between defendant and plaintiff's daughter.

(2) That the £15 paid by defendant and alleged by plaintiff to be in respect of damages for seduction was in actual fact the first instalment of dowry.

(3) That although the custom of "teleka" (impounding of the wife by the father) is recognised, it would be unwise to apply it in urban areas.—Appeal allowed.

Authorities: None.

Marsberg (President) delivering judgment of the Court:—

In the Native Commissioner's Court at Johannesburg, plaintiff, David Hlongwane, sued defendant, Simon Thomas Mncubu, for an order for the custody and delivery up of two minors, the children of defendant and plaintiff's daughter Elizabeth on allegations that—

(1) Plaintiff is the father and legal guardian of his daughter, Elizabeth Hlongwane.

(2) Since 1941 defendant and plaintiff's daughter, Elizabeth, have been living together as man and wife.

(3) As a result of defendant's cohabitation with the said Elizabeth, three children were born illegitimately to the said Elizabeth, of whom the defendant is the father.

(4) Defendant paid to plaintiff's representative the sum of £15, being as damages for seduction but has not paid nor has he made any offer to pay lobolo to plaintiff.

(5) During August, 1945, the defendant took possession of the two children, Christopher and Susan, and has failed to return them to plaintiff.

(6) Plaintiff is in law entitled to the custody of the children, but defendant, notwithstanding demand, fails, refuses and/or neglects to deliver the said children up to plaintiff.

The record does not disclose whether any plea or defence to the claim was made. The action is based apparently on the assumption that in native custom the father of an unmarried woman is the owner of and has proprietary rights in all children born to her. The real dispute between the parties is, however, the payment of dowry. The plaintiff appears to hold that defendant and Elizabeth were not married because dowry had not been paid, Elizabeth had not been handed over and there was no marriage feast. The summons alleges that defendant and Elizabeth have been living together as man and wife since 1941. According to Elizabeth's evidence she and defendant have lived together at defendant"s house in Alexandra Township for over 7 years. Three children have been born as a result of their union. On 8th August, 1945, a discussion took place between defendant and a representative of plaintiff as a result of which a document was drawn up which stated: "I am in receipt of fifteen pounds (£15) from Simon Mncubu, being money for lobolo. Fifty-five pounds (£55) agreed upon including damages. £55—£15: £40 balance. I am Foses J. Hlongwane."

Plaintiff seeks now to hold that this document was merely a receipt for £15 damages paid for seduction and pregnancy of Elizabeth by defendant. He holds further that there was no formal handing over of the bride, accompanied by the customary marriage celebrations. He argues, therefore, that the essentials of marriage are absent and consequently no customary union subsists between his daughter and the defendant. With this contention, however, we are unable to agree. Plaintiff lives in Natal. Obviously his parental control over Elizabeth has weakened since several years ago she came to the Reef and entered employment. It would not be unusual to find non-observance of picturesque tribal ceremonies in the sophisticated ways of urban life. The formalities of handing over the bride are frequently absent. That essential must often be inferred from the circumstances of the particular case. Here we find that defendant and Elizabeth actually lived together for over seven years during which time three children were born, facts within the knowledge of the father of the woman, and actually lived together after payment of the £15. His acquiescence must be assumed. On the question of dowry confusion appears to exist between agreement to pay and delivery. The document handed in as Exhibit "A" states that the amount of dowry agreed upon was £55, of which £15 was paid, with a balance of £40 to be paid. The document definitely states that the £15 paid was money for lobolo. It is not unusual that dowry is paid in instalments. There is the classic example in recent times when following the death of Chief Marelane, the whole Pondo nation was debarred from *delivery* of any dowry during the period of national mourning. Though many dowry transactions were concluded by word of mouth, no deliveries were effected until a later date. In this case £55 was agreed upon as the dowry payable for

Elizabeth. In our opinion therefore the essentials of a valid customary union have been established. The third essential, the consent of the contracting parties, is too obvious to need further proof.

As previously stated the real issue in this case is an attempt on the part of plaintiff to enforce payment of the dowry by seeking to obtain control of the minor children. Unfortunately the chattels over which he desires to exercise a lien (for want of a better word) are human beings. Our Courts are not available to lend their aid to such trafficking. Plaintiff's action does not commend itself to us. Whatever may be said for the custom of "teleka" (impounding of the wife by the father) in areas where it is practised, it would be wholly unwise to recognise its force in the urban areas where Natives' living conditions do not follow the tribal pattern.

The appeal is allowed with costs and the Native Commissioner's judgment is altered to read: "For defendant with costs."

For Appellant: Mr. R. I. Michel of Messrs. Helman and Michel, Johannesburg.

For Respondent: Mr. H. Basner of Johannesburg.

ADULTERY : DAMAGES.

CASE No. 9 OF 1949 (TAUNGS).

BENJAMIN DANIEL SEHOLI *v.* JACK RATILODI.

KIMBERLEY: 7th October, 1949. Before H. F. Marsberg, President, K. J. Mummbrauer and H. N. Doran, Members of the Court (Central Division).

Marriage by Christian Rites—Claim for damages for adultery and pregnancy—Alleged agreement to pay £96—Payment of £48 admitted—Held amount claimed excessive under common law—Damages should bear some relation to the amount claimable under Native custom.

Claim: £96 damages for adultery committed with plaintiff's wife followed by pregnancy.

Plea: Payment of full amount.

Judgment: Absolution from the instance.

Appeal:

(1) Law absolution from the instance incompetent.

(2) On Facts.

Held: The appeal is allowed and the Native Commissioner's judgment is altered to read: For plaintiff for £48 damages, being the amount already paid by defendant to plaintiff. No further payment in respect of damages will be payable by defendant. No order as to costs to mark Court's displeasure at plaintiff's excessive claim for damages and defendant's failure to put forward proper defence.

Authorities:

Est. Lynch *v.* Steward, 1913 C.P.D.
Van Leeuwen: Censura Forensis, 1, 4, 32, 19.
Scoble on Evidence, pages 69 and 66.
N.A.C. Rules 9 and 10.
Hirstfield *v.* Espoch, 1937 T.P.D., page 21.
Schoeman *v.* Moller, 1949(3), S.A.L. Reports, page 757.
de Wet & Yeats, page 167.
Fawatt *v.* Gold, 16 P.H. A-79.
Nepken *v.* Michaelson, 1908 T.S. 954.
Smith's Trustee *v.* Smith, 1927 A.D., page 484.
Lubbe v. Bosman, 1948 O.P.D. 1943, (3), S.A.L. Reports, pages 909 and 1914.

Koch *v.* Lichtenstein, 1910 A.D., page 191.
Goosen *v.* Stevenson, 1932 T.P.D.
Bevan v. Carelse, 1939 C.P.D. 325.
Keyser *v.* Terblanche, 1947 (2), S.A.L. Reports, page 581.
Oosthuizen *v.* Miller: 18 C.T.R.
Welsh *v.* Harris, 1925 E.D.L., page 298.
Economic Cert. Mfrs, *v.* Salvertson, G.W.L. 1925, vol. 6 P.H.
Matz *v.* Shepherd, 2 L.L.R. 160.
Mnyamana *v.* Lusiza Busakwe (1944 N.A.C. T. & N. 78).
Rule 96, Supreme Court Rules.
Rule 22, N.A. Court.
Richard Mapoloba *v.* Adolphus Gazi, 1945 N.A.C. C. & O., page 74.

Mtimkulu Zibinya v. Wielex P. Magugu, 1947 N.A.C. C. & O. 7.
Modekayi v. Modekayi, 1939 P.H.
Viviers *v.* Kilian, 1927 A.D.

Marsberg, P. (delivering judgment):

In the Native Commissioner's Court at Taungs, plaintiff, Benjamin Daniel Seholi, sued defendant, Jack Ratilodi, for £48, being the balance of damages of £96 which defendant agreed to pay plaintiff for committing adultery with and rendering pregnant plaintiff's wife Susan. As the record does not disclose that a plea or defence to plaintiff's claim was entered, it is not clear what exactly was the issue before the Court for trial but apparently it was assumed by the Court and the parties that defendant admitted plaintiff's claim and alleged that he had made full payment of the mount of £96. The onus of proof was placed on defendant and his evidence was adduced first. At the end of the trial the Native Commissioner entered judgment of absolution from the instance for the reason, as stated in his judgment, that neither party had made out a proper case. An appeal has been lodged on a point of law that as the onus of proof rested on defendant it was not competent for the Native Commissioner to enter judgment of absolution from the instance. As a matter of law, as was pointed out in the case of Richard Mapoloba v. Adolphus Gazi, 1945 N.A.C. C. & O., at page 74, penultimate paragraph, "although it is competent to give an absolution judgment in a case in which the onus is on defendant, it is illogical to do so, because if defendant discharges the onus then he is entitled to judgment; and if he fails, then he has failed in his defence and plaintiff is entitled to judgment." It follows therefore that the Native Commissioner's judgment was technically wrong and in the ordinary course as the Native Commissioner found that defendant had not proved payment of the balance of £48, judgment should have been given to plaintiff in that amount.

But there are other aspects of this case which appear to have been overlooked by the Court and the parties. Plaintiff married his wife, Susan, by Christian rites. This action must therefore be determined by common law. Plaintiff says: "I have not divorced her (Susan) and I have no intention to do so." This is a factor which should have been borne in mind because it has an important bearing on the assessment of damages. The leading case is that of Viviers v. Kilian, 1927 A.D. Damages are recoverable by the injured spouse on two grounds: Firstly on the ground of loss of consortium and secondly on the ground of injury or contumelia inflicted upon the injured spouse. Where the injured spouse continues to live with his wife there can be no damages on the first ground, viz. loss of consortium, and in respect of the second ground, contumelia, the Court must be guided by all the circumstances of the case. The Native Commissioner formed the impression that plaintiff's whole case had become a money making concern to him. We think that the Native Commissioner was justified in coming to that conclusion. At one stage plaintiff put up his claim for damages from £96 to £200, giving as his reason for doing so that his

wife had told him that defendant had raped her. The adultery is alleged to have taken place in November, 1946, but no complaint was made by the wife. Plaintiff himself noticed her pregnancy in June, 1947. Only then, according to plaintiff's evidence, did she say that defendant had had connection with her against her will. The wife's failure to make any voluntary complaint about the intercourse with defendant must to a great extent discount the value of her statement to her husband, if indeed it was made. It has apparently had no effect on the marital relationships of the plaintiff and his wife and this in itself must militate against any claim for substantial damages. A husband cannot seek profit from his wife's dishonour. Again, if it were true that defendant had raped plaintiff's wife, plaintiff has acted very improperly in failing to report the matter to the police and in seeking to profit thereby by raising his claim against defendant to £200. We also cannot resist the conclusion that his prime motive has been to make money. The marital relationships of the husband and wife is a factor to be considered. Plaintiff is often away on business His wife is not always at home. She is a teacher. The adultery took place while defendant was working at plaintiff's home. Defendant lives by herding cattle in a native reserve. It is probably that the intercourse was a mutual affair and had pregnancy not supervened probably no suspicion would have been raised. It is at least on record that the wife made no disclosure until some six or seven months after the liaison, and then only when she was taxed by her husband. There is no evidence that defendant is any more blameworthy than plaintiff's wife and obviously plaintiff's own neglect of his wife must have conduced to her misconduct. In our opinion this does not appear to be a case where defendant must be regarded as a rascal who has broken up a happily constituted home, to be punished by the award of substantial damages against him.

We are not unmindful of the fact that the parties are Natives, who, though professing to follow our civilised marriage eusoms, actually adhere to their tribal ways, e.g. plaintiff at first demanded cattle as damages. In the Case of Mtimkulu Zibaya *v.* Willex P. Maguga (1947 N.A.C. C. & O., 7), it was laid down that damages in a case of this nature must under common law bear some relation to those recoverable under Native custom, and also the Court is at liberty in appropriate cases to increase or decrease the award. In the case of Mnyamana *v.* Lusiza Busakwe (1944 N.A.C. T. & N. 78) it was held that it is the function of the Court and not that of the interested parties to assess any damages which may have been suffered. Now, in the case before us, though the claim is based on an alleged agreement, the real basis is a claim for damages for adultery and pregnancy.

The amount of damages claimed by plaintiff in this case is far in excess of an amount which would be allowed in a normal case of this nature. As has been pointed out the award should bear some relation to the amount allowable under Native custom. Plaintiff has not proved that there are circumstances in this case entitling him to damages above the customary level and on the basis of the decision in the case Viviers *v.* Kilian, he would probably be awarded far less. Plaintiff is described as a farmer of the Vryburg district and does not appear to reside in a Native Reserve. Defendant appears to be a peasant living in the Pudimoe Native Reserve in the district of Taungs. Although the claim must be determined by common law, an award approximating to damages payable under Native custom would seem to be appropriate. In the area concerned customary damages for adultery and pregnancy would not exceed 5 head of cattle. The plaintiff has admittedly received £48 which in our view is adequate compensation. The Native Commissioner's judgment, though technically incorrect, does in effect succeed in ensuring substantial justice to both parties according to the merits of the case.

It is observed that no order was made as to costs. As defendant did not state his defence to the claim nor did he put forward a proper defence as may be gathered from the remarks in our judgment he was equally blameworthy in failing to clarify the issues which should have been put before the Court for trial. Moreover he has not sought, by way of cross appeal, to have the judgment rectified according to the issues implicit in the proceedings. In the exercise of our powers as a Court of Appeal we have seen fit to rectify the matter, to ensure that justice be done.

The appeal is allowed and the Native Commissioner's judgment is altered to read: For plaintiff for £48 damages, being the amount already paid by defendant to plaintiff. No further payment in respect of damages will be payable by defendant.

In order to mark the displeasure of the Court in regard to plaintiff's conduct in claiming, in our view, an exhorbitant amount of damages and in seeking to profit by his wife's dishonour there will be no order as to costs, either in this Court or the Court below.

For Appellant: Adv. v. d. Westhuizen, instructed by Messrs. Elliot, Visser & Frylinck, Vryburg.

For Respondent: Adv. Witipski, instructed by Messrs. Sassin and Moult, Kimberley.

ACQUISITION OF STOCK : PURCHASE, BARTER OR OTHERWISE.

CASE No. 10. OF 1949 (VENTERSDORP).

DAVID NSHIMEALI *v.* JANTJIE MOTEMOGOLO.

JOHANNESBURG: 14th October, 1949. Before H. F. Marsberg, President, T. D. Ramsay and J. S. de Wet, Members of the Court (Central Division).

Movements of Livestock—Transvaal Stock Theft Ordinance, No. 6 of 1904, Section 29—Certificates of transfer—Observance of provisions of Ordinance essential—Matter not dealt with by trial court—Point raised at appeal stage—Point allowed—Judgement set aside and case remitted for further consideration in light of provisions of Ordinance.

Claim: Delivery of one horse or its value, £17. 10s.

Plea: Counterclaim—allegation of exchange of animals.

Judgment: For defendant.

Appeal: Irrelevant.

Held: Judgment set aside—and case remitted for further consideration in light of Ordinance.

Authorities:

Moribane *v.* Bateman, 1918 A.D. 460.
Burgers *v.* Foroetse, 1927 T.P.D. 738.
Rex *v.* Masego, 1951 T.P.D.
Rex *v.* Noko, 1943 (3), S.A.L. Reports, 456.
Rex v. Ngeshang, 1948 (3), S.A.L. Reports, 843.
Willie Menane *v.* J. Mddikane, 1940, N.A.C. (T. & N.) 86.
Whitfield, S.A. Native Law, at page 492.
Vuurman *v.* Universal Enterprise, Ltd. (1924 T.P.D. 488).
Cape Dairy and General Livestock Auctioneers *v.* Sim, 1924 A.D. 167.
Transvaal Ordinance, No. 6 of 1904.
Cole *v.* Union Government, 1910 A.D.

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

Mr. Welsh who appears for appellant (plaintiff) has raised a new issue before us, which was not considered in the Court below and is not incorporated in the Notice of Appeal. He raises the question of illegality arising out of the provisions of section 29 of the Transvaal Stock Theft Ordinance, No. 6 of 1904.

Section 29 of the Ordinance reads as follows:—

> "No one may acquire stock by purchase, barter or in any other way from Coloured persons or from persons having no known place of habitation without a certificate from the Justice of the Peace or two residents of substantial means of the neighbourhood in which the transaction takes place, certifying that the transferor is entitled to transfer such stock."

A contravention of the section is an offence punishable by fine.

As authority for raising the matter for the first time at the appeal stage he quoted Cape Dairy and General Livestock Auctioneers *v.* Sim (1924 A.D. 167). It is therein stated that the Court is bound to refuse to enforce a contract which is illegal even though no objection to the legality of the contract is raised by the parties. A contract prohibited and rendered illegal by statute cannot be ratified. In a number of other authorities which we have considered based on the implications of the same Ordinance the matter has been raised at the appeal stage and has been acted on by the Appeal Court. We. therefore, have no hesitation in allowing the new point to be raised before us. Mr. Fine who appeared for respondent intimated that he was taken by surprise but nevertheless proceeded with his argument on the issue.

There are several references on the record to "kwitansies" given in relation to transfers of stock, but nowhere is there any reference to the required certificate in connection with the particular transfers alleged in the summons or plea. The use of the word "kwitansie" may be the local equivalent in the area concerned of the statutory certificate. The Native Commissioner seems to refer to the "kwitansie" as documentary evidence in corroboration of the party's possessory rights. Whatever the references in the record may mean or were taken to mean, we can find no direct connection between them and the animals mentioned in these proceedings. Nor can we find any reference in the record that the implications of section 29 of the Ordinance were considered in this case.

As the law stands the implications of the Ordinance must be observed. The following authorities among others can be quoted:—

Morimane *v.* Bateman, 1918 A.D. 460.
Rex *v.* Masego, 1915 T.P.D.
Burgers *v.* Moroetse, 1927 T.P.D. 738.
Rex *v.* Noko, 1949(3), S.A. Law Reports 456.
Rex *v.* Ngeshang, 1943 (3), S.A. Law Reports, 843.
Willie Menane *v.* J. Mdikane, 1940 N.A.C. (T. & N.) 86
Whitfield, S.A. Native Law, at page 492.

To enable the parties and the Native Commissioner to give further consideration and atetntion to the matter now raised before us we are of opinion that the judgment of the Native Commissioner must be set aside and the case returned for further disposal. Leave may be granted to either party to produce and hand in any certificate relating to the particular transactions alleged, such certificates to be documents actually in existenxe. Thereafter the parties may again address the Court with reference to the provisions of the Ordinance and their bearing upon the issues between the parties and the Native Commissioner should enter a fresh judgment. The case should not be resubmitted to this Appeal Court unless an appeal should be noted against the new judgment given. The authorities which have been quoted are not exhaustive and the parties may be able to quote others.

In returning the case for further disposal we have followed the procedure adopted in Vuurman *v.* Universal Enterprises, Ltd. (1924 T.P.D. 488).

It is accordingly ordered that the judgment of the Native Commissioner be set aside and the case is returned for further disposal.

There is no order as to costs.

For Appellant: Adv. Welsh, instructed by Messrs. v.d. Merwe and Jooste, Ventersdorp.

For Respondent: Mr. Fine, instructed by Mr. Max Hyman, Ventersdorp.

CIVIL MARRIAGE - SETTING ASIDE - ABSENCE PARENTAL CONSENT.

CASE No. 11 OF 1949 (JOHANNESBURG).

JOHN LETABE *v.* (1) FRANK RALITHLALO, (2) BETTY RALITHLALO.

Native Divorce Court—Order to set aside civil marriage on grounds absence of parental consent in terms of Law No. 3 of 1897, Transvaal—Contracting parties over 21 years of age —Parental consent not required under Common Law—Section 2 of Law No. 3 of 1897 makes provision for issue of enabling certificate only—Does not imply parental consent—Section 2 of Law No. 3 provides for issue of certificate by any of three classes of persons, not necessarily in order of priority—Pamphlet entitled "Coloured Marriages, Transvaal: Instructions to Marriage Officers" discussed—Section 6 of Circular Instructions relating to enabling certificates from public officials held to be in conflict with provisions of section 2 of Law No. 3 of 1897.

Claim: Order to set aside marriage of plaintiff's daughter with defendant on grounds of absence of parental consent.

Judgment:

Held: Plaintiff's claim fails because—

(*a*) his knowledge of and consent to marriage not lawful requirements as contracting parties were over age;
(*b*) section 2 of Law No. 3 of 1897, Transvaal, confers no right on plaintiff to refuse consent;
(*c*) plaintiff failed to show he had exclusive right to grant enabling centrificate.

Authorities:

Transvaal Law No. 3 of 1897; Act No. 38 of 1927, section 11 (3); *Ex parte* of Minister of Native Affairs *in re* Yako *v.* Beyi, S.A.L. Reports, January (1) 1948; Department of Interior Pamphlet: Coloured Marriages, Transvaal: Instructions to Marriage Officers.

Marsberg, P. (delivering judgment):—

In the Native Divorce Court at Johannesburg, plaintiff, John Letabe, sued first defendant, Frank Ralithlalo, and second defendant, Betty Ralithlalo (born Letabe), for an order setting aside the marriage entered into between first and second defendants and costs of suit against first defendant on allegations:—

(1) The parties hereto are Natives as defined by Act No. 38 of 1927, and are domiciled within the jurisdiction of this Honourable Court.
(2) Plaintiff is John Letabe of 7500 Orlando West, Johannesburg. The plaintiff is a registered taxpayer in the district of Senekal, O.F.S.
(3) First defendant is Frank Ralithlalo of Stand No. 1441, Orlando, Johannesburg.
(4) The second defendant is Betty Ralithlalo of Stand No. 1441, Orlando, Johannesburg.
(5) The plaintiff is the father and natural guardian of the second defendant.

(6) On the 5th October, 1948, and at Johannesburg, the first and second defendants entered into a civil marriage and the said marriage still subsists.

(7) The said marriage of the second defendant was solemnized without the knowledge and consent of the plaintiff and has never been consented to since.

(8) The consent of the plaintiff in terms of Law No. 3 of Act, 1897, Transvaal, was never given by plaintiff who was at all times available and resident at the address aforementioned.

(9) The plaintiff learnt of the said marriage on the 25th February, 1949, for the first time.

Defendants, in pleading, admitted paragraphs 1 to 6 and denied paragraphs 7 to 9.

During the course of the trial two or three issues became clear. Plaintiff relied strongly on his contention that he had not given his consent to the marriage of his daughter Betty and first defendant. He argued that his consent was a pre-requisite in terms of Law No. 3 of 1897 of the Transvaal, and that an enabling certificate issued by the Marriage Officer for Coloured persons was wholly invalid. He admitted during the course of evidence that he first wanted lobolo to be arranged and that he would have no objection to the marriage thereafter.

The marriage certificate discloses that the two defendants were married on 5th October, 1948, by a Marriage Officer for Coloured persons at Johannesburg after publication of banns on an enabling certificate issued by the Marriage Officer. The ages of the husband (first defendant) and the wife (Betty Letabe, second defendant) are given as 27 years and 22 years respectively. At no point in the evidence was there any suggestion that the father (plaintiff) had withheld his consent on the grounds that his daughter was under age, but rather was it clear that his consent had been withheld because the matter of dowry had not been settled. Apart, therefore, from the question of the doubtful enabling certificate, the capacity of the daughter Betty to enter into a marriage was not in dispute. At the age of 22 years she would have been legally capable of entering into the marriage contract without the consent of her father, in accordance with the common law of this country. Section 1 of Law No. 3 of 1897 of the Transvaal provides that male and female Coloured persons who have reached a marriageable age may contract a lawful marriage with each other. Section 11 (3) of Act No. 38 of 1927 (Native Administration Act) provides that the capacity of a Native to enter into any transaction shall, subject to any statutory provision affecting any such capacity of a Native, be determined as if he were an European: See *ex parte* Minister of Native Affairs *in re* Jako v. Beyi (S.A. Law Reports, 1948, Jan (1).

No statutory provision to the contrary was quoted nor is the Court aware of any such statute to suggest that a Native woman is under the guardianship of her father or guardian beyond the age of 21 years. It must be held therefore that by the general law of this country a Native woman over the age of 21 years may enter into a marriage contract without the consent of her parent. To this extent plaintiff's consent was not required nor could its absence affect the validity of the marriage.

But plaintiff's main contention to have the marriage set aside was that contained in paragraph 8 of his claim, viz. "The consent of the plaintiff in terms of Law No. 3 of 1897 was never given by plaintiff who was at all times available and resident at the address aforementioned." The relative provision is that contained in section 2 of Act No. 3 of 1897 which reads:—

> "Every Coloured person who wishes to contract a marriage as above must make an application to that effect to a person or persons to be appointed for that purpose by the government. He must submit therewith a *certificate*

from his parents, or where there are no parents alive, from their guardians, or from his Captain or other Chief of Natives, that *according to law there is no hindrance to the proposed marriage,* or, if they are Christians, of the Minister of the Church."

The difficulty in this case has arisen from the interpretation of this provision. The plaintiff has obviously confused his rights of guardianship over his children with what he supposes to be rights conferred on him by the law embodied in this section. This provision does not confer on a parent any right to withhold his "consent" to the marriage of his child other than that flowing from the general law whereby parental consent to the marriage of a minor is concerned. Where the child is a major such consent does not arise. He has alleged that his consent was never given, but section 2 does not provide for the giving of consent (except where that is a hindrance according to law, i.e. in the case of a minor). A certificate was required that according to law (that is the general law of the country) there was no obstacle to the proposed marriage. The general law on this point relates to freedom from the prohibited degrees of relationship between the parties intending to marry, existing marriages or want of consent of parents or guardians in the case of minors, in general that the parties themselves were in a position lawfully to marry each other. Nothing can be read into the wording of this section to suggest that the parent had the right to consent or refuse his consent to the marriage. The certificate must be based on the requirements of law, not on the parents' personal feelings. In this respect, therefore, plaintiff's allegation that he never gave his "consent" is of no effect.

Again, plaintiff argued strenuously that as he was alive and available no other person could give the necessary certificate and as the certificate had been granted by a marriage officer, the marriage was invalid. Now, section *two* provides that the certificate must be given by (1) parents or guardians, *OR* (2) captain or other chief of Natives, *OR* (3) Minister of their Church The plain meaning of that provision is that the certificate can be given by one or other of those three classes of persons. That the law did not intend to imply that the one class had exclusive authority as against the other classes of persons may be gathered by reference to the other provisions of section *two* and the provisions of section *three* of Act No. 3 of 1897. For instance Coloured persons coming from beyond the boundaries of the Transvaal must show by certificate *or other sufficient evidence* that there is no impediment to the marriage. Again, if the parties be Christians their Minister of religion can give the enabling certificate. The object of the law was clearly to create a fairly wide class of persons from whom enabling certificates could be obtained. The specific wording of section 2 does not bind the parties to seek a certificate from the three classes mentioned in order of priority. Plaintiff's contention, therefore, that he alone should have given the certificate is untenable. His claim to have the marriage set aside on this score must fail, and it is unnecessary to decide whether, in the absence of an enabling certificate, the marriage would have been void or voidable.

It is, however, necessary to discuss a further argument put forward by plaintiff indirectly arising from this matter. The marriage certificate discloses that the enabling certificate was given by a Marriage Officer for Coloured persons. Nowhere in the Act is there any provision permitting an enabling certificate to be issued by a Marriage Officer. Reference was made during the trial to a pamphlet issued by the Union Department of the Interior entitled "Coloured Marriages, Transvaal: Instructions to Marriage Officers". Paragraph 6 of the Instructions reads:—

"6. Certificate of Non-objection.—Article *two* of the law provides that no marriage between Coloured persons may be solemnised or if solemnised may be considered valid unles either their parents or guardians, their captain or chief, or

the minister of their church, *or failing these, any reputable person such as the Sub Native Commissioner or other person in an official position,* certifies that there is no impediment to the marriage according to law."

Diligent search by Counsel and by this Court has failed to discover any amendment by statute of the provisions of section 2 of Act No. 3 of 1897, by which the words italicised above have been incorporated in the law. As the law stands to-day there is no lawful authority to enable official persons as described above to issue non-objection certificates to Coloured persons to marry. Nevertheless it is common knowledge that a wide-spread practice has been in vogue for many years whereby non-objection certificates have been issued by public officials and marriage officers. Marriage officers have obviously followed the Administrative instructions issued by the Department of Interior, but, as pointed out, there is no lawful authority to support the practice. The provision is wise and wholesome and to meet the requirements of Coloured persons, as defined, in the circumstances in which they find themselves, it could with advantage be embodied in the law of the country by amendment of section 2 of Act No. 3 of 1897. This is a matter for consideration and attention by the Executive Authority. As it is also probable that countless marriages have been contracted on the certificate of public officials, provision would have to be made for the validation of all such past marriages.

So far as the present case before this Court is concerned the matter is not directly in issue. No allegation has been made that the marriage was invalid because the enabling certificate was issued by a marriage officer. Had the claim been based on such an allegation it is a moot point whether the case could be tried without the marriage officer being joined as a party or, had he been so joined, whether this Court would have jurisdiction to try the case. The jurisdiction of this Court is limited to issues between natives. On the issues before this Court as determined by the pleadings it is unnecessary to give a finding on this point. The question was not raised nor was it fully explored. Plaintiff alleged that he had not given his consent to the marriage of his daughter Betty but, as pointed out earlier, Betty was over age and consent of her parents was not a lawful necessity.

The real issue in this case was plaintiff's dissatisfaction with arrangements made for the payment of dowry. He made it quite clear during the case that if satisfactory arrangements were made he would give the marriage his blessing. Clearly he has resorted to this action to enforce payment of dowry. Letters and documents handed in as exhibits leave no doubt upon this matter. It is important to note that Law No. 3 of 1897 was promulgated for the benefit of Coloured persons, that is, all persons who were not white persons. Natives have been included in the definition. The law was made, according to the preamble, for those Coloured persons " who by instruction and civilisation, have become distinguished from barbarians and who therefore, desire to live in a Christian and civilized manner and accordingly wish to be lawfully united in marriage ". Important as dowry is in the Native concept of the marriage union, dowry was never in contemplation in the general law of the Transvaal. Where, then the law (section 2 of Law No. 3 of 1897) required that a certificate should be given that according to law there was no hindrance to the proposed marriage no question of the payment of dowry was implied. Among Coloured persons, not Natives, the payment of dowry would seldom arise. Coloured persons contemplating marriage would conform to the general law of the country. Plaintiff's endeavour now to engraft tribal customs on the civilised form of marriage cannot be countenanced. He cannot use the threat to have this marriage set aside to enforce a claim for payment of dowry.

To summarise, plaintiff's claim to have the marriage set aside must fail because—

(*a*) (*Paragraph 7 of Particulars of Claim*) his knowledge of and consent to the marriage were not a lawful requirement, as at the date of marriage his daughter was 22 years of age and therefore a major;

(*b*) (*Paragraph of Particulars of Claim*) Section 2 of Law No. 3 of 1897 of the Transvaal did not confer on plaintiff the right to refuse consent to the marriage. In terms of this law no " consent " is required;

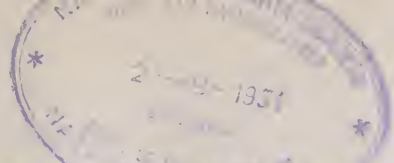
(*c*) plaintiff has not shown that he had the exclusive right to grant the enabling certificate that according to law there was no hindrance to the proposed marriage;

(*d*) non-payment of dowry is not an impediment, according to law, to a proposed marriage.

Judgment is granted in favour of defendants with costs.

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

For Defendant: Mr. Susser, of Messrs. Behrman & Behrman, Johannesburg.



SELECTED DECISIONS

OF THE

NATIVE APPEAL COURT

CENTRAL DIVISION
1950

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