One of the grounds of the appeal is that the value placed on the beast is too high. This ground was abandoned, but in any case, as the beast is in existence, defendant has the option of delivering the beast if he considers that it is not worth £12.

The appeal is dismissed with costs.

OPINION OF NATIVE ASSESSORS.

Names of Assessors: C. Mamanga (Qumbu), T. Poswayo (Engcobo), H. Makamba (Tsolo), J. Ngcwabe (Cofimvaba) and J. Zwelendawo (Umtata).

Question: Can a woman who has been left in charge of her husband's kraal without the appointment of an "eye" sell his cattle to meet an emergency, such as the payment of a fine imposed on her for failing to eradicate noxious weeds?

Answer (per John Ngcwabe): She should consult the relatives of her husband and get permission from them to sell a beast. Such permission binds her husband. Without such permission she may not sell.

All the others agree.

Question: If there is no relative of her husband in the location, could she obtain the permission in question from her Chief or the headman of her location?

Answer (per Thomas Poswayo): No. The Chief or headman could not give permission.

Answer (per Henry Makamba): As a fine of the nature mentioned would be in respect of her husband's land, I consider that the woman would be entitled to sell the beast even without the permission of her husband.

Answer (per John Ngcwabe): According to our custom it would be in order if she consulted the Chief or headman. The reason why a woman is not permitted to sell her husband's stock without permission is that she could then sell all his stock for the benefit of her lovers.

Other Assessors agree.

Question: Could the woman consult close neighbours and friends of her husband?

Answer: (per John Ngcwabe): The woman should not consult neighbours or friends. The headman is the right person to give the necessary authority.

Question: Does it often happen that a man goes away and leaves his wife in charge of his kraal?

Answer (per John Ngcwabe): Yes, often.

Question: Can a woman sell wool, skins, hides, eggs, fowls and pigs for the support of her kraal during her husband's absence without consulting his relatives?

Answer (per John Ngcwabe): Yes, that is her privilege.

All the other Assessors agree.

Question: Is a wife nowadays left in sole charge of her husband's kraal or does the latter specially authorise some male relative to look after his affairs?

Answer (per Thomas Poswayo): It does happen that a woman is left alone in charge of her husband's kraal these days.

For Appellant: Mr. Muggleston, Umtata.

For Respondent: Mr. Airey, Umtata.

SELECTED DECISIONS

OF THE

NATIVE APPEAL COURT

(Southern Division)
1950.

Volume I
(Part XII)

The Government Printer, Pretoria.
1950.

G.P.-S.4199—1950-1—500.

CASE No. 110.

ALFRED NINGI *v.* ELIAS ZINI.

KINGWILLIAMSTOWN: 10th July, 1950. Before J. W. Sleigh, Esq., President; Pike and Fenix, Members of the Court (Southern Division).

Native Appeal Case—Practice and Procedure—Purchase and sale —Risks as well as profits pass to purchaser immediately contract completed—Exceptions—Not competent to except to one of two claims arising out of same cause of action— Appeal—Court cannot contenance appeal from ruling which disposes of part of cause of action only.

Appeal from the Court of the Native Commissioner, Middledrift.

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

It is alleged in the particulars of claim that on 26th July, 1948, plaintiff purchased from the estate of the late W. Damane certain fixed property in the Division of Kingwilliamstown under an agreement of sale; that the property was transferred to him on 25th July, 1949; that at the time of the purchase plaintiff, as he was entitled to do, required defendant to vacate the said property, but defendant failed to do so; that when plaintiff obtained transfer of the property into his name he again required defendant to vacate the property with which demand defendant complied in September or early in October, 1949; and that in consequence of defendant's wrongful and unlawful action, plaintiff could not enjoy the beneficial use of the property from the date of purchase (26th July, 1948) to the date when defendant vacated it. Plaintiff claimed the sum of £20 either as a fair rental value for this period or, alternatively, as damages for defendant's wrongful occupation.

Defendant pleaded specially as follows:—

> "That plaintiff is not entitled to the damages claimed as the legal rights of ownership only vested in him on the date of transfer of the property into his name and that consequently his claim for rental or damages for the period 26th July, 1948, to 25th July, 1949, does not disclose a cause of action."

At the hearing of the case defendant's attorney requested the judicial officer to give a ruling on the special plea and stated that he was prepared to admit, for the purpose of argument, the facts as stated in the summons. The Assistant Native Commissioner held that plaintiff was entitled to the profits for the period stated in the special plea, overruled the "exception" and ordered the case to continue on its merits. From this ruling defendant appeals.

It is a well-established rule that in a contract of purchase and sale, the risks as well as the profits pass to the purchaser immediately the contract is perfected (completed) and not only when delivery of the property is made (see *Van Leeuwen's Commentaries—Kotze's translation*—Vol. II, p. 131; *Willie and Millin's Mercantile Law*, 7th ed., p. 84; De Kock and Ano. *v.* Fincham, 19 S.C. 136; Walker *v.* Wales, 1922 C.P.D. 49). There are exceptions to this rule but they are not immaterial in this case. Where the property sold is immovable and the occupier thereof is a lessee, the purchaser is entitled to the fruits from the period from the date of sale to the date of transfer in the Deeds Registry, but, in the absence of agreement with the lessee and seller, he must claim the fruits from the latter unless he had obtained cession of action (see Walker's case *supra*), because the purchaser has no right to terminate the lease or even a unilateral agreement to which he was not a party until he becomes the owner of the property and steps into the place of the party who contracted with the occupier (Petersen, Ltd., *v.* Bai Divati, 1946 W.L.D. 60).

In this Court Counsel for defendant assumes that defendant was a lessee. It seems more probable that he was occupying the property rent free with the permission of the seller. Although this may affect the *quantum* of fruits, it makes no difference to the principle that plaintiff is entitled to the fruits whatever they may be. Now, as was stated in Meintjes *v.* Manley & Co. (1922 C.P.D. 151) "the profits (fruits) must be such as were either actually in existence or at all events in contemplation of the parties at the date of the transaction; they must be intrinsic to the contract. They must . . . be accretions and benefits attaching thereto. They must be directly connected with and actually produced by the property which has been purchased." Plaintiff is not claiming fruits as here defined. The particulars of claim make it clear that plaintiff's claim is for loss of beneficial use of the property due to defendant's wrongful failure to comply with both notices to vacate. His claim is therefore for damages and he had to prove firstly that he had a legal right to terminate defendant's occupation and secondly the damages he had suffered. The measure of damages may be based on the fruits or on a fair rental value of the property, but the issue whether or not plaintiff is entitled to the fruits for the period from date of sale to date of transfer was never raised in the summons. However, it is quite unnecessary to pursue the matter any further because it is clear that the appeal must fail on a different ground.

The Native Commissioner's Court Rules (the Transkei excepted) do not make provision for exceptions. A defendant is required to answer the plaintiff's claim and if he has an exception or objection to the claim he must take it by way of plea, hence defendant's special plea. Now although it is called a plea, nevertheless it is clear from the notes on the record that it was dealt with as an exception. Defendant virtually admits in the plea that his occupation from the date of transfer to the date he vacated the property was unlawful. He thus excepts to a portion of the claim only. Assuming that it is possible to divide the claim into two parts, it is not competent for a defendant to except to one of two claims, arising out of the same cause of action, on the ground that no cause of action is disclosed (see Stein *v.* Giese, 1939 C.P.D. 366, and the cases there quoted). Although paintiff may not be entitled to the full amount claimed his summons nevertheless discloses a cause of action.

A plea that defendant is not liable in law to plaintiff for any damage suffered by him prior to the registration of the transfer, and that plaintiff has suffered no damage as a result of defendant's unlawful occupation of the property after such transfer, might have been in order, but that is not the same as pleading that the summons disclosed no cause of action; and in any case this Court cannot contenance an appeal from a ruling which disposed of an issue which forms only a part of the cause of action.

The appeal is dismissed with costs and the record of proceedings is returned to the Court below for further hearing.

For Appellant: Mr. Stanford, Kingwilliamstown.

For Respondent: Mr. Van Coller, Keiskamahoek.

CASE No. 111.

NOMHLABA MTEMBA *v.* **VIOLET MATSHIKIZA.**

KINGWILLIAMSTOWN: 10th July, 1950. Before J. W. Sleigh, Esq., President. Pike and Fenix, Members of the Court (Southern Division).

Native Appeal Case—Estate—Municipal Location—Practice and Procedure—Court should take notice of legal exceptions mero motu*—Judgment should be capable of being complied with*

by defendant—Estate—Devolving according to Native Law—Females cannot succeed—Daughter or granddaughter can only claim support.

Appeal from the Court of the Native Commissioner, Queenstown.

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

Plaintiff (now respondent) duly assisted by her husband, sued defendant (now appellant) for the delivery of Stand No. 30 in the Municipal Location, Queenstown.

In the particulars of claim it is alleged that the said stand was up to 1946 registered in the name of Cikizwa Mtembu who died many years ago; that Cikizwa had three daughters, namely, Loqose who died without issue, Noqumra who had a son Mbuti, and Nomhlaba; that after the death of Cikizwa the said stand was inherited in turn by Noqumra and Mbuti; but remained registered in the name of Cikizwa; that respondent as the daughter and sole heir of Mbuti inherited the said stand, and that in 1946 appellant wrongfully and unlawfully caused the stand to be registered in her name.

Appellant, who was not represented in the Court below, avers in her plea that Mbuti died single, inferring that respondent, if she is Mbuti's child, is illegitimate.

At the hearing of the appeal appellant applied for leave to argue the following additional grounds of appeal:—

(6) That the Native Commissioner erred in ordering defendant to deliver Stand No. 30, Queenstown Location, to plaintiff since delivery of the said stand to plaintiff can be affected only by the *dominus* thereof, viz., the Municipality of Queenstown, which is not a party to this suit and which in any case is not subject to the jurisdiction of the Native Commissioner's Court.

(7) That the claim for "delivery" of the site is vague and embarrassing, but if the Native Commissioner's judgment amounts to an order requiring defendant to assign or cede her lease with the Municipality, the Native Commissioner erred in making such order, since such assignment or cession cannot in law be effected without the consent of the Municipality of Queenstown, as the lessor of the stand.

(8) That the Native Commissioner erred in holding that plaintiff, between whom and the Municipality of Queenstown there is no privity of contract, has a greater right to the stand than defendant, to whom the stand was at all material times and still is leased by the Municipality of Queenstown.

(9) That the Native Commissioner erred in holding that plaintiff inherited the stand.

The Native Commissioner says in his additional reasons that paragraphs (6), (7) and (8) are new points which should have been raised as exceptions before the trial. Paragraph (8) is not new. It raises an issue which was actually decided by the Native Commissioner. Paragraphs (6) and (7) are new but they are legal exceptions of which the Native Commissioner should have taken cognizance *mero motu* [see *Voet* 5.1.49, also Qunta *v.* Qunta 1940 N.A.C. (C. & O.) 131]. Although respondent claimed from appellant the "delivery" of Stand No. 30, the Native Commissioner knew or should have known that since the stand belongs to the Queenstown Municipality, it was quite impossible for appellant to transfer it to respondent. The Location Superintendent is the only one who could do so. The most appellant could have done was to surrender her site permit or agree to the transfer of it to respondent. The Native Commissioner should, therefore, have worded his judgment differently and should not have given a judgment with which it was impossible for appellant to comply.

However, it is clear from the record that the questions which the Native Commissioner had to decide were firstly, whether respondent had inherited the immovable improvements on the stand, and, if not, whether she has a better claim than appellant to the occupation of the stand and the improvements thereon. These points are raised in grounds (8) and (9). They were obviously canvassed at the trial. This Court, therefore, decided to grant the application and hear argument on the additional grounds of appeal.

According to the papers before us the stand in question was up to 1946 registered in the name of Cikizwa Mtembu, who died in 1902. She never married but had three daughters and a son. The first child was a girl Loqose, who died leaving a daughter Nosisi. The second daughter was the late Noqumra, who apparently never married. She had two children, Alice and Mbuti, now both dead. The latter married Sina according to Native Custom and they had a daughter, respondent in the present case. Nomhlaba (appellant) is the third daughter of Cikizwa and Mcapukiso is the son. He disappeared about 30 years ago and has not been heard of since. After the death of Cikizwa the stand was occupied in turn by Noqumra, Nosisi, Alice and appellant. Mbuti apparently also lived there with his mother and family until he died in 1918. His widow remarried and left, and respondent also left after the death of Nosisi in 1930. Noqumra who had meanwhile been in Johannesburg, returned after the death of Nosisi and when she died in 1946 appellant came from Sterkstroom and had the stand transferred to her name. Apparently at this time Alice was in occupation. She went to Johannesburg where she died in 1949. At present, therefore, the only known descendants of Cikizwa who are alive or are presumed to be alive Mcapukiso and the parties in this case.

Now Cikizwa's estate must devolve according to Native Law [see Section 2 (*e*) of Government Notice No. 1664 of 1929, as amended], unless it had been reported to the Master prior to the promulgation of Act No. 38 of 1927 [see Section 23 (11) of the Act]. There is no evidence that it was reported and we can accept that it was not so reported otherwise it would have been administered. According to Native Law, therefore, Cikizwa's heir would be her father or his male descendants in order of priority in rank. Failing such descendants her son Mcakupiso would succeed, and failing him and his heirs the estate would devolve on Mbuti. Sufficient evidence has not been adduced to presume the death of Mcakupiso, but assuming that he died without leaving male issue before the death of Mbuti and that Mbuti consequently inherited the estate, Mbuti's estate would also devolve according to Native Law, and under that system of law females can never succeed (see cases quoted in *Whitfield's S.A. Native Law* 2nd Ed. p. 337, also *Seymour's Native Law of South Africa* p. 123). The most a daughter or a grand-daughter can claim is to be supported out of the estate and then only while she remains unmarried and resides at the kraal of the deceased, or, if married, she has for any reason left her husband and has returned to her paternal kraal.

The result, therefore, is that the Native Commissioner erred in holding that respondent inherited the improvements on the stand and, since she is married, and is living with her husband, she has no right to be supported out of Cikizwa's estate.

Appellant also has no right of inheritance; but as she is unmarried she is entitled to be supported out of her mother's estate. It is not clear whether she is at present residing on Stand No. 30. In the summons her address is given as 179 Location. Sterkstroom. Assuming that she is still at Sterkstroom

and has not taken up her permanent abode at Stand No. 30, her right to the stand is still not inferior to that of respondent. There is an onus on the latter to show, at least, that she has a preferent claim to the occupation of the stand. This, in view of her marriage, she cannot do and there is, therefore, no ground for holding that appellant's occupation of the stand, as against respondent, is wrongful and unlawful.

The appeal is consequently allowed with costs and the judgment of the Court below is altered to one for defendant with costs.

For Appellant: Mr. Joiner, Kingwilliamstown.

For Respondent: Mr. Stanford, Kingwilliamstown.