defendant had admitted the adultery. Here it should be mentioned that the inference adverse to the defendant drawn by the Native Commissioner owing to the defendant's failure to call Wilson does not appear to be justified as the defendant's evidence indicates that he did ask Wilson's people for his address and they could not give it; and the fact that the defendant added that he did not ask all of Wilson's people does not necessarily imply that he did not ask those that mattered. However this factor does not militate against the success of the plaintiff's case as the other factors mentioned above, standing by themselves, suffice to establish it. It follows that the first, second, third and fifth grounds of appeal fail.

Turning to the remaining ground, i.e. the fourth, the plaintiff was not cross-examined in regard to the delay in his taking action. From the evidence for the plaintiff, it is manifest that there was no appreciable delay in having the defendant charged with the adultery after the adultery had come to the plaintiff's knowledge and, from the defendant's evidence, it would appear that he and not the plaintiff may well be responsible for the delay in the issue of the summons in this case; for the defendant admitted in cross-examination that immediately after his final meeting with the plaintiff's people in connection with the adultery, he left for Cape Town where he remained for about a year, and there is nothing to indicate that his address there was known to, or could be ascertained by the plaintiff. It follows that the plaintiff may well not have been in a position to have issued and had the summons in this case served on the defendant until the latter's return home, see Rule 31 (3) of the rules for Native Commissioners' Courts, published under Government Notice No. 2886 of 1951, as amended, and *ex parte* Minister of Native Affairs, 1941, A.D. 53, at pages 58 and 59; and from the summons and the defendant's evidence, it is manifest that the plaintiff issued the summons and had it served on the defendant without delay after the latter's return from Cape Town. Moreover, the defendant's evidence under cross-examination indicates that he may well not have taken all the necessaary steps to ascertain Wilson's address. It follows that it has not been shown that the defendant was prejudiced in his defence as a result of the plaintiff's not having taken action against him timeously and the fourth ground of appeal, therefore, also fails.

Accordingly the appeal should be dismissed with costs.

For Appellant: Mr. Heathcote, King William's Town.

For Respondent: Mr. Stewart, King William's Town.

REPORTS

OF THE

NATIVE APPEAL COURTS

1958

VERSLAE

VAN DIE

NATURELLE-APPÈLHOWE

THE GOVERNMENT PRINTER, PRETORIA
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G.P.-S.5213014—1958-9—700.

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OFFICERS OF THE NATIVE APPEAL COURTS.
AMPTENARE VAN DIE NATURELLE-APPÈLHOWE.
1958.

CENTRAL NATIVE APPEAL COURT.
SENTRALE NATURELLE-APPÈLHOF.

PRESIDENT: R. WRONSKY succeeded by/opgevolg deur J. P. COWAN.

PERMANENT MEMBER/PERMANENTE LID: J. P. COWAN succeeded by/opgevolg deur N. P. J. O'CONNELL.

NORTH-EASTERN NATIVE APPEAL COURT.
NOORDOOSTELIKE NATURELLE-APPÈLHOF.

PRESIDENT: W. O. H. MENGE.

PERMANENT MEMBER/PERMANENTE LID: R. ASHTON.

SOUTHERN NATIVE APPEAL COURT.
SUIDELIKE NATURELLE-APPÈLHOF.

PRESIDENT: H. BALK.

PERMANENT MEMBER/PERMANENTE LID: H. W. WARNER.

5213014—5

Case Index
Bladwyser van Sake
1958

Index of Subject Matter
Inhoudsopgawe
1958

NORTH-EASTERN NATIVE APPEAL COURT.

CULE *v.* CULE.

N.A.C. CASE No. 97 OF 1957.

PIETERMARITZBURG: 22nd January, 1958. Before Menge, President, Ashton and Oftebro, Members of the Court.

NATIVE CUSTOM.

Sisa—*Essentials of contract in Natal.*

Evidence.

Possession—No onus on bona fide *possessor to account for possession.*

Summary: Plaintiff sued for the return of *sisa* stock. He alleged that he had transferred the stock into the dipping book of defendant, his widowed brother, who was an inmate of plaintiff's kraal at the time; but that he never parted with the stock, the object being merely to make the authorities believe that defendant was the true owner. The defendant thereafter left the plaintiff's kraal and took the stock with him. He denied that the animals had been *sisa'd* to him and averred that he had bought them from plaintiff.

Held: An arrangement to transfer stock into the dipping book of another without parting with the stock, made merely to create a false impression of ownership, cannot be relied on as a contract of *sisa.*

Held further: Defendant being in *bona fide* possession of the stock is under no onus to account to plaintiff for his possession.

Appeal from the Court of the Native Commissioner, Bulwer.

Menge, President:—

In this matter we have, for good reasons shown, condoned the late noting of the appeal. Plaintiff sued defendant, his full brother, before a Native Chief for the return of four head of cattle alleged to have been *sisa'd* to the latter some ten years ago in order to overcome difficulties connected with the Government's measures against overstocking, whereby, it is alleged, stock owners were required to reduce their herds. The defence was that the cattle had been bought from plaintiff. The chief found in favour of plaintiff. He found it difficult to believe that defendant had bought the cattle.

In the Native Commissioner's Court the Chief's judgment was reversed to one for defendant with costs. The defendant who, at the plaintiff's instance, was wrongly saddled with the onus to commence before the Native Commissioner, stated that he had bought the cattle from plaintiff about six years ago for £35 and that he recently left plaintiff's kraal and took the animals with him. Plaintiff's case is this: He owned a large herd of cattle. Fearing that he would be compelled to reduce their number he had four of them entered in the dipping book of the defendant, who was then a widower and an inmate of plaintiff's kraal. But the stock remained with plaintiff. They only separated for dipping purposes. The defendant apparently took an entirely passive part in these arrangements and seems only to have provided the use of his dipping book. "He never attended dipping tank and he

never knew anything", says plaintiff. This alleged *sisa* arrangement took place about ten years ago. A year later plaintiff quarrelled with defendant. "After that," says plaintiff, he demanded his four head of cattle back and plaintiff threw defendant out of his kraal. But this demand and throwing out occurred, strangely enough, only early this year. When defendant left his kraal he claimed the four head of cattle and plaintiff was told at the Native Commissioner's Court to hand them over. He did so and then sued for their return before the chief.

Plaintiff's evidence was given very confusedly, but it would appear that he did not really intend to sue for the return of *sisa* stock. He says that when he threw defendant out he did not get his cattle back from defendant because he already had them. He explains: "the book (i.e. defendant's dipping book) was with me and the cattle were with me." His real cause of action seems to have been that defendant was in possession of stock belonging to plaintiff and which plaintiff had been obliged, against his will, to hand over to defendant.

Only plaintiff and defendant gave evidence.

Plaintiff now appeals on various grounds, from which it appears clearly that he again based his cause of action on *sisa,* and indeed Mr. Swain argued the appeal before us on the basis of *sisa.*

Now the onus of proving that the stock he claims were *sisa* cattle rested on the plaintiff. To discharge that onus he had to prove, in accordance with the definition of *sisa* in the Natal Code of Native law, that the stock had been *deposited* with defendant *on the understanding that he shall enjoy the use of them.* But on plaintiff's own showing that was not the case. The arrangement with defendant was not a *sisa* contract but a mere pretence to hoodwink the authorities. As plaintiff himself said: "The cattle were in my possession and they were only dipped in defendant's name. . . . My cattle and defendant's cattle were dipped in same tank. They were only separated when they were actually being dipped." Quite apart from the fact that—as the Native Commissioner points out—one does not ordinarily *sisa* stock to an inmate of one's own kraal, the Courts will examine the intention of the parties with the view of establishing whether a contract of *sisa* has in fact been concluded. In this case there clearly was never an intention to *sisa.* One's motives for concluding a contract do not ordinarily affect its validity, and, of course, a *sisa* contract can be validly concluded even if the object is to disguise ownership, but the essentials of the contract must be present.

However, discarding all reference to *sisa* and viewing the claim of plaintiff merely as a vindicatory action based on ownership, the plaintiff is still saddled with the difficulty that defendant's evidence of purchase is strongly supported by the fact that plaintiff has at all times given out that the animals belonged to defendant. The preponderance of evidence is clearly not in his favour.

The appeal is dismissed with costs.

Ashton, Permanent Member, dissenting:—

I find myself unable to agree with the learned President and Member of the Court that this appeal should be dismissed.

The action came before the Native Commissioner as an appeal from a Chief's Court. The plaintiff claimed the return of four head of cattle which he said he had "*sisa'd* with defendant as a result of a law that said cattle were to be taken". Defendant admitted having had four of plaintiff's cattle, but contended he had bought them from him.

The Chief found for plaintiff as prayed with costs, and defendant thereupon appealed to the Native Commissioner.

In both the Chief's and the Native Commissioner's Court, neither plaintiff nor defendant called any witnesses, and the presiding officers had to decide the issue between the parties who were full brothers, living for many of the relevant years in the kraal of the plaintiff. The Native Commissioner allowed the appeal and reversed the Chief's judgment, and plaintiff has now appealed to this Court.

From the pleadings in the case, the onus was on the defendant to prove that he bought the cattle and the Chief expressed himself in his reasons for judgment as finding "it difficult to believe that defendant bought these cattle from plaintiff". The Native Commissioner in his reasons said he "could not agree with the Chief's finding. The defendant gave his evidence in a straightforward manner and he described how the four cattle were bought by him" and, after criticising the story told by plaintiff, he added, "Weighing the evidence of the one against the other the Court found that the preponderance of probabilities was in favour of the defendant and that his story should be believed."

But the probabilities, to my mind, are all in favour of plaintiff. He said he had a large number of cattle in the location and, believing that he would have to reduce the number, he arranged with his brother, who had less cattle than he, to register four of his in his brother's dipping book. When defendant left plaintiff's kraal he took these extra four head with him and that is how the dispute arose. It is not very likely that plaintiff, who admittedly was previously involved in a court case, would have sold four heifers to his brother as defendant testified, when he had a large number of cattle, and it is also unlikely that those heifers have, over a period of years, had no offspring, as defendant told the Court was the case.

The Native Commissioner, although having said that defendant gave his evidence in a straightforward manner, has not said anything of plaintiff's demeanour in the witness box. This Court is accordingly in a position to judge of the probabilities of the two stories and I am in no doubt that they favour plaintiff.

In my view the judgment should be:

The appeal is allowed with costs; the Native Commissioner's judgment is set aside and for it is substituted: "The appeal from the Chief's Court is dismissed with costs and the Chief's judgment for plaintiff, with costs, is upheld."

Oftebro, Member:

I agree with the judgment of the learned President.

In my opinion the onus was wrongly placed on defendant and it was for plaintiff to prove his case.

From the cross-examination of the defendant, it would appear that plaintiff placed cattle with three other people in circumstances similar to those in which he alleges he placed the four cattle with defendant. As he, plaintiff, was represented in the Court *a quo*, one must assume that this was canvassed and that it was decided not to call them as witnesses, and so rely solely upon plaintiff's extraordinary story. His story does not convince me and I agree that the appeal should be dismissed with costs.

For Appellant: J. Swain.

For Respondent: H. L. Bulcock.

NORTH-EASTERN NATIVE APPEAL COURT.

NKWANYANA *v.* NKWANYANA.

N.A.C. CASE No. 76 OF 1957.

ESHOWE: 28th January, 1958. Before Ashton, Acting President, Alfers and Botha, Members of the Court.

ZULU LAW AND CUSTOM.

Status of wives married by Native custom prior to 1932; *Automatic "blood" affiliation; "Balekela" wife. Opinion of Native Assessors.*

Summary: The head of a kraal died having married four wives. The first-married wife balekela'd him while he was engaged to the woman whom he married next. His third-married wife was the sister of the second-married wife—she was married after the deaths of the latter and of the only male issue of her house. The fourth-married wife does not enter into the picture.

Plaintiff was the eldest son of the first-married wife and defendant was the eldest son of the third-married wife. They disputed the general heirship to their late father and certain cattle in the estate.

The marriages were all by Native Custom and took place in Zululand before 1932.

Held: (1) That in the absence of a declaration made in accordance with Zulu custom the first-married wife was the Chief wife;

(2) That the status of a "balekela" woman married during the existence of an engagement to another woman who was taken in marriage second in point of time was not affected by the latter marriage;

(3) That the marriage of the sister of a wife who has died and in whose house there was no male heir automatically affiliated the house of the former to the latter.

Cases referred to:

Zulu *v.* Zulu, 1934, N.A.C. (N. & T.) 1.
Manqele *v.* Manqele, 1936, N.A.C. (N. & T.) 46.
Dhludhla *v.* Dhludhla, 1952, N.A.C. 263 (N.E.).
Ntaminemidwa *v.* Mpunyu, 1918, N.H.C. 27.

Appeal from the Court of the Native Commissioner, Mtunzini.

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

The claim of plaintiff in this case which started in a Chief's Court was aptly recorded in these words "I should like to know who made you my father's heir. Your mother is my father's third wife. I see you have assumed the position of an heir. I am the heir for my mother is my father's first wife." Defendant's reply was just as aptly put; it was "I am not aware that you are the heir."

The Chief declared defendant to be the heir, saying in his reasons for judgment, that ". . . Witnesses testify he (defendant) is in the third house. The plaintiff is in the second house. Although for both the witnesses are many (*sic*) the father couldn't have been wrong if he chose his heir from the third house. Native practice allows this"

The plaintiff appealed against the Chief's decision to the Court of the Native Commissioner and there elaborated his claim to include certain estate cattle which he maintained were his as heir to his late father. Defendant's plea was that plaintiff was not the general heir to their father, Kaba, but that he (defendant) was by virtue of the fact that his mother was affiliated to the house of the chief wife. He went on to deny that plaintiff's mother was the first wife and contended that their father's first married wife was Oka Sidigida (Mbukubukwana) (to which house his mother was affiliated).

The Native Commissioner after hearing evidence for both parties allowed the appeal from the Chief's Court with costs and substituted for the Chief's judgment the following "For plaintiff who is declared heir to the late Kaba and as such entitled to 28 (twenty-eight) head of cattle in Kaba's estate. As to claim for 11 (eleven) head of cattle, defendant is absolved from the instance. Defendant to pay costs."

That judgment now comes on appeal to this Court at the instance of defendant on the following grounds:—

"1. That the said judgment was bad in law in that—

(*a*) the marriages of Kaba Mkwanyana and his four wives all having taken place prior to 1932, it was competent for him to appoint his Chief wife at any time and the learned Native Commissioner was therefore in error in holding that it was not competent for him to do so.

(*b*) That the learned Native Commissioner erred in holding that it was necessary for Kaba specifically and formally to affiliate Oka Sidigida II to Oka Sidigida I. as such "affiliation", under the circumstances constituted an automatic substitution, which required no formality for its legality."

"2. That the said judgment was against the weight of evidence in that—

(*a*) even if Kaba married Oka Sidigida after Oka Manqana, he appointed the former his Chief wife, as he was entitled to do;

(*b*) that it was amply proved, and the learned Native Commissioner accepted, that Kaba had been to the Chief Somshoko to confirm the original appointment of Oka Sidigida I as his chief wife;

(*c*) that it was amply proved, and the learned Native Commissioner accepted, that it had been the intention of Kaba to affiliate or, more properly, to substitute Oka Sidigida II in the place of Oka Sidigida I, who was the Chief wife, and as such substitution was automatic, the defendant would also automatically be Kaba's general heir."

"3. That the learned Native Commissioner accordingly erred in holding that plaintiff was the general heir of the late Kaba Nkwanyana."

Some fifty or so years ago Kaba is said to have married his first wife, Oka Manqana, having at the time been engaged to another girl, Oka Sidigida; the reason given for the marriage of the unengaged girl was that she had *balekela'd* Kaba to save the family fortunes. Thereafter, on the death of Oka Sidigida, and her son having died without male issue, Kaba took to wife her sister Oka Sidigida, the second, and later on he took another wife, Oka Mafunda. Plaintiff is the offspring of Oka Manqana and defendant is the son of Oka Sidigida, the second, who he contends, was affiliated to Oka Sidigida, the first.

The first point to come to a decision on is which woman Kaba married first. It is clear that the Chief found that Oka Sidigida, the first, was the first married wife and Oka Manqana the second married wife but it would seem that he regarded Oka Sidigida, the first, as the first married wife because he thought custom made her so as she was the first one engaged. But Oka Manqana, whose engagement to another man had been broken off, *bale-kela'd* Kaba who married her before he married his betrothed. This is clear from the evidence and it would seem from the grounds of appeal that the Native Commissioner's finding that it was so, is not challenged. Nor is it sought in the grounds of appeal to suggest that the alleged custom that the first "engaged" wife was regarded as the first married wife had the fore of law. If it did not have such force then the question whether Oka Sidigida, the second, was affiliated to her sister's house or not does not affect the general heirship question.

In the case of Zulu *v.* Zulu, 1934, N.A.C. (N. and T.) 1 it was held that in the absence of a public declaration made in accordance with Zulu custom there is no justification for ousting the first married wife from her position as the "Nkosikazi". In that case the circumstances were not very dissimilar from those in the present case and the decision in that case was followed in Mangele *v.* Manqele, 1936, N.A.C. (N. & T.) 46. Both these cases emanated from Zululand as did the present case.

It will appear from the annexure to this judgment which sets out the views of assessors who were called to the Court's assistance and to which reference is made later that they were of opinion that the "engaged" girl who was married after the *bale-kela* girl did not oust the latter. With this view this Court is in agreement.

This brings us to a consideration of the first ground of appeal and to deal with the first part of it, it is necessary to point out that although Kaba took all his four wives before 1932—the year in which the present Natal code of Native Law came into force—he made no verbal declaration before that date regarding his chief wife, as he was entitled to do by the numerous decisions of this and the Native High Court, and consequently his first married wife would seem to be his *Nkosikazi.* This is clear from the case of Dhludhla *v.* Dhludhla, 1952, N.A.C. 263 (N.E.), not to mention others in which this Court has expressed the same view.

As to the second part of the first ground of appeal it is clear that if Oka Sidigida, the first, was not validly nominated chief wife and was not the first wife Kaba married, then in so far as the heirship question is involved it does not matter whether there was affiliation of Oka Sidigida, the second, or not.

The first part of the second ground of appeal has already been dealt with. If there was no appointment of a chief wife within the time mentioned above it was not possible to make one after that time. But the second part of this ground requires some analysing. It is not correct that the Native Commissioner accepted that Kaba went to Chief Somshoko "to *confirm* the original appointment of Oka Sidigida, the first, as his chief wife". Kaba went to the Chief to find out how he would remedy his omission to publicly appoint her his chief wife—the evidence is clear on this point and the Native Commissioner found it to be so.

The third part of the second ground of appeal fails in so far as it relates to the contention that the general heirship is affected because this Court has already decided above that Oka Sidigida, the first, was not the chief wife. But it was clear from the views of the assessors consulted by this Court—see the annexure hereto —that the taking of Oka Sidigida, the second, to wife in the circumstances shown to have existed in this case amounted to an

automatic affiliation. With this view this Court is in agreement and it draws some confirmation of such a custom from what was said by Chadwick, J., in the case of Ntaminemidwa *v.* Mpunyu, 1918, N.H.C. 27 at page 28. There he is reported to have said:—

> "There are cases, however, in which what I may call an automatic affiliation between wives takes place, and this has happened in this very family. The late Msutshwana married two sisters. . . . These two wives, though both junior wives were affiliated to each other by blood. . . . He has recognised the affiliation of blood."

In expressing concurrence with the assessors and the opinion quoted above this Court wishes to make it clear that it does not express the view that any marriage between a man and two or more sisters is automatically an affiliation of the later married sister's hut to the hut of the earlier married sister. It is only in circumstances prompting a necessity for an affiliation—such as appeared in this case—that the affiliation becomes automatic.

It would seem clear then that the claim by plaintiff for the eleven head which were paid for Joel's daughter, Tali—Joel was the eldest son of Oka Sidigida, the first—and which plaintiff said were wrongly used by defendant, were in law rightly his, defendant's property. To this extent the appeal must succeed.

It is appropriate to mention here that some of the points of Native Law and Custom which were quoted in the course of this case were referred to assessors called in terms of section *nineteen* (1) of Act No. 38 of 1927. The questions put to them and the answers they gave form the contents of the annexure to this judgment.

The result is that the appeal of the defendant to this Court succeeds in part and fails in part and the judgment of this Court is—

> It is ordered that the appeal in so far as it relates to the decision that plaintiff is the general heir of the late Kaba Nkwanyana and as such is entitled to twenty-eight head of cattle in Kaba's estate is dismissed and in so far as the eleven head are concerned it is upheld and the Native Commissioner's judgment in this respect is altered from "defendant is absolved from the instance" to "judgment is awarded to defendant for eleven head of cattle." Defendant (appellant) to pay two-thirds of plaintiff's (respondent's) costs in all courts.

For Appellant: Wynne & Wynne.

Respondent in person.

ANNEXURE.

ASSESSORS:

1. Gilbert George Mkize of Nongoma, Zululand.
2. Ndesheni Zulu of Nongoma, Zululand.
3. Ntsoyi Mpungose of Mtunzini, Zululand.
4. Manyikwana Biyela of Eshowe, Zululand.

OPINIONS OF THE ASSESSORS.

Qustion 1:

If a man were engaged to a girl and before marrying her married a girl who *balekela'd* him would the former girl oust the latter as his chief wife although married second in order of time?

ANSWERS:

Gilbert George Mkize:

My opinion is that where a man marries a *balekela* girl before the girl to whom he is engaged he must, if he wishes the engaged girl to be his chief wife, make a declaration at the marriage ceremony that she is his chief wife. If he made no such declaration she would be his second wife. The fact that there was a prior engagement by *ulugcu* makes no difference to Zulu law that the first wife is the chief wife.

Ndesheni Zulu:

I agree with Mkize.

(NOTE.—The engagement by giving an *ulugcu* is of no significance other than that the girl accepts the man as a suiter. This is guite different from preparing the thread to sew the *isicoco* which is the engagement proper.)

Ntsoyi Mpungose:

I agree. That is our custom. The husband must make a declaration at the ceremony.

Manyikwana Biyela:

I agree with Mkize.

Question 2:

If the husband did not make the declaration at the time of the celebration of the union could be remedy the omission by a later declaration or by his conduct?

ANSWERS:

Gilbert Mkize:

No, he cannot make a later declaration or by his conduct designate his chief wife. The appointment of a chief wife could only be made at the celebration of the union of the woman selected to be chief wife.

Ndesheni Zulu:

So far as I know, the custom followed is that the chief wife is the first married wife amongst commoners. Important people did nominate a chief wife later especially when the husband married the daughter of an important man, but even then the declaration must be made at the celebration of the union.

(The other two assessors agreed).

Question 3:

If the husband placed the first married wife in the "ikohlo" section of the kraal and the "engaged" wife in the "indhlunkulu" side immediately after the ceremony would that replace a declaration at the ceremony?

ANSWERS:

Gilbert Mkize:

The answer is that we are on the question of commoners who had no "ikohlo" and "indhlunkulu" sections so that no significance can be attached to the position of the hut in which he placed her. The placing of the huts would not replace the making of a declaration. The "ikohlo" only occurred with the "king's donation of an 'isigodlo' girl to the man".

Ndesheni Zulu:

I do not see how a man could put the first wife in the "ikohlo" section and the second wife on the "indhlunkulu" side. The position of the woman's hut would not indicate that she would bear the heir.

Ntsoyi Mpungose:

I support Ndesheni Zulu. A commoner with few wives can put his huts anyhow and that would not alter the fact that his first married wife is his chief wife.

(The fourth assessor agreed.)

Question 4:

Was the woman who prepared the thread for the "isicoco" invariably the "inkosikazi"?

ANSWERS:

Gilbert Mkize:

The girl who prepared the thread for the "isicoco" was always the chief wife unless, while working on it, another girl married the man before her.

(The other assessors agreed.)

Question 5:

If a man intends that his first wife shall not be his chief wife and has in mind another girl whom he desires to make his chief wife would he assume the "isicoco" only on the marriage of that other girl? Would he not assume the "isicoco" when he took the first wife?

ANSWERS:

Gilbert Mkize:

No. the "isicoco" was put on to indicate that he was permitted by the king to marry. If he had no "girl" he would ask a female relative to put it on. The significance of the adornment of an "isicoco" is that the man had the king's permission to marry.

(The other assessors agreed.)

Question 6:

Was a man obliged to marry a girl who "balekela'd" him?

ANSWERS:

Manyikwana Biyela:

When a girl "balekela'd" a man he married her straightaway and a hut was allotted to the couple. It would be unseemly for a man to send a "balekela" girl away.

(The other assessors agreed.)

Question 7:

A man marries a woman who bears him a son and then dies; the son dies without male issue; then the man marries his deceased wife's sister. Does this taking of the deceased wife's sister indicate an affiliation or any change of status of the deceased woman's house?

ANSWERS:

Gilbert George Mkize:

The sister would be automatically affiliated to the late sister's house which would be "vusa'd". The status of the house would not be affected.

(The other three assessors agreed.)

Question 8:

If it is accepted that it was always the intention of the husband that the "engaged" girl was to be his chief wife but no declaration was made at the celebration of the union can she be regarded as his chief wife? Can she because of that intention, not verbally expressed, be regarded as his chief wife?

ANSWERS:

Gilbert George Mkize:

No, she could not be regarded as his chief wife.

(The other three assessors agreed.)

NORTH-EASTERN NATIVE APPEAL COURT.

VUNDLA *v.* VUNDLA.

N.A.C. CASE No. 88 OF 1957.

ESHOWE: 29th January, 1958. Before Menge, President, Ashton and Alfers, Members of the Court.

NATIVE CUSTOM.

Succession—Translation of younger son as heir to another house not competent in Zulu law.

Summary: Defendant, as surviving brother of one Mazameswane, who died without male issue, received the dowry for the daughters of the deceased. Plaintiff, son of a younger half-brother of defendant claimed this dowry on the ground that his father had been translated as heir to the house of Mazameswane's wife. The legality of the translation was in issue and the Native Commissioner rejected the claim. In argument after the evidence was heard defendant asked for dismissal of the summons. The Native Commissioner gave judgment for defendant.

Held: The translation of a younger son of one house in which there is an heir to another house so as to become heir to the latter house is not competent in Zulu law.

Held further: A successful party cannot obtain a more advantageous judgment than he asks for.

Cases referred to:

Ngetshana Kumalo *v.* Mkitshwa Kumalo, 1932 N.A.C. (T. & N.) 13.

Mambeni Sitole *v.* Nonsu Sitole, 1938 N.A.C. (T. & N.) 35.

Tom Butelezi *v.* Mavela Butelezi, 1948 N.A.C. (T. & N.) 85.

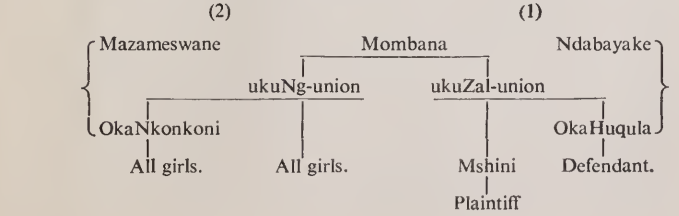
Jenti *v.* Jakeni, 1954 N.A.C. 90.

Appeal from the Court of the Native Commissioner, Mtunzini.

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

In this action the plaintiff claimed from defendant 57 head of cattle, or their value, £285, being the balance of *lobolo* paid for certain six women of an heirless house to which defendant would normally have been heir, but into which the plaintiff claims that his father was placed or translated as heir. Certain evidence was led on behalf of the plaintiff and thereupon the parties submitted for the Court's decision the question whether in Natal Native law an heir could be provided for an heirless house in such a manner.

The facts relevant to this legal issue are few and not disputed. The following genealogical plan sets out the position:—



Mombana was an eldest son. He never married. He had a younger brother, Ndabayake, who married AkaHuqula, the mother of defendant. He also had a half-brother, Mazameswane, oldest surviving son of the common ancestor's second house, who married OkaNkonkoni. OkaNkonkoni had only daughters. After the birth of defendant, his father, Ndabayake, died, and Mombana formed an ukuzalela union with the widow. Out of this union Mshini was born, the father of plaintiff. After the death of Mazameswane, Mombana also became *ngena* husband to OkaNkonkoni, but again the issue was only girls. Defendant collected the *lobolo* for the six daughters of OkaNkonkoni, viz., 66 head of cattle in all, but he paid nine head as dowry for plaintiff's wife. Mshini was born at about the beginning of the century and he was about 18 years of age when, it is alleged, he was placed into the house of OkaNkonkoni. Plaintiff's case is that Mombana shortly before his death placed Mshini into OkaNkonkoni's hut as heir to her house and that plaintiff, as Mshini's heir, is therefore entitled to the dowry for the girls of that house. There is no allegation that the defendant was ever disinherited.

The Native Commissioner gave judgment for defendant with costs, leaving aside the question (irrelevant at this stage) whether the translation of Mshini to the house of OkaNkonkoni has been proved on the evidence led, he held that it is not competent in Zulu law for a kraalhead who has an heir to place a younger brother of the latter's house as heir into an heirless house.

The plaintiff now appeals against this decision in the following terms:—

"(1) The decision of the Native Commissioner was wrong in law.

(2) The decision of the Native Commissioner in holding that plaintiff had not made out a case to meet was wrong in law and against the evidence and the weight of evidence

The plaintiff (appellant) reserves the right to amend and/or add to the above after perusal of the Record and the written Judgment of the Native Commissioner."

These insufficient grounds of appeal cannot, of course, be entertained, and the reservation of the right to amend or add to these grounds is completely wrong practice which this Court has had occasion before to deplore. There is no such thing as reserving a future right of appeal and the practice must cease. However, in this case, a proper application has been filed to amend the grounds of appeal, and we have allowed this. The gist of these amended grounds of appeal is that the judgment is wrong in law in that such a translation of a son is competent, even without the disinherison of defendant, in that the practice is analagous to the recognised practice of *ukungena*.

The Native Commissioner is supported by ample authority ever since the case of Sitole *v.* Sitole, 1938 N.A.C. (T. & N.) 35. The earlier case of Kumalo *v.* Kumalo, 1932 N.A.C. (T. & N.) 13, in which it was said that it is not competent for a kraalhead to translate a son from one house to another as heir is purely *obiter* on the point; but in Sitole's case the defence relied on a translation of the defendant as heir to the eldest son of the *qadi* of his father's house and it was held by McLoughlin, President, that this was incompetent. This reasoning was concurred in by at least one of the two members and is therefore a decision on the point (*vide* the article appearing on p.6 of the *S.A. Law Journal* for 1955 entitled *Ratio dicendi and Divided Courts*). Incidentally, Sitole's Case is badly reported. It does not make sense as it stands. Comparison with the manuscript reveals that in the

first paragraph on page 36, the name "Nkoto's" should be substituted for "Nkoqo's" and the name "Nkoto" for "Ngoqo". Sitole's case was followed in Radebe *v.* Radebe, 1943, N.A.C. (N. & T.) 56; and in Butelezi *v.* Butelezi, 1948 N.A.C. (T. & N.) 85, it also finds support.

No authority has been cited in favour of the plaintiff's contention that such a transfer of a son is lawful. It appears indeed to be a recognised practice in the Cape, where there are a number of decisions supporting it from Sibozo *v.* Notshokovu, 1 N.A.C. 198 to Jenti *v.* Jakeni, 1954, N.A.C. 90. But that difference in customs, though fundamental, can probably be accounted for. The *ukungena* custom, which among the Zulus answers so usefully the need of providing an heir, is not practised by the Xosas. These people, and probably the neighbouring tribes influenced by them, must therefore resort to other means to avert the harsh consequences of the strict application of the rules of primogeniture in succession; and the translation of a son, with due formalities, meets this need. However, whatever the explanation may be, we see no justification for departing from previous decisions on this aspect of the law in Natal.

It follows that the appeal must fail; but the Native Commissioner was not correct in giving judgment for defendant. The defendant did not prove his case. He proved nothing. The decision on the issue before the Court was that the plaintiff did not make out a lawful claim and the judgment should have been one of absolution. In any case the defendant himself asked in his written argument that the claim be dismissed and the judgment cannot be for more than he asks.

The appeal is dismissed with costs, but the Native Commissioner's judgment is altered to one of absolution from the instance with costs.

Ashton (*Permanent Member*):

I agree that the appeal be dismissed with costs and that the Native Commissioner's judgment be altered to one of absolution from the instance with costs.

Alfers (*Member*):

I concur.

For Appellant: J. G. Barnes.

For Respondent: W. E. White.

NORTH-EASTERN NATIVE APPEAL COURT.

NGCOBO AND MVUBU *v.* NGCOBO.

N.A.C. CASE No. 81 OF 1957.

DURBAN: 4th February, 1958. Before Menge, President, Ashton and Alfers, Members of the Court.

PRACTICE AND PROCEDURE.

Appeal—Condonation of late noting—Principles governing.

Summary: The facts appear from the judgments. After discussing the principles relative to condonation—

Held: (The President dissenting) that the application should be granted as there was no prejudice, the noting was only a month late, the delay was not shown to be unreasonable and there was every prospect of success.

Cases referred to:

Qina *v.* Qina, 1939 N.A.C. (C. & O.) 41.

Appeal from the Court of the Native Commissioner, Umzinto.

Menge, President:—

This is an application for the condonation of the late noting of an appeal in an action in which plaintiff successfully sued the wife of his late son (defendant No. 1) and her father (defendant No. 2) for payment of £29 (twenty-nine pounds), the property of first defendant's deceased husband, alleged to have been appropriated by first defendant some three years before, when she deserted plaintiff's kraal. Judgment was granted on 1st May, 1957, and the appeal was noted by second defendant on 26th June, 1957—about a month late, no reasons for judgment having been asked for.

It is trite law that an applicant for condonation must (*a*) explain the cause of the delay and (*b*) show that he has reasonable prospects of success. Either (*a*) or (*b*) alone is not sufficient. Now, as regards (*a*) all that the applicant says is this:—

> "I am illiterate and unversed in Court procedure and I truly believed that, at the proceedings before the Native Commissioner I was not a party, but that I was present merely for the purpose of asisting my widowed daughter, who was first defendant in the case. My said daughter now resides at my kraal and the respondent is her father-in-law and may well be her guardian according to Native law and custom."

No explanation is given why these factors should have prevented applicant from taking steps at the proper time. The second part of the statement has no relevance at all. In fact it seems to contradict the first part. It is very hard to believe that the applicant thought he was merely assisting his daughter in the proceedings. He cross-examined the witnesses and gave evidence himself; in any case, he heard the judgment and must, therefore, have known to what extent he was affected. The respondent, in a replying affidavit to which there is no replication, says:—

> "The applicant only thought of appealing against the judgment when his cattle were attached by the Messenger in satisfaction of this judgment."

That is probably correct. On the papers before us it can only be concluded that the applicant at first decided to ignore the judgment which was given against him. Whether he was wilful in that or just negligent, his attitude disentitles him to the indulgence of this Court, and I think that the application should be dismissed. As, however, the majority of the Court are not with me in this regard the application is granted.

On the merits I agree that the case was wrongly decided in the Court below. In fact, the summons does not even disclose a valid cause of action. Mr. Wilson, who appeared before us for the respondent conceded this.

The appeal is upheld with costs and the judgment of the Native Commissioner altered to absolution from the instance with costs as regards second defendant.

Ashton (Permanent Member):

Plaintiff sued jointly and severally Mbate Ngcobo assisted by her father, Ngobo Mvubu, and Ngobo Mvubu in a Native Commissioner's Court for £29 (twenty-nine pounds), £10 (ten pounds) being the value of certain property and asked for an account of certain moneys. Plaintiff was the father of first defendant's husband who had died and it was asserted by him that first defendant had taken the £29 (twenty-nine pounds) and certain property from his son's kraal and had failed to account for certain moneys she is said to have received from her late husband's employers. According to the summons second defendant was "cited as the father of defendant No. 1 and the money and the property was spent at his kraal."

Both defendants pleaded that they were not indebted to the plaintiff but after hearing evidence for plaintiff and defendants the Assistant Native Commissioner gave judgment for plaintiff for the sum of £29 (twenty-nine pounds) and costs against defendants jointly and severally and the claim for £10 (ten pounds) and the claim for moneys unaccounted for were dismissed.

Against the whole judgment in so far as it affects him the second defendant has appealed to this Court on a large number of grounds to which he asked another four grounds to be added.

The appeal was noted about a month later than the last date allowed by the Rules and appellant asked that the late noting be condoned.

In support of his application appellant filed on affidavit in which he said he truly believed that he was not actually a party to the case but that he was cited merely to assist his daughter who had been residing in his kraal since the death of her husband. He added that he believed that his appeal would be successful. This affidavit was replied to by respondent who declared that applicant only thought of appealing against the judgment when his cattle were attached in pursuance of the judgment and he went on to say "The mere application for condonation of the late noting of appeal is only to gain time to raise money to release the cattle which are now under attachment."

This Court has for many years been consistent in its decisions on these applications for condonation. It has followed the principles enunciated in Quina *v.* Quina, 1939 N.A.C. (C. and O.) 41 (in which a number of leading cases are quoted). Where no prejudice to the respondent would result if condonation were granted and there was a prospect of the success of the appeal it has allowed the condonation sought.

In this case before us there is no suggestion that respondent would be prejudiced, the noting was only a month late, the reason for delay was not shown to be unreasonable and there is every prospect of the appeal being successful. The condonation should, therefore, in my view be granted.

(The learned member then dealt with the evidence and continued as follows): Whether or not the summons discloses a cause of action—the point was not taken in the Native Commissioner's Court nor on appeal and the parties seemingly knew what was meant in the summons—the plaintiff cannot succeed and the appeal must be upheld. I would add here too that the summons was drawn up by the Clerk of the Court and neither party was legally represented.

In my view the appeal should be upheld with costs and the judgment of the Assistant Native Commissioner should be altered to one for defendant with costs.

Alfers (Member):

I concur in the view of learned Permanent Member that the late noting of the appeal should be condoned.

I also concur in the learned President's view that the appeal succeeds with costs and that the Native Commissioner's judgment in so far as it relates to second defendant should be altered to one of absolution from the instance with costs because the summons contains no allegations—

(*a*) that plaintiff was the lawful owner of the money;

(*b*) that first defendant took the money unlawfully; and

(*c*) that first defendant was residing in second defendant's kraal at the time of the commission of the alleged delict.

For Appellant: L. M. Mandy.

For Respondent: Adv. Wilson i/b Cowley & Cowley.

NORTH-EASTERN NATIVE APPEAL COURT.

MAGABE N.O. *v.* DINKWANYANE AND ANOTHER.

N.A.C. CASE No. 85 OF 1957.

PRETORIA: 12th March, 1958. Before Menge, President, Ashton and O'Connell, Members of the Court.

PRACTICE AND PROCEDURE.

Jurisdiction of Native Commisisoner's Court in relation to mental capacity.

Summary: In an action in which plaintiff sought to deprive defendants of the control of certain tribal funds the plaintiff alleged that the head of the tribe, who was not a party to the case, had lost his mental faculties and had in fact retired long since from participation in the affairs of the tribe. The allegation was made in an affidavit in support of an application for an interdict and when the matter was ordered to go to trial the application stood as summons in the action. Defendants pleaded in bar that in as much as the action sought to affect the mental status of the chief the Court had no jurisdiction. Plaintiff appealed against a judgment upholding this plea.

Held: Reversing the judgment, that the plea was bad because no actual order based on mental incapacity had been asked for against the chief and because the question of his mental state was in any case irrevelant as he had retired from active participation in the affairs of the tribe.

Statutes referred to:

Section 10 (1) (*a*), Act No. 38 of 1927.

Cases referred to:

Mntaka *v.* Ngcemu, 1952 N.A.C. 129, approved.

Appeal from the Court of the Native Commissioner, Lydenburg.

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

This is an action concerning tribal funds amounting to £290 held by the Standard Bank, Lydenburg. The plaintiff's case is that these funds are held by the bank for the Micha Dingwanyane Bapedi tribe under the control of the defendants; that recently a tribal meeting was held investing plaintiff and another as secretary, with the control of the funds, but that the defendants refuse to sign the necessary documents to enable the bank to give effect to this change.

Originally the matter came before the Native Commissioner as an application, but later it was ordered that the parties proceed to trial, the applicants' affidavit to serve as particulars of summons. The result is that certain allegations which the applicant placed on record in the applicant's affidavit, but which would not have been necessary for purposes of a summons, became part of the pleadings. Among these allegations there appear the following (quoted to the extent to which they are relevant), viz.—

> "2. That the Head of the Tribe is nominally Headman Micha Dinkwanyane.
>
> 3. That the said Micha Dinkwanyane is an extremely old man who has lost almost all his faculties and no longer takes an active part in the administration of the affairs of the Tribe."
>
> 4. That the said Micha Dinkwanyane retired from active participation in affairs of the Tribe from about 1949 and that . . . . .
>
> 5. . . . . the affairs of the Tribe were then taken over by the wife of Johannes Dinkwanyane (first respondent) and second respondent."

In their plea hereto the defendants contend that Micha is in fact the head of the tribe; that, although he is an old man, he has not lost any of his faculties; that he already retired in 1936, but that, though he no longer participates actively in the affairs of the tribe, he nevertheless, gives advice to the tribe in tribal matters. But the defendants also filed a special plea in bar, contending that the Native Commissioner has no jurisdiction as the "plaintiff seeks to affect the status of Micha Dinkwanyane in respect of the said Micha Dinkwanyane's mental capacity". This special plea was upheld by the Assistant Native Commissioner, and the plaintiff now appeals on the ground, *inter alia*, that the court was not required nor obliged to make any declaration as to the status or mental capacity of Micha Dinkwanyane.

Before us Mr. Beyers, for respondent, applied to raise a point not taken in the Court below, namely, that the defendants had been wrongly cited, in that they were not sued in their representative capacities but in their personal capacities. This application was opposed and was refused by us. In view of our judgment in the case it is open to the defendants to raise the point in the Court below when the hearing is resumed.

In his reasons the Assistant Native Commissioner claims to find support in the case of Mntaka *v.* Ngcemu, 1952 N.A.C. 129; but Mr. Lubinsky argued before us, quite correctly that this case is squarely against him. If evidence were to be given in regard to Micha's mental state of health and the Native Commissioner

were to find on that evidence that Micha has "lost almost all his faculties", as alleged, or that he is in fact a half-wit or that he is *non compos mentis* this would not be opposed to his powers in the least because this case is not a proceeding in which—to quote from section 10 (1) (*a*) of the Native Administration Act, 1927—the status of Micha in respect of mental capacity is sought to be affected. The Native Commissioner was not asked to make any order affecting the personal status of Micha and no finding he might have made would have had the slightest effect on Micha's present status as an ordinary normal person. In fact, as Mr. Lubinsky pointed out, the personal status of Micha or his mental health had nothing to do with the proceedings. It is common cause that he retired long ago from active participation in the tribe's affairs. It is also common cause that the control of the funds is vested solely in the defendants. Micha and his mental faculties had nothing to do with the actual claim before the Court.

The appeal is upheld with costs. The Native Commissioner's judgment is set aside and the matter is referred back for further hearing.

I may add that this Court views with concern the manner in which this case has proceeded in the Court below. The value of the subject matter of the claim is not high but the costs which must have been incurred—to the Court's mind most unnecessarily—in the proceedings so far are altogether incommensurate. The hope is expressed that the matter will now be brought to trial on the peadings without further ado.

For Appellant: Adv. I. E. Lubinsky, i/b Schoeman & De Villiers.

For Respondent: Adv. C. Beyers, i/b J. W. C. van der Hoven.

NORTH-EASTERN NATIVE APPEAL COURT.

NHLABATI *v.* **LUSHABA.**

N.A.C. CASE No. 96 OF 1957.

PRETORIA: 13th March, 1958. Before Menge, President, Ashton and O'Connell, Members of the Court.

PRACTICE AND PROCEDURE — NATIVE CUSTOMARY UNION.

Customary union—Dissolution—Action for by woman—Joinder of guardian as co-plaintiff.

Summary: In an action by a woman assisted by her guardian for dissolution of her customary union with defendant.

Held: (The President dissenting) that the action is not competent, irrespective of the circumstances, unless the woman's guardian is joined as a party.

Cases referred to:
Thabea Mokgatle *v.* Erens Mokgatle, 1946 N.A.C. (T. & N.) 82.

Appeal from the Court of the Native Commissioner, Piet Retief

Menge, President (dissentiente):—

Plaintiff, a Native woman, assisted by her guardian—her eldest surviving brother—sued her husband by customary union for dissolution of the union on the ground of excessive cruelty and danger to life, and she also sued for custody of the six children of the marriage. These children are at present with plaintiff. Evidence was led for both sides and thereupon the Native Commissioner gave judgment for plaintiff with costs.

The defendant at first appealed merely on the facts, but he applied for an amendment of his grounds of appeal and this was allowed by the majority of the Court, the President dissenting.

The amended appeal is brought on four grounds. One of these, ground (*d*) is that the dissolution was not justified on the merits of the case; but we consider, and indeed counsel conceded before us that the evidence fully supports the Native Commissioner's decision on this point. Ground (*c*) is pointless. It reads:—

> "It is not alleged, neither is there any evidence to prove, to what tribe the parties belong, nor is there any competent evidence regarding the Native law and custom applicable."

Ground (*a*) attacks the dissolution as bad in law in as much as "a claim for dissolution of a customary union has no place in Native law and custom actions in the Transvaal". This contention is not correct. Natives in the Transvaal can, and do, validly terminate their customary unions by private arrangement, but there is nothing to prevent one of the partners from obtaining a decree of dissolution from the Court. As a general proposition this would seem to derive authority from the recently published case of Sonia (Pty.), Ltd. *v.* Wheeler, 1958 (1) S.A. 555, where Price, A.J.A., is reported at p. 559 to have said: " . . . . . the real question is whether a person who thinks he is entitled to repudiate a contract has a right to approach the Court for such a order, and there cannot be the slightest doubt that he has such a right".

But members of this Court *mero motu* raised a further point: Namely, that where a woman sues the proper procedure is to join her guardian as co-plaintiff as was laid down in the case of Thabea Mokgatle *v.* Erens Mokgatle, 1946, N.A.C. (T. & N.) 82, and that, as that was not done in this case, the action was not valid. Counsel for appellant did not deal with this point, notwithstanding that it was put to him, but counsel for respondent replied that this Court could overlook such a defect under the powers contained in section 15 of the Native Administration Act. It seems to me that as the plaintiff's guardian was present, assisted her in the action and gave evidence for her, the omission to cite him as a co-plaintiff is indeed a mere technicality. The woman herself certainly has a right of action. True, the guardian must be joined, but if he joins in the action in actual fact, and no claim is made by or against him and when there cannot possibly be any prejudice, can it make any difference that he is not formally joined? I do not thing so, but the majority of the Court has decided that as the guardian was not joined as co-plaintiff the plaintiff had no action. So we have the position that a point which is at most a very trivial technicality, which was not raised in the Court below, which was not raised on appeal and which Counsel did not choose to make use of in argument before us, is invoked—in the face of the provisions of section *fifteen* of the Act. In my opinion the point is not well taken.

The last ground, (*c*), however, is well taken. It reads: "The Court was not justified on the evidence in granting custody of the children to the plaintiff". There is indeed nothing in the evidence to indicate where the interests of the children would lie. The Native Commissioner says he considers "the mother of children, especially those of tender years, to be better suited to have their custody"; but the record contains no indication as to the ages or even the identity of the children concerned.

Actually, however, this is beside the point, as in Native law (in which the plaintiff's claim depends) a woman has no claim to the custody of her children. Only her guardian has such a claim. And the fact that he has not been joined as co-plaintiff in the action is fatal to the claim for custody. It was not fatal to the claim for dissolution because the woman was herself vested with a legal right to sue. In the claim for custody she has no such legal right and cannot sue. It is her guardian who must sue.

Counsel for the plaintiff (respondent) argued that the woman was entitled to bring the action because of her rights to her illegitimate children in common law. But that argument cannot be entertained for one moment. She was married by Native custom. Her whole action for dissolution is dependent on Native custom. How then could common law be invoked to decide the custody issue? That would involve denying defendant the right to rely on Native custom, in other words the Court would have to reject the very existence of Native law. The plaintiff cannot have it both ways: she cannot have legitimate children in Native law and sue for their custody as illegitimate children.

The appeal ought, therefore, in my opinion, to succeed on the custody issue. But in accordance with the decision of the majority of the Court it is ordered that the appeal be and it is hereby upheld; the judgment of the Native Commissioner is set aside and for it is substituted: "The summons is dismissed with costs". No costs of appeal are awarded.

O'Connell, Member with whom Ashton, Permanent Member, concurs):—

Plaintiff, a Native woman, sued defendant, her customary-union husband, for a "cancellation of the customary union, custody of her six children and costs." She was assisted by her guardian in the action and after hearing the evidence called for the parties the Native Commissioner entered judgment for plaintiff with costs.

Against that judgment defendant has appealed to this Court on the grounds *inter alia* that the order for cancellation of the customary union was incompetent; the Court was not justified on the evidence in granting the custody of the children to the plaintiff; that there was nothing to show to what tribe the parties belong.

The Native Commissioner found that defendant had repeatedly assaulted plaintiff and concluded that he so grossly ill-treated her that she was entitled to have the union dissolved and he formed the opinion that the welfare of the children would be the better guarded by placing them in the custody of the mother rather than with a father with tendencies to violence.

But before considering the facts of the case and the conclusions based on them it is necessary to determine whether the procedure adopted by the plaintiff was correct.

In the Transvaal dissolution of a customary union at the instance of the wife is brought about by her guardian at her request; she has no right to dissolve her union without referring to him and she is generally completely dependent on him to take the necessary steps to bring about the dissolution of the union.

The position is set out in the case of Mokgatle *v.* Mokgatle, 1946, N.A.C. (T. & N.) 82, by the learned President at page 84. He makes it clear that a wife cannot sue unaided for the dissolution of her union and he goes on to say: "The customary union is a contract between the husband and the wife's guardian, who must be a party" (the underlining is mine).

It is clear that the procedure adopted before the Native Commissioner was irregular and he had no right to make the order on the summons as it was before him.

As the union was not dissolved the claim for custody falls away.

In the result it is ordered that the appeal be and it is hereby upheld; the judgment of the Native Commissioner is set aside and for it is substituted: "The summons is dismissed with costs". No costs of appeal are awarded because the decision of the Court was not made on the grounds set out in the appeal, nor was the point taken in the Native Commissioner's Court nor in this Court by appellant's counsel.

For Appellant: Adv. H. van Rensburg, instructed by A. E. Language.

For Respondent: Adv. H. P. van Dyk, instructed by H. Olmesdahl.

SOUTHERN NATIVE APPEAL COURT.

MANGWANYA *v.* **MAPUPA.**

N.A.C. CASE No. 34 OF 1957.

PORT ST. JOHN'S: 4th February, 1958. Before Balk, President, Warner and Wakeford, Members of the Court.

PRACTICE AND PROCEDURE.

Appeal from Chiefs' Courts—Rule 9 (3)*—condonation of late noting of appeal—Native Commissioner's discretion a judicial one—Appeal Court's right to interfere—Native Commissioner to have Chief's reasons at hearing.*

Summary: Application was made to a Native Commissioner's Court for condonation of late noting of an appeal from a judgment of a Chief's Court, and this was refused. This decision was brought before this Court on appeal. The Chief's reasons were not before the Native Commissioner's Court when it heard the application.

Held: That, in terms of Rule 9 (3) of the Regulations for Chiefs' Courts the Native Commissioner had a discretion to grant the application on good cause shown, and that it is not open to the Appeal Court to interfere unless it is satisfied that the discretion was not exercised judicially.

Held further: That where delay in noting an appeal is due to an attorney's negligence, such negligence is, by itself, not sufficient to debar his client from relief and the Court should consider all the circumstances of the particular case in deciding whether the applicant has shown something which justifies a Court in holding that sufficient cause for granting relief has been shown.

Held further: That it is advisable for the Chief's reasons for judgment to be obtained before an application for condonation of the late noting of an appeal from his judgment is heard in the Native Commissioner's Court as they may be important if the merits of the proposed appeal are relied upon.

Cases referred to:

Rose and Ano. *v.* Alpha Secretaries, Limited, 1947 (4) S.A. 511 A.D.

Dhlongolo *v.* Dhlongolo, 1952 N.A.C. 226 (N.E.).

Gumede *v.* Nxumalo, 1953 N.A.C. 191 (N.E.).

Legislation referred to: Government Notice No. 2885 of 1951, as amended, sections 9 (3) and 10 (1) (*c*).

Appeal from the Court of the Native Commissioner, Ngqeleni.

Balk (President):—

This is an appeal from the judgment of a Native Commissioner's Court refusing, with costs, an application for condonation of the late noting of an appeal against the judgment of a Chief's Court.

In terms of section 9 (3) of the Regulations for Chiefs' and Headmen's Civil Courts, published under Government Notice No. 2885 of 1951, as amended, the Native Commissioner's Court had a discretion to grant the application on good cause shown so that the appeal to this Court resolves itself to the question whether the Court *a quo*, upon facts properly found, exercised a judicial discretion in refusing the application; for it is not open to this Court to interfere unless it is satisfied that the discretion was not exercised judicially, see Goodrich *v.* Botha & Ors., 1954 (2) S.A. 540 (A.D.), at page 546.

It emerges from the affidavit filed in support of the application, that the judgment of the Chief's Court was delivered on the 27th March, 1957, and that, on the 29th *idem*, the applicant fully instructed his attorney, through a member of the attorney's staff in the absence of the attorney from his office, to note an appeal from the judgment. It was not until the 20th June, 1957, when the applicant interviewed his attorney as a result of his cattle having been attached in pursuance of the judgment, that he discovered that the appeal therefrom had not been noted timeously by his attorney, i.e., that it had not been noted by the latter until the 3rd June, 1957. The application for condonation was made on the same day, viz., 20th June, 1957.

Beyond citing certain Native Appeal Court decisions on which he apparently relied and stating that the instant case was not one in which the indulgence sought should be granted, the Native Commissioner gives no reasons for his refusal of the application. As pointed out in argument on behalf of the appellant, the cases cited by the Native Commissioner are not in point and, in my view, it is quite clear that the Native Commissioner, in refusing the application, did not exercise a judicial discretion. That this is the position will be apparent from what follows.

The judgment in Rose and Ano. *v.* Alpha Secretaries, Limited, 1947 (4) S.A. 511 (A.D.), at page 518, indicates that where the delay has been due to an attorney's negligence, such negligence by itself is not sufficient to debar his client from relief of the nature here in question. There the Court considered that it was undesirable to frame a comprehensive test as to the effect of an attorney's negligence on his client's prospect of obtaining such relief or to lay down that a certain degree of negligence will debar the client and another degree will not; and it came to the conclusion that it was preferable to say that the Court should consider all the circumstances of the particular case in deciding whether the applicant has shown something which justifies a Court in holding, in the exercise of its wide judicial discretion, that sufficient cause for granting relief has been shown, see page 519 of the report of that judgment.

In the instant case there can, to my mind, be no doubt that such cause has been shown; for, as is clear from the supporting affidavit and the *viva voce* evidence given at the hearing of the application before the Court *a quo*, the applicant instructed his attorney in good time to note the appeal from the judgment of the Chief's Court and it was through no fault on the part of the applicant but entirely due to the negligence of his attorney that that appeal was not timeously noted. It is equally clear from the supporting affidavit and the *viva voce* evidence that the applicant intended all along that that appeal should be prosecuted. In argument before this Court it was contended on behalf of the respondent that the applicant had not taken the necessary steps to ensure that the appeal was noted timeously in that he had not, after having left instructions on the 29th March, 1957, for the noting of the appeal, interviewed his attorney until the 20th June, 1957. But, to my mind, this contention is unsound as the applicant was entitled to assume that his instructions to his attorney for the noting of the appeal would be carried out timeously without his reminding him thereanent before the period prescribed for the noting of the appeal, i.e., forty days from the date of the judgment, had expired. In the circumstances it would be most inequitable that the applicant should be made to suffer for his attorney's negligence to the extent of being debarred from proceeding with his appeal in the Native Commissioner's Court.

It is unnecessary to consider the merits of the proposed appeal to that Court as this issue has not been relied upon by either side, see de Villiers *v.* de Villiers, 1947 (1) S.A. 635 (A.D.), at page 637.

A further point calls for mention, *viz.*, the absence of the Chief's reasons for judgment. It is advisable that the Chief's reasons should be obtained before the hearing of an application for condonation of the late noting of an appeal from his judgment is proceeded within the Native Commissioner's Court as the merits of the proposed appeal may well be relied upon and the reasons may then be of importance. In any event the Chief's reasons should be before the Native Commissioner's Court when it hears an appeal from his judgment, unless, of course, they are unobtainable, see Dhlongolo *v.* Dhlongolo, 1952, N.A.C. 226 (N.E.), at pages 228 and 229, and Gumede *v.* Nxumalo, 1953 N.A.C. 191 (N.E.), at page 192.

In the result the appeal to this Court falls to be allowed, with costs, and the judgment of the Court *a quo* altered to read: "The application for condonation of the late noting of the appeal from the judgment of the Chief's Court is granted. The applicant is to pay the costs of the application".

As regards the prosecution of the appeal from the judgment of the Chief's Court, the clerk of the Native Commissioner's Court should issue the notice for the hearing thereof in terms of section 10 (1) (*c*) of the Regulations referred to above.

The Registrar is directed to forward a copy of this judgment to the Law Society concerned for such action as it may deem fit in regard to the attorney's negligence in respect of which there is no explanation.

SOUTHERN NATIVE APPEAL COURT.

MZIMA *v.* **BUHLUNGU.**

N.A.C. CASE No. 43 OF 1957.

UMTATA: 21st February, 1958. Before Balk, President, Warner and Bates, Members of the Court.

PRACTICE AND PROCEDURE.

Assessment of damages—remitttal of case by Appeal Court to Native Commissioner for—no purpose served by remitting if Appeal Court in as good a position as Court a quo.

Summary.—Plaintiff after an unsuccessful action for damages in the Native Commissioner's Court, succeeded in his appeal to this Court. The appeal having succeeded on the merits, the question of assessment of the damages to be awarded to appellant arose. It was submitted that the case should be remitted to the Native Commissioner for assessment of the amount of damages.

Held.—That as this Court is in as good a position as the Native Commissioner to assess the damages from the evidence, no purpose would be served in remitting the case to him.

Cases referred to.—Matuli *v.* Billy, 1 N.A.C. (N.E.D.) 324.
Appeal from the Court of the Native Commissioner, Mqanduli.
Balk (President:—

This is an appeal from the judgment of a Native Commissioner's Court for defendant (now respondent), with costs, in an action in which he was sued by the plaintiff (present appellant) for damages in the sum of £80 far assault.

The defendant in his plea denied the alleged assault and averred that the plaintiff's injuries were sustained in a fight provoked by the latter.

The appeal is brought on the ground that the judgment is against the weight of the evidence.

There are inconsistencies and discrepancies both in the evidence for the plaintiff and that for the defendant; but it seems to me that the appeal turns on the probability arising from the injuries sustained by the plaintiff to his upper lip and teeth, as the other probabilities cannot be regarded as decisive. The plaintiff's version is that the defendant came up to him at a beer drink and, as he (plaintiff) turned, struck him on his mouth with his stick whereupon he fell and the defendant then struck him further blows which landed behind his right ear, on the back of his neck and on his shoulders. According to the defendant's testimony, the plaintiff swore at him and went for his stick. They met and fought. He struck the plaintiff horizontally on the mouth with the point of his stick whilst facing him. The plaintiff fell and he thereupon struck him twice on the back between the shoulders. It is common cause that there had been trouble between the parties prior to the beer drink.

The Assistant Native Commissioner came to the conclusion that as the scar running from the right corner of the plaintiff's mouth to his left nostril was a thin one, it was more consistent with a cut or tear and that the defendant's version was, therefore, the more probable. But the Native Commissioner lost sight of the fact that, according to the plaintiff's testimony, which was not controverted on this point, the blow by the defendant on his mouth also broke four of his teeth. It is hardly conceivable

that a blow with the point of a stick delivered as described by the defendant, which cut or tore the upper lip so as to leave a thin scar, would at the same time break four teeth, whereas a full blow on the mouth, as alleged by the plaintiff, would do so; and there is nothing to show that the wound on the upper lip caused by such a blow could not, on healing, leave a thin scar. It follows that the overriding probability favours the plaintiff's version and that the appeal succeeds.

It was submitted in this Court that in the event of the appeal succeeding, the case should be remitted to the Native Commissioner to assess the amount of damages. But, as this Court is in as good a position as the Native Commissioner to assess the damages from the evidence, no purpose would be served in remitting the case to him, see Matuli *v.* Billy 1 N.A.C. (N.E.D.) 324; and on the basis adopted in that case, I consider that £20 would be a fair award to the plaintiff in the instant case as damages.

In the result the appeal should be allowed with costs, and the judgment of the Court *a quo* altered to read:—

"For plaintiff in the sum of £20, with costs."

For Appellant: A. L. Wilkins, Mqanduli.

For Respondent: R. Knopf, Umtata.

SOUTHERN NATIVE APPEAL COURT.

MAYENTLE *v.* JONAS.

N.A.C. CASE No. 45 OF 1957.

KING WILLIAM'S TOWN: 13th March, 1958. Before Balk, President, Warner and Pike, Members of the Court.

PRACTICE AND PROCEDURE.

Appeal—Point not covered by grounds of appeal—Defective summons—Point not taken mero motu*—Absence of prejudice to defendant—Action under section* three, *Act* 1895 *(C)—Not criminal trial—Onus of proof in paternity actions where defendant admits intercourse.*

Summary: Plaintiff obtained an order against defendant for payment of maintenance for his illegitimate child by her, under section *three* of the Deserted Wives and Children Protection Act, No. 7 of 1895 (C).

The defendant appealed on the ground, *inter alia*, that as the case was of a criminal nature, the Assistant Native Commissioner erred in deciding the issue on the balance of probabilities (the defence in the Court below having been based on a denial of paternity).

Counsel for appellant sought leave at the hearing to take a point not covered by the grounds of appeal, viz., that the summons had been signed by the Clerk of the Court and not by the Native Commissioner as required by section *two* of the Cape Act, and that the summons was, therefore, fatally defective.

Held: The appellant is, in terms of Rule 16 of the Native Appeal Courts' Rules, limited to the grounds stated in his notice of appeal, in the absence of an application under Rule 14 for leave to bring additional grounds.

Held further: That it is not incumbent upon this Court *mero motu* to take the new point raised by Counsel as it has not been shown that the defect in the summons complained of resulted in substantial prejudice to the defendant.

Held further: That there is no legal requirement that corroboration of the complainant's evidence must be present.

Held further: That, in order for the defendant to escape liability for the maintenance of the child of a woman with whom he admits having had intercourse, it is incumbent upon him to prove that it was physically impossible for him to have been the father of that child.

Cases referred to:

Rex *v.* Tucker, 1953 (3) S.A. 150.

Rex *v.* Baker, 1941 E.D.L.D. 64.

Rex *v.* Safeda, 1950 (2) S.A. 55.

De Souza *v.* du Preez, 1952 (2) S.A. 379.

Machaka *v.* Seripe, 1956 N.A.C. 207.

Mda *v.* Gcanga, 69 P.H. R. 24.

Legislation referred to:

Sections *two* and *three* of Act No. 7 of 1895 (Cape).

Sections *ten bis* and *fifteen* of Act No. 38 of 1927, as amended.

Rules 14 and 16, Government Notice No. 2887 of 1951.

Appeal from the Court of the Native Commissioner, Port Elizabeth.

Balk (President):—

This is an appeal from an Assistant Native Commissioner's order made under section *three* of the Deserted Wives and Children Protection Act, No. 7 of 1895 (Cape), read with section *ten bis* of the Native Administration Act, 1927, as amended, and requiring the defendant (present appellant) to pay £2 per month as maintenance for his illegitimate child by the complainant (now respondent).

The appeal is brought on the following grounds:—

"1. That the Assistant Native Commissioner erred in holding that this matter is a Civil case and not a Criminal case, and consequently has decided the case in favour of applicant on the balance of probabilities, whereas in fact the case being of a Criminal nature he should have decided the issues beyond a reasonable doubt, in which event the matter should have been decided in favour of respondent.

2. That in any event, alternatively, in deciding the issue on the balance of probabilities the Assistant Native Commissioner erred in accepting the evidence of Applicant and witness Magaba, who is a self-expressed biased witness in favour of the applicant, whereas he should have accepted the evidence of the respondent corroborated as it was by his wife.

3. That the Assistant Native Commissioner erred that Respondent's evidence was a bare denial and that his wife's demeanour was very weak, whereas in fact he did not take into account the very weak demeanour of applicant and her witness."

At the outset of his argument, Counsel for appellant sought leave to take a point not covered by the grounds of appeal, viz., that the Native Commissioner's order was null and void in that the summons had been signed by the clerk of the Native Commissioner's Court instead of by the Native Commissioner himself as required by section *two* of the Cape Act. In support of his

submission that the leave should be granted, he cited Rex *v.* Tucker, 1953 (3) S.A. 150 (A.D.), and argued on the analogy thereof that this Court should not allow a void order to stand in the same way as in a criminal case an appellate tribunal would not allow a conviction to stand on an indictment which disclosed no offence. In the first place the appellant is, in terms of Rule 16 of the rules of this Court, limited to the grounds stated in his notice of appeal in the absence of an application under Rule 14 of those rules for leave to bring additional grounds; and, secondly, it is not for this Court to take the new point *mero motu*—Counsel's arguments in reality is that it is its duty to do so—since such intervention is in any event not called for here, in that it has not been shown that the defect in the summons resulted in substantial prejudice to the defendant and the proviso to section 15 of the Native Administration Act, 1927, lays down that in the absence of substantial prejudice a judgment shall not be set aside or reversed on appeal owing to a defect of the nature in question.

Counsel for appellant abandoned the first ground of appeal and properly so as it is clear from the language of the relevant provisions of the Cape Act, which are substantially the same as those of the corresponding legislation in the other Provinces, that the enquiry before the judicial officer is a civil and not a criminal proceeding, see Rex *v.* Baker, 1941 E.D.L.D. 64, at page 65; Rex v. Safeda, 1950 (2) S.A. 55 (N.P.D.), at page 60; and de Souza *v.* du Preez, 1952 (2) S.A. 379 (T.P.D.), at page 381. Consequently it was not necessary to prove the case against the defendant beyond a reasonable doubt which is the standard of proof peculiar to criminal cases. The standard that was required in these proceedings will be discussed later in this judgment.

Counsel for appellant took a further point, viz., that the complainant's evidence had not been corroborated as required by law. But apart from the fact that this point is also not covered by the grounds of appeal, there was in the instant case no legal requirement that such corroboration must be present. That this is so will be apparent from what is said when the standard of proof here required is dealt with.

Turning to the remaining grounds of appeal, i.e., the second and third grounds, Counsel for appellant conceded that, as is implicit therein, the Native Commissioner's order was being attacked solely on the paternity issue so that it is unnecessary for this Court to consider whether the other requirements for the making of such an order which are specified in Machaka *v.* Seripe, 1956, N.A.C. 207 (C), at pages 208 and 209, were satisfied. Counsel contended that the onus of proving paternity rested on the complainant and that on this basis the correct judgment on the evidence was one of absolution from the instance. The defendant, however, admitted in the course of his evidence that he had sexual intercourse with the complainant. It is true that he stated that he had ceased having intercourse with her at about the time when she conceived, but even so to escape liability his admission placed upon him the onus of proving that it was physically impossible for him to be the father of her child, see Mda *v.* Gcanga, 69 P.H., R. 24 (S.N.A.C.). It is manifest from the evidence for the defendant that he did not discharge this onus. That this is so is also apparent from Counsel's submission that the correct judgment was one of absolution from the instance on the basis that the onus of proof rested on the complainant.

In the result the appeal fails and should be dismissed. No order as to costs of appeal is called for as the respondent was in default.

For Appellant: Adv. M. Seligson of Port Elizabeth.

For Respondent: No appearance.

SOUTHERN NATIVE APPEAL COURT.

GCUKUMANI *v.* **N'TSHEKISA.**

N.A.C. CASE No. 48 OF 1957.

KING WILLIAM'S TOWN: 14th March, 1958. Before Balk, President, Warner and Pike, Members of the Court.

PRACTICE AND PROCEDURE.

Sufficiency of evidence—Corroboration of evidence of guilty wife concerning adultery—Use of term "married" to denote existence of customary union between parties.

NATIVE CUSTOM.

Quantum of damages for adultery without pregnancy.

Summary: Plaintiff, having sued defendant for five head of cattle or their value as damages for his adultery with the former's wife, as a result of which she had given birth to a child, was awarded damages of three head of cattle or their value. Defendant, who had denied the adultery, appealed on various grounds, *inter alia,* that plaintiff, having alleged a marriage in his summons and failed to prove it, the Native Commissioner should have dismissed his claim. The remaining grounds of appeal and details are immaterial for the purpose of this report.

Held: That, in an action for damages for adultery, no corroboration of a wife's evidence of her adultery with defendant is required if there is otherwise a sufficient balance of probabilities in the plaintiff's favour.

Held further: That the accepted quantum of damages for adultery which is not followed by pregnancy is three head of cattle, as against five head when it is so followed, among the tribes to which these scales apply.

Held further: That the defendant is not substantially prejudiced by an averment in the summons that plaintiff is married to his wife, when the evidence shows that his union with her was a customary one.

Cases referred to:

Qata *v.* Nyubata & Another, 1 N.A.C. (S.D.) 290.

Gates *v.* Gates, 1939 A.D. 150.

Goodrich *v.* Goodrich, 1946 A.D. 390.

Zibaya *v.* Maguga, 1947 N.A.C. (C. & O.) 7.

Appeal from the Court of the Native Commissioner, Uitenhage.

Balk (President):—

Good cause having been shown the late noting of the appeal was condoned by this Court.

The appeal is from the judgment of a Native Commissioner's Court for plaintiff (now respondent) for three head of cattle or their value, £24, in an action in which he claimed five head of cattle or their value, £50, from the defendant (present appellant) as damages for adultery with his wife, Sophie.

In his plea the defendant denied the alleged adultery and also put the plaintiff to the proof of his allegations that he was married to Sophie and that she had given birth to a child.

The appeal is brought on the following grounds:—

"1. That he erred in finding that there was proof that defendant had intercourse with plaintiff's wife.

2. That he erred in finding that defendant was the father of the child born to plaintiff's wife on 12th July, 1955.

3. That, plaintiff having alleged a marriage in his summons and failed to prove it, the Native Commissioner should have dismissed plaintiff's claim and he erred in law in holding that 'it is sufficient in a case of this nature in which both parties are Natives to prove that some form of marital relationship which is recognised by law exists between plaintiff and his wife, and that defendant was not prejudiced by the misleading allegation in the summons'.

4. That the Native Commissioner erred in holding that there was corroboration of the evidence of plaintiff's wife.

5. That he erred in finding that at no time did defendant deny intercourse."

It is convenient to deal in the first place with the fourth ground of appeal, viz., that there was no corroboration of the evidence of the plaintiff's wife.

In Qata *v.* Nyubata & Another, 1 N.A.C. (S.D.) 290 and in a number of other decisions of the Native Appeal Courts, it is stated that in order to succeed in a claim for damages for adultery, it is essential that there should be corroboration of the wife's evidence of the alleged adultery where such adultery is denied on oath by the defendant. Whilst this statement as a rule of law is true in seduction cases, it seems clear, with respect, that it does not obtain in adultery cases. That this is so is apparent from the judgments in Gates *v.* Gates, 1939 A.D. 150, at pages 154 and 155, and Goodrich *v.* Goodrich, 1946 A.D. 390, at pages 395 and 396, where it is laid down that there is not any variation in the standard of proof required in adultery cases and that the ordinary rule in civil cases, viz., proof on a preponderance of probability, applies also in adultery cases with this reservation that in considering the question whether there is a balance or sufficient balance of probabilities that the alleged adultery has in fact taken place, the general improbability of such an occurrence dictated by moral and legal sanctions against immoral and criminal conduct, is a factor to be weighed; and it is implicit in the second paragraph on page 155 of the report of the judgment in Gates' case (*supra*) that the law does not in adultery cases require a minimum volume of testimony so that no corroboration of the wife's evidence of adultery is required if there is otherwise a sufficient balance of probabilities in the plaintiff's favour. Of course it may be that there is not a sufficient balance of probabilities without corroboration, but in that case corroboration is required to bring about such a balance and not as a rule of law in addition thereto.

Proceeding to a consideration of the first ground of appeal on this basis, the Native Commissioner gives cogent reasons for preferring the testimony for the plaintiff to that of the defendant. He states that the plaintiff, his wife and his remaining witness, Harry Daniel, gave their evidence in a very satisfactory manner and that in particular Daniel gave the impression of a genuinely honest and sincere witness. That Daniel was a reliable witness is borne out by the fact that he was not cross-examined. Then there is the false denial by the defendant of the money transactions he had with the plaintiff and the latter's wife as deposed to by them, and the defendant's failure to deny the alleged adultery when confronted therewith, as established by

Daniel's evidence. There can, to my mind, be no doubt that these factors bring about a sufficient balance of probabilities in the plaintiff's favour in so far as the alleged adultery is concerned. It is unnecessary to consider whether at any time prior to the hearing of the case in the Court below the defendant denied the alleged adultery, as the finding that he failed to do so when confronted therewith by Daniel suffices for the purposes of this case. It is also unnecessary to consider the paternity issue in this case as the Court *a quo* awarded the plaintiff three head of cattle only on a claim of five head and three head constitute the accepted quantum of damages for adultery which is not followed by pregnancy as against five head when it is, amongst the tribes to which these scales apply, see Zibaya *v.* Maguga, 1947 N.A.C. (C. & O.) 7. It follows that the first, second, fourth and fifth grounds of appeal fail.

Turning to the remaining ground of appeal, viz., the third ground, whilst the plaintiff stated in his summons that he was married to his wife and whilst, on a proper construction, the word "married" connotes a civil union, yet this word is often loosely used to denote a customary union and the fact that cattle or their equivalent in money were claimed as damages in the instant case and not money only was an indication that by "married" a customary union was intended. However that may be, there is nothing to indicate that the defendant was substantially prejudiced by the plaintiff's averment in the summons that he was married to his wife, whereas the evidence adduced by him showed that his union with her was a customary one, so that, having regard to the proviso to section *fifteen* of the Native Administration Act, 1927, this ground of appeal also fails.

In the result the appeal falls to be dismissed, with costs.

For Appellant: B. Barnes of King William's Town.

For Respondent: E. M. Heathcote of King William's Town.

SOUTHERN NATIVE APPEAL COURT.

KESWA v. WILLIE.

N.A.C. CASE No. 50 OF 1957.

UMTATA: 21st February, 1958. Before Balk, President, Warner and Bates, Members of the Court.

PRACTICE AND PROCEDURE.

Onus of proof as fixed by pleadings does not shift.—Delay in bringing action militates against success when no convincing explanation offered.

Summary: Plaintiff, the heir to his late father, claimed that the latter had advanced the equivalent of nine head of cattle for defendant's wife's dowry, conditional upon its being refunded from the dowry of the defendant's first daughter; that the said daughter had been given in marriage and that the defendant refused to repay the stock.

The defendant denied the transaction and that any cattle were payable to plaintiff, while admitting that he had given his daughter in marriage.

Plaintiff succeeded before the Chief, and again successfully defended an appeal to the Native Commissioner's Court. An appeal to this Court was noted by defendant. In his reasons for judgment the Additional Native Commissioner analysed the evidence, on the assumption that the onus of proof rested on plaintiff and found that on this basis a judgment for neither party was warranted. He, however, came to the conclusion that the onus of proof had shifted to defendant and on that basis found for the plaintiff, who had delayed six years in bringing the action and offered the explanation therefor that he was in no hurry.

Held: That the true onus of proof, i.e., the onus of proof as fixed by the pleadings can never shift.

Held further: That long delay by a person in bringing an action without convincing explanation therefor, is a factor militating against the success of his case.

Cases reffered to:

Pillay *v.* Krishna & Another, 1946 A.D. 946.
Ngombane *v.* Mankayi, 1956 N.A.C. 115.

Appeal from the Court of the Native Commissioner, Umtata.

Balk, H. (President):—

This is an appeal from the judgment of a Native Commissioner's Court dismissing, with costs, an appeal against the judgment of a Chief's Court, and confirming the Chief's finding for the plaintiff (present respondent) for nine head of cattle or their value £90.

The pleadings, as restated in the Native Commissioner's Court in terms of section *twelve* of the Regulations for Chiefs' and Headmen's Civil Courts, published under Government Notice No. 2885 of 1951, as amended, read as follows:—

STATEMENT OF CLAIM.

" 1. The parties are Natives.

2. Plaintiff's father paid as dowry for defendant's wife, 7 head of cattle, 1 dark filly and 10 sheep representing 9 head of cattle in all, it being a condition that these cattle would be refunded out of the dowry of the first daughter of defendant.

3. Plaintiff is the heir to his late father.

4. Defendant gave his first daughter Nongeteni in marriage and received 11 head of cattle as dowry, but refuses to hand to plaintiff the 9 head of cattle referred to or their value £90.

5. Plaintiff obtained judgment in the Chief's Court for 9 head of cattle or their value £90 and prays that the appeal be dismissed and that the judgment of the Chief's Court be reaffirmed with costs."

STATEMENT OF DEFENCE.

" 1. Defendant admits paragraph one of plaintiff's particulars of claim.

2. Defendant denies that plaintiff's father paid any dowry for him, the Defendant, and has no knowledge of any condition that the defendant would repay any cattle to plaintiff's father on the marriage of his daughter.

3. Defendant has no knowledge of paragraph three of plaintiff's particulars of claim and puts him to the proof thereof.

4. Defendant admits having given his daughter in marriage and admits his refusal to pay any dowry to the plaintiff.

5. Defendant admits paragraph five of plaintiff's particulars of claim but by reason of the foregoing denies he is liable to the plaintiff and puts him to the proof of his allegations of any agreement between defendant and plaintiff's father as set out."

The appeal to this Court is brought on the following grounds:—

"(*a*) That the Judgment is against the weight of evidence and the facts proved in the case and against the probabilities.

(*b*) That the Judgment should have been for the defendant or should have been a judgment of absolution from the instance by virtue of the fact that—

(1) The plaintiff did not adduce sufficient evidence in support of his claim more particularly as the Assistant Native Commissioner, in his judgment made no findings at all in respect of the credibility of defendant or his witness;

(2) The plaintiff failed to discharge the onus upon him and that the Assistant Native Commissioner erred in casting the onus on defendant as stated in his verbal judgment."

The Additional Native Commissioner *a quo* analysed the evidence and, on the assumption that the onus of proof rested on the plaintiff, found that a judgment for neither party was warranted. He came to the conclusion, however, that the onus of proof had shifted from the plaintiff to the defendant, and on that basis found for the plaintiff (then also respondent).

But the true onus of proof, i.e. the onus of proof as fixed by the pleadings, in the instant case by the pleadings as restated in the Native Commissioner's Court, can never shift and was here clearly on the plaintiff, see Pillay *v.* Krishna and Another, 1946. A.D. 946, at pages 951 to 954, so that the Native Commissioner erred in holding that the onus had shifted from the plaintiff to the defendant.

Proceeding to a consideration of the evidence, it was contended in this Court on behalf of the respondent that, in the light of the plaintiff's explanation that he had merely sat and listened and not taken any part in the family meeting at which he alleged it was agreed that the defendant would repay the dowry advanced for his wife by the plaintiff's late father, the Native Commissioner wrongly held that it was contrary to custom for him to have attended that meeting in view of his youth. It was further contended in this Court on behalf of the respondent that the Native Commissioner also erred in holding that it was unusual for a relation on the maternal side, such as the plaintiff's witness, Palazeleni Tsota, to have attended the family meeting in question. Both these contentions are sound but it seems to me that, allowing for the erroneous findings by the Native Commissioner in these respects, the evidence still does not warrant a finding for either side. That this is the position will be apparent from what follows. According to the defendant's witness, November Sigide, Palazeleni went to Cape Town with him before the defendant contracted his customary union and they remained working there for a considerable time. The defendant testified that Palazeleni was not at home when he (defendant) contracted his customary union. Palazeleni denied that he had ever been to Cape Town. The Native Commissioner does not comment adversely on November as a witness. It is true that the defendant did not call November at the hearing at the Chief's Court, but then if, as alleged by the defendant, Palazeleni was not at home at the time of his (defendant's) customary union, the latter would not have expected him to give evidence at the Chief's Court, and would, therefore,

not have arranged for November to be there. Admittedly, the Chief states in his reasons for judgment that the defendant was asked whether he had any witnesses and that he replied in the negative. But, according to the defendant, he was asked whether he had any witnesses present at the trial. Admittedly, also, there are inconsistencies in November's evidence, but then the same applies to Palazeleni's evidence. Consequently it is not possible to decide whether Palazeleni or November is telling the truth. This leaves only the plaintiff's testimony that the dowry cattle concerned were advanced by his late father and were repayable by the defendant against the latter's testimony that stock belonging to his house and bearing his earmark were used to pay that dowry. The adverse inference drawn by the Native Commissioner against the defendant from his allegation that the plaintiff's late father had donated three of the dowry cattle paid for his (defendant's) sister and due to the plaintiff's late father to repay an advance of dowry for the defendant's mother, viz., that such a gift is not customary is of little moment as it emerges from the evidence for the plaintiff that the defendant contracted his customary union prior to that entered into by his sister, so that, as is consistent with the defendant's testimony, the three cattle could not have formed part of the dowry payment for the defendant's wife and, therefore, have no direct bearing on the issue in the instant case.

The plaintiff delayed six years in bringing the instant action. His only explanation for this long delay was that he was in no hurry, which is hardly a convincing reason. As pointed out in Ngombane *v.* Mankayi, 1956, N.A.C. 115 (S), at page 118, long delay by a person in bringing an action without a convincing explanation therefor, is a factor militating against the success of his case. In these circumstances there is no justification for holding that either party established his case and as, for the reasons given above, the onus of proof on the pleadings rested on the plaintiff, the correct judgment is one of absolution from the instance.

The appeal to this Court should accordingly be allowed, with costs, and the judgment of the Court *a quo* altered to read as follows:—

> "The appeal is allowed, with costs, and the judgment of the Chief's Court is altered to one of absolution from the instance, with costs."

For Appellant: H. White of Umtata.

For Respondent: G. Hughes of Umtata.

SOUTHERN NATIVE APPEAL COURT.

NGCOBONDWANA *v.* GAGELA.

N.A.C. CASE No. 52 OF 1957.

UMTATA: 21st February, 1958. Before Balk, President, Warner and Bates, Members of the Court.

EVIDENCE.

Presumption of spinster's virginity—Seduction—Onus of proof of non-responsibility for pregnancy on seducer—Recruiter's records hearsay—Labour "passport" not a public document

NATIVE LAW AND CUSTOM.

"Fine" for seduction unaccompanied by pregnancy in Tembu custom—"Ntlonze" beast—An acknowledgment of liability for "fine".

Summary: Plaintiff sued defendant for three head of cattle or their value, being the balance of damages of five head of cattle for the seduction and pregnancy of the former's daughter for which he alleged the defendant was responsible.

Defendant denied the seduction and his responsibility for the girl's pregnancy and that he had ever admitted liability therefor. The remaining facts are immaterial to this report.

Held: That, as a spinster is presumed to be a virgin, a finding that intercourse between the defendant and the spinster has taken place carries with it liability by the former for damages for seduction, unless that presumption is rebutted.

Held further: That under Tembu law and custom a "fine" of one head of cattle is payable for seduction unaccompanied by pregnancy.

Held further: That the testimony of an official of a Native labour recruiting corporation that, according to his records, a person went forward under contract to a mine, is obviously hearsay and therefore inadmissible in proof of the alleged fact.

Held further: That a labour "passport" is not a public document as it is clear from the endorsement printed thereon in red letters that it need only be produced to an authorised officer and the public had no right of access thereto, and it is, therefore, inadmissible in evidence as such.

Cases referred to:

Sgatya & Ano. *v.* Mbane, 1956, N.A.C. 48.
Ngquzu *v.* Sixishe & Ano., 4 N.A.C. 324.
Molesana *v.* Leqela, 2 N.A.C. 189.
Bacela *v.* Mbontsi, 1956, N.A.C. 61.
R. *v.* Amod & Co. (Pty.), Ltd. & Ano., 1947 (3) S.A. 32.
Boon *v.* Vaughan & Co., Ltd., 1919, T.P.D. 77.
Ntloko *v.* Tseku, 3 N.A.C. 257.
Manakaza *v.* Mhaga, 1 N.A.C. (S.D.) 213.
Hassim *v.* Naik, 1952 (3) S.A. 331.

Appeal from the Court of the Native Commissioner, Cala.

Balk (President):—

The plaintiff (present appellant) sued the defendant (now respondent) in a Native Commissioner's Court for three head of cattle or their value, £30, in respect of the balance of damages due for his having seduced and rendered his daughter, Kulukazi, pregnant.

In the particulars of his claim the plaintiff averred, *inter alia,* that the total damages suffered by him amounted to five head of cattle or their value, £50, but that upon the customary report being made, the defendant had, through his agent, Edward Gagela, admitted liability and paid two head of cattle on account of the damages, leaving a balance of three head which he had failed to pay notwithstanding demand.

The defendant in his plea denied that he had seduced and rendered Kulukazi pregnant, as also that he had admitted liability therefor. In addition he denied that he had authorised anyone to make any payment on account of the damages on his behalf and counterclaimed for the two cattle or their value, £28.

The Native Commissioner entered judgment for the defendant as prayed, with costs, on the claim in convention and for the plaintiff in reconvention as prayed, with costs, on the counterclaim.

The appeal is against the whole of the judgment and is brought on the following grounds:—

"1. That the judgments in convention and re-convention are against the weight of evidence.

2. That on the claim in convention the Court of first instance erred in finding that the plaintiff failed to establish, on a balance of probabilities, that the defendant seduced and rendered pregnant plaintiff's daughter.

3. That on the claim in re-convention the Court of first instance erred in holding that the defendant had established on a balance of probabilities that the two head of cattle had been paid over to the plaintiff without his knowledge or authority or without any admission to either Edward Gagela or Fodi Gagela of his liability for the said seduction and pregnancy—and that defendant discharged the heavy onus of proving that he was not and coud not have been the cause of the pregnancy of the plaintiff's said daughter.

4. That the Court of first instance erred in fixing the value of the two cattle at £28 in view of the accepted value of £10 per head in all seduction and pregnancy and dowry cases."

I will refer to the plaintiff in convention as plaintiff throughout, i.e. when dealing with both claim and counterclaim, and similarly to the defendant in convention as defendant.

Mr. Muggleston, who appeared on behalf of the respondent in this Court, stated that he had no grounds for attacking the Native Commissioner's finding that the defendant had sexual intercourse with Kulukazi, that he, therefore, accepted that finding and would, in contesting the appeal, confine himself to the question of damages based on the pregnancy. In the circumstances it is unnecessary for this Court to consider the correctness of that finding. Here it should be mentioned that the Native Commissioner's finding as regards the pregnancy is that the defendant was not responsible therefor.

The Native Commissioner's finding of intercourse carries certain consequences in its wake. Firstly, the defendant is liable for damages for seduction in that—

(*a*) Kulukazi, being a spinster, as is implicit in the evidence, is presumed to have been a virgin at the time when the defendant had intercourse with her, see Sgatya & Another *v.* Mbane, 1956, N.A.C. 48 (S), at pages 51 and 52;

(*b*) this presumption was not in any way challenged by the defendant; and

(*c*) under Tembu law and custom, which applies in the instant case, a "fine" of one beast is payable for seduction unaccompanied by pregnancy, see Ngquzu *v.* Sixishe and Another, 4 N.A.C. 324 and Molisana *v.* Leqela, 2 N.A.C. 189, at page 190.

Secondly, in order to escape liability for damages for Kulukazi's pregnancy, the defendant had to prove that he did not render her pregnant, unless she was found to be unworthy of credence, see Bacela *v.* Mbontsi, 1956, N.A.C. 61 (S) at page 68.

Accepting the defendant's testimony that he left the Xalanga District on the 1st February, 1956, to take up employment in the Orange Free State and that he remained there until December, 1956, as this aspect does not appear to have been challenged in cross-examination, it is still not impossible that the defendant rendered Kulukazi pregnant in January, 1956, regard being had

to the date of the birth of her child and the possible period of gestation. Moreover, the defendant's false denials in connection with the letter (Exhibit "C") which are referred to by the Native Commissioner in his reasons for judgment, detract from his credibility. However, the Native Commissioner found that Kulukazi was unworthy of credence and this finding cannot be gainsaid in view of the blatant inconsistencies in her testimony. In the circumstances the evidence does not warrant a finding for either side. That being so, and as the letter (Exhibit "C") suggests that the defendant wrote an earlier letter in connection with Kulukazi's accusation that he was responsible for her pregnancy, which was not produced and may be probative of the plaintiff's allegation that the defendant therein admitted responsibility for Kulukazi's condition, the correct judgment on the claim in convention is one of absolution from the instance in so far as damages for pregnancy are concerned; and, for the reasons given above, for one beast or its value, £10, in respect of damages for the seduction.

Turning to the counterclaim, the Native Commissioner's finding that, prior to the birth of Kulukazi's child, the defendant had admitted liability by letter for her pregnancy, and had authorised the payment of two head of cattle on account of the customary "fine" of five head for her seduction and pregnancy is not supported by the evidence as that letter was not produced nor is there any proof that proper search was made therefor and that it could not be found, or that it was otherwise unobtainable so as to allow of secondary evidence of its contents, see Rex *v.* Amod & Co. (Pty.), Ltd. & Another, 1947 (3) S.A. 32 (A.D.), at page 40, and Boon *v.* Vaughan & Co., Ltd., 1919, T.P.D. 77. It is as well to add that the only evidence of the contents of the earlier letter is hearsay and, therefore, in any event inadmissible. It is true that the evidence of the defendant's witness, Ford Gagela, anent the payment of the two head of cattle is so improbable on the face of it, bearing custom in mind, as to be unworthy of credence; for Ford would have the Court believe that he and the late Edward Gagela paid the two cattle to the plaintiff to stop him from suing the defendant for damages for Kulukazi's seduction and pregnancy even though they did not know whether or not the defendant would deny liability therefor; and thereafter Ford stated that one of the cattle paid was intended as an *ntlonze* beast, i.e. as an acknowledgment that the defendant owed the "fine" of five head of cattle, see Ntloko *v.* Tseku, 3 N.A.C. 257, at page 258, and thus contradicted himself. But these unsatisfactory features in Ford's evidence, whilst justifying its rejection, are not in themselves probative of the authorisation by the defendant of the payment of the two cattle. That being so, and as the defendant's evidence that the two cattle are his property and are worth £28 has not been controverted, the judgment of the Court *a quo* for defendant as prayed, with costs, although founded on an application of wrong principles, is correct.

Several further points call for mention.

Firstly, the Native Commissioner followed the dictum in Manakaza *v.* Mhaga, 1 N.A.C. (S.D.) 213, as regards the incidence of the onus of proof, overlooking the fact that that dictum was overruled in Bacela's case (*supra*).

Secondly, the testimony of the defendant's witness, A. J. Pringle, the official in charge of the Native Recruiting Corporation at Cala, that, according to his records, the defendant went forward under contract to the Western Holding Mines in the Orange Free State on the 1st February, 1956, is obviously hearsay as it is manifest from his evidence that he did not see the defendant leave for the mines on that date and that in testifying thereto he relied solely on his records compiled from reports of others. It follows that his testimony was inadmissible and that the Native Commissioner misdirected himself in holding that it was probative

of the defendant's having left for the mines on the 1st February, 1956. Similarly, the Native Commissioner was wrong in holding that the passport produced by the defendant (Exhibit "D") was probative of the defendant's having commenced work on the mines in February, 1956, in that it is clear from the endorsement printed thereon in red letters that it need only be produced to an authorised officer and that the public, therefore, have no right of access thereto, with the result that it is not a public document and is inadmissible in evidence see Hassim *v.* Naik, 1952 (3) S.A. 331 (A.D.), at page 339. The endorsements on the passport (Exhibit "D") relative to the defendant's having been employed on the mines are also inadmissible in the absence of proof that the person by whom they were made had an express authority, judicial or statutory, to effect them, see Hassim's case (*supra*) at pages 339 and 340.

In the result the appeal falls to be allowed, in part, with costs and the judgment of the Court *a quo* altered to read as follows:—

"(1) *On the claim in convention:* For plaintiff in convention for one beast or its value, £10, as damages for seduction. Absolution from the instance as regards the damages for pregnancy. Costs are awarded to the plaintiff.

(2) *On the counterclaim:* For plaintiff in reconvention as prayed, with costs."

For appellant: G. Hughes of Umtata.

For Respondent: K. Muggleston of Umtata.

SOUTHERN NATIVE APPEAL COURT.

WILLIE *v.* MBODA.

N.A.C. CASE No. 53 OF 1957.

UMTATA: 21st February, 1958. Before Balk, President, Warner and King, Members of the Court.

PRACTICE AND PROCEDURE.

Noting of appeal—Security for respondent's costs on appeal—Waiver.

Summary: The material facts are that, when appellant lodged his notice of appeal with the Clerk of the Court, within the time prescribed by the Rules, he did not give security for the payment of respondent's costs as required by Rule 5 (3) of the Rules for the Native Appeal Courts. Instead, respondent's attorneys consented to the waiving of the provisions of the Rule mentioned.

Held: That, as the requirement of security is designed for the protection of the opposite party, it may be waived by such party should he be so inclined.

Cases referred to:

Mering *v.* Uys, 1924 O.P.D. 250.

Legislation referred to:

Rules 4 and 5, Government Notice No. 2887 of 1951.

Appeal from the Court of the Native Commissioner, Maclear. Warner, H. W. (Permanent Member):—

At the hearing of this appeal the question arose, at the outset, whether the noting of the appeal was in order. The notice of appeal was delivered within the period prescribed in Rule 4 of the Rules promulgated under Government Notice No. 2887 of 1951, but security for the payment of the costs of the other party was not given within this period as required by sub-section (3) of Rule 5. Respondent's attorneys, however, within this period, consented to the waiving of the provisions of the last-mentioned Rule. Consideration was given, therefore, to the question whether this consent satisfied the requirements of the Rule.

Rule 47 (4) of the Rules of Magistrates' Courts contains a similar provision in regard to the giving of security and in regard thereto it was held in the case of Meiring *v.* Uys, 1924, O.P.D. 250, that the requirement of security is, of course, designed for the protection of the opposite party and may, therefore, be waived by such party, should he be so inclined. It is held that this ruling applies also to appeals from Native Commissioner's Courts so that the noting of the appeal in this case was in order.

(The Court then went on to deal with the appeal on its merits.)

For Appellant: G. Hughes.

For Respondent: K. Muggleston.

SOUTHERN NATIVE APPEAL COURT.

KOHLAKALA *v.* KOHLAKALA.

N.A.C. CASE No. 55 OF 1957.

UMTATA: 20th February, 1958. Before Balk, President, Warner and King, Members of the Court.

PRACTICE AND PROCEDURE.

Burden of proof on pleadings—Absolution from instance.

Summary: Plaintiff sued defendant for the return of certain five head of cattle averring that they had been *ngomaed* by him to the latter. In the defendant's plea the alleged *ngoma* transaction was denied, it was claimed that one of the cattle had been acquired from plaintiff by defendant by way of an exchange, and that the rest were progeny of that animal. After hearing evidence the Assistant Native Commissioner granted absolution from the instance; and plaintiff appealed, *inter alia,* on the ground that the Assistant Native Commissioner erred in granting absolution from the instance in that defendant failed to discharge the onus resting upon him, entitling plaintiff to judgment in his favour.

Held: That the onus on the pleadings of proving the alleged *ngoma* transaction rested on plaintiff, and that of establishing the alleged exchange on the defendant, so that there were two distinct burdens of proof which had nothing to do with each other. It is only where there is a single burden of proof on the pleadings in respect of any one claim and such burden rests on the defendant, that there is no room for a decree of absolution from the instance.

Cases referred to:

Pillay *v.* Krishna & Another, 1946, A.D. 946.

Arter *v.* Burt, 1922, A.D. 303.

Appeal from the Court of the Native Commissioner, Engcobo.

Balk (President):—

This is an appeal from the judgment of a Native Commissioner's Court decreeing absolution from the instance, with costs, after the close by both the parties of their cases, in an action in which the plaintiff (present appellant) sued the defendant (now respondent) for the return of certain five head of cattle, averring that they had been *ngomaed* to the latter by him.

In his plea the defendant denied the alleged *ngoma* transaction and stated that he had acquired the red cow in dispute from the plaintiff in exchange for a horse and that the remaining four head were the progeny of the red cow, born after its acquisiion by him.

The appeal is brought on the following grounds:—

"1. That the Assistant Native Commissioner erred in granting absolution from the instance, in that defendant failed to discharge the onus resting upon him, entitling plaintiff to a judgment in his favour.

2. That upon all the evidence there is a balance of probabilities in favour of the plaintiff entitling him to a judgment in his favour."

The onus on the pleadings of proving the alleged *ngoma* transaction rested on the plaintiff and that of establishing the alleged exchange on the defendant, so that there were two distinct burdens of proof which had nothing to do with each other, see Pillay *v.* Krishna and Another, 1946, A.D. 946, at pages 951 to 954. That being so, and as it is only where there is a single burden of proof on the pleadings in respect of any one claim and such burden rests on the defendant, that there is no room for absolution from the instance, see Arter *v.* Burt, 1922 A.D. 303, at pages 305 and 306, the first ground of appeal fails.

Turning to the remaining ground of appeal, there are blatant inconsistencies in the plaintiff's evidence and that of his witness, Sivela, as well as material discrepancies between their evidence, as pointed out by the Assistant Native Commissioner in his able reasons for judgment. As also pointed out by the Assistant Native Commissioner and as is apparent from the record, the plaintiff's remaining witness is hazy in his recollections so that it is unsafe to rely on him. The defence witnesses do not assist the plaintiff in establishing his case; nor do the two witnesses called by the Assistant Native Commissioner in view of the discrepancies between their evidence and the improbabilities therein.

In the circumstances the Assistant Native Commissioner cannot be said to be wrong in finding that plaintiff had not established his case and in absolving the defendant from the instance.

Accordingly the appeal falls to be dismissed, with costs.

For Appellant: H. White of Umtata.

For Respondent: G. M. M. Matanzima of Engcobo.

SOUTHERN NATIVE APPEAL COURT.

MAVELA AND ANOTHER *v.* NOMGWIQI.

N.A.C. CASE No. 58 OF 1957.

PORT ST. JOHNS: 5th February, 1958. Before Balk, President, Warner and Wakeford, Members of the Court.

PONDO CUSTOM.

Damages payable for seduction and pluries pregnancies—Unmarried females and widow's living as dikazis.

PRACTICE AND PROCEDURE.

Default judgment against tort feasor—Not binding upon another defendant disputing vicarious responsibility.

Summary: Plaintiff sued the first defendant for fifteen head of cattle, or their value, as damages for causing the three pregnancies of the former's daughter, and joined the second defendant in his claim on the ground that he was liable for the first defendant's *torts* in that the latter was an inmate of his kraal. Responsibility for the third pregnancy only was admitted by the first defendant and both denied in their plea that the first defendant was an inmate of the second defendant's kraal.

Default judgment having been taken against both defendants, and having been rescinded, the hearing of the action commenced, in the absence of the first defendant against whom a default judgment was again entered for fifteen head of cattle or their value. The Court found that the first and third of the alleged pregnancies were attributable to the first defendant and held the second defendant, as kraalhead, jointly and severally responsible with the first defendant for the payment of ten head of cattle or their value.

Second defendant appealed on the ground, *inter alia,* that the plaintiff was in the circumstances of this case not entitled to the full damages of five head of cattle in respect of each pregnancy. Plaintiff in a cross-appeal contended, *inter alia,* that the judgment in favour of second defendant in so far as the second pregnancy was concerned, was bad in law and not in accordance with Pondo law and was illogical and inconsistent with the rest of the judgment of the Court in that, when the Court accepted the fact that the first defendant was an inmate of the second defendant's kraal when the second pregnancy occurred, the liability of the second defendant for that pregnancy followed as a matter of course, and by operation of law and custom. Plaintiff also claimed that the second defendant could not avail himself of any special defence that was not open to the first defendant, once it was proved that the latter was an inmate of his kraal when the *torts* were committed and that the first defendant was the *tort feasor,* and that the defence that the second pragnancy was not reported could not absolve the second defendant from kraalhead liability.

Held: After consultation of the Native Assessors: That the "fine" claimable for causing the pregnancy of females who have not contracted customary unions, as well as widows who have returned to their fathers' kraals, where they are living as *dikazis,* is five head of cattle in respect of each pregnancy, no matter how many.

Held further: That the default judgment against the first defendant binds him only and is in no way binding on the second defendant to whom it was open to contest the case on all disputed issues raised by the pleadings (i.e. not only the question whether the first defendant was an inmate of the other's kraal when he committed the alleged *torts;* but also the question whether the first defendant in fact committed all the *torts* complained of by the plaintiff).

Cases referred to:

Mpeti *v.* Nkomanda, 2 N.A.C. 43.

Kolwa *v.* Moyeni, 2 N.A.C. 100.

Mcitwa *v.* Ndondo, 1944, N.A.C. (C. & O.) 96.

Appeal from the Court of the Native Commissioner, Libode.

Balk (President):—

The plaintiff sued the two defendants, jointly and severally, in a Native Commissioner's Court for fifteen head of cattle or their value, £150, as damages for three pregnancies of his daughter, Nomakamani, averring, *inter alia,* in the particulars of his claim that the first defendant had rendered Nomakamani pregnant on those three occasions and that the second defendant was liable for the first defendant's torts in that the latter was an inmate of the former's kraal.

In their plea the defendants admitted that the first defendant had rendered Nomakamani pregnant on the third occasion, but denied that he had done so on the other two occasions. They also denied that the first defendant was an inmate of the second defendant's kraal.

Judgment by default was entered against both defendants on the 27th October, 1955. That judgment was rescinded on their application and the hearing of the action commenced on the 18th September, 1956. The first defendant did not appear on that day and, on an application by his attorney for the postponement of the case against him being refused by the Court, the attorney withdrew therefrom and the case proceeded against the second defendant only. On the application of the plaintiff's attorney judgment by default was again entered against the first defendant for fifteen head of cattle or their value, £120 less £3 paid on account. At the resumed hearing of the case against second defendant on the 29th October, 1957, he did not appear and his attorney applied for a postponement to enable the second defendant to give evidence, his other witnesses having testified at the previous hearings. This application was refused and the attorney thereupon closed his case. After addresses by the attorneys for both parties judgment was entered against second defendant as follows:—

> "That second defendant is found to be the kraal head and is held to be liable jointly and severally with first defendant for the payment to plaintiff of 10 head of cattle or their value £80 and costs being damages in respect of the first and third pregnancies less £3 paid on account."

The appeal against that judgment is brought on the following grounds:—

"1. That the judgment is against the weight of evidence and probabilities of the case.

2. That the plaintiff in the circumstances of this case is not entitled to the full damages of five head of cattle in respect of each pregnancy.

3. That a postponement should have been allowed."

Here it may be mentioned that the identity of the appellant or appellants is not specifically stated in the notice of appeal, as should have been done, but it is implicit in the grounds of appeal and was in fact confirmed by Mr. Attorney Birkett, who appeared in this Court on behalf of the appellant, that the appeal was brought by the second defendant only.

The plaintiff noted a cross-appeal on the following grounds only against the part of the judgment assolving the second defendant from liability for damages for the alleged second pregnancy:—

"1. That the portion of the judgment appealed against the weight of the evidence (sic), the facts proved and the probabilities of the case.

2. That the judgment in favour of second defendant as specified above hereof is bad in law, and is not in accordance with Pondo law and custom and is illogical and inconsistent with the rest of the judgment of the Court in that the Court having found proved that first defendant was an inmate of the kraal of the second defendant at the time when the first pregnancy as well as the third pregnancy occurred the Court was bound to accept, and did in fact accept and find proved that first defendant was an inmate of the kraal of the second defendant when the second pregnancy occurred as well and so the liability of the second defendant followed and followed (*sic*) as a matter of course and by operation of law custom and vicariously from that of No. 1 for the second pregnancy as well.

3. That No. 2 defendant could not avail himself of any special defence that was not open to No. 1 once it was proved that No. 1 was an inmate of his kraal when the *torts* were committed and that No. 1 was the *tortfeasor*, and the fact that the Second pregnancy was not reported and the "stomach never taken" was not special defence for No. 2, which could absolve him from kraal liability.

4. That this position of the judgment was inconsistent was (*sic*) the previous judgment given by the same Court in the same case on the 27th October, 1955, by default judgment against both defendants jointly and severally for the full amount of plaintiff's claim, which judgment was subsequently rescinded."

At the inception of his argument on behalf of the appellant, Mr. Birkett abandoned the third ground of appeal and properly so, as there is obviously no substance therein in that it is abundantly clear from the record that there was no excuse for the second defendant's failure to attend Court on the 29th October, 1957, when his attorney applied unsuccessfully for the postponement in question to enable the second defendant to give evidence.

In his argument Mr. Birkett attacked the Native Commissioner's finding against second defendant in regard to the first pregnancy as also his finding that the first defendant was an inmate of the second defendant's kraal at the material times. The Native Commissioner gives cogent reasons for those findings. The first defendant's admission in the course of his evidence for the second defendant that he had commenced to have sexual intercourse with Nomakamani shortly after she returned to her father's kraal, coupled with the improbabilities and discrepancies in the evidence for the second defendant and the unsatisfactory demeanour of the defence witnesses mentioned by the Native Commissioner, on the one hand, and the obviously more reliable testimony for the plaintiff on the other, justify the Native Commissioner's findings in question. It should be added that in arriving at this conclusion due consideration was given to the arguments advanced by Mr. Birkett. The first ground of appeal, therefore, fails.

Coming to the second ground of appeal, the previous decisions regarding the scale of "fines" in Pondo law and custom applicable to cases of the nature here in question, are not consistent, see, for example, Mpeti *v.* Nkomanda, 2 N.A.C. 43, where it is stated that the "fine" for the pregnancy of a *dikazi* is five head of cattle, and Kolwa *v.* Moyeni, 2 N.A.C. 100 where the "fine" is stated to be from three to five head of cattle, in accordance with the discretion of the Court. For this reason the Pondo assessors were consulted. Their reply, with which I am in agreement, as it conforms to the custom as known to this Court, is appended. It will be seen from their reply that the "fine" claimable is fixed at five head of cattle in respect of each pregnancy, no matter how many, and that this scale obtains in respect of females who have not contracted customary unions as well as widows who have returned to their fathers' kraals and are living there as *dikazis,* as is the position in the instant case. The latter aspect is covered by the judgment in Mcitwa *v.* Ndondo, 1944, N.A.C. (C. & O.) 96. The second ground of appeal, therefore, also fails.

Turning to the cross-appeal, the admitted failure on the part of the plaintiff to take the "stomach" to the defendants in the case of the second pregnancy supports the evidence for the second defendant that the first defendant discarded the plaintiff's daughter for a year and was not responsible for her second pregnancy, so that the Native Commissioner's finding against the plaintiff on that score cannot be said to be wrong, and the first ground of the cross-appeal, therefore, fails.

In his argument advancing the second and third grounds of the cross-appeal, Mr. Vabaza contended that the existing default judgment against the first defendant automatically bound the second defendant in regard to the number of pregnancies for which the latter was liable as kraal head. But the default judgment given against the first defendant obviously only binds him and is in no way binding on the second defendant to whom it was open to contest the case on all the disputed issues raised by the pleadings which include not only the question whether the first defendant was an inmate of the second defendant's kraal when he (first defendant) committed the alleged *torts,* but also the question whether the first defendant in fact committed any of these *torts,* i.e., whether he was responsible for the first and second pregnancies as alleged by the plaintiff in his summons and denied by the defendants in their plea.

As regards the remaining ground of the cross-appeal, the rescinded default judgment given against the second defendant on the 27th October, 1955, obviously has no bearing in the direction adumbrated on the subsequent judgment given against him.

It follows that the second, third and fourth grounds of the cross-appeal also fail.

In the result the appeal and the cross-appeal fall to be dismissed, with costs.

STATEMENT BY PONDO ASSESSORS.

Assessors in Attendance:

1. Matapela Sontsele from Bizana district, Eastern Pondoland.

2. Lumayi Langa from Flagstaff district, Eastern Pondoland.

3. Acting Chief Mdabuka Cetywayo from Lusikisi district, Eastern Pondoland.

4. Johnson Hlwatika from Ngqeleni district, Western Pondoland.

5. Lanyazima Mvinjelwa from Port St. Johns district, Western Pondoland.

Question by President:

A widow returns permanently to her father's kraal where she is rendered pregnant three times by the same man. What "fine" is claimable by the father under Pondo law and custom in such a case?

Reply by Acting Chief Mdabuka Cetywayo:

It is immaterial whether it is a girl who has never entered into a customary union or a widow who has permanently returned to her father's kraal and become a *dikazi*. The "fine" in every case is fixed at five head of cattle in respect of each pregnancy no matter how many.

All the other Assessors agree.

Question by President:

Does the custom in Western Pondoland differ from that in Eastern Pondoland?

Reply by Acting Chief Mdabuka Cetywayo:

There is no difference. We Pondos have one custom.

All the other Assessors agree.

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

For Respondent: J. G. S. Vabaza, Libode.

SOUTHERN NATIVE APPEAL COURT.

MNGXUNYA *v.* TYIKANA.

N.A.C. CASE No. 9 OF 1958.

KING WILLIAM'S TOWN: 15th March, 1958. Before Balk, President, Warner and Pike, Members of the Court.

PRACTICE AND PROCEDURE.

Appeal—Condonation of late noting—Interpleader—Onus where property attached in claimant's possession—"Interpleader dismissed" not a competent judgment.

Summary: Cattle in claimant's ostensible possession were attached in execution of a warrant, issued at the judgment creditor's instance, as being the property of the judgment debtor. An interpleader action was commenced at claimant's instance, and after hearing evidence the Native Commissioner entered a judgment which reads: "Interpleader dismissed with costs", which, in his view, as explained in his reasons for judgment, resulted in the restoration of the position which obtained prior to the institution of the interpleader proceedings. In delivering judgment the Native Commissioner also indicated that he knew the Native mind and, according to the notice of appeal, continued that he

was satisfied that the cattle belonged to the whole family and the judgment debtor, as senior member of that family, was owner thereof. In his reasons for judgment he explained that when he used the expression "I know the Native mind", he merely did so to indicate that in the case of Natives it was very difficult to tell who the lawful owner was of stock found in possession of an individual and that, more often than not, the cattle belonged to the whole family.

In his reasons for judgment he stated that the onus of proving ownership of the cattle rested on the plaintiff.

Appeal having been noted late and there being no application before the Court for condonation of late noting, the case was struck off the roll, with costs, in October, 1957, at respondent's request. He was paid his costs from the deposit in possession of the Clerk of the Court. Later application was made for the re-instatement of the appeal on the roll and for condonation of late noting. On 18th February, 1958, £7. 10s. was deposited with the Clerk of the Court as fresh security for respondent's costs; but no mention was made of this fact in the affidavit in support of the application for condonation. Respondent's attorney strenuously objected to the application being granted, although no formal objection was lodged as provided for in Rule 14 of the Rules for Native Appeal Courts.

Held: That as fresh security for respondent's costs of appeal was proved to have been deposited, no prejudice to the respondent had resulted from applicant's failure to allege such deposit.

Held further: That, as it could not be said to be clear that the applicant had no prospect of success on appeal, there was no justification for refusing the application on that ground.

Held further (in dealing with the merits of the appeal) That ostensible possession by the claimant of the property attached raised a presumption that he was the owner thereof, and that the onus of rebutting that presumption of ownership rested on the judgment creditor.

Held further: That the onus of rebutting such a presumption of ownership is discharged by the execution creditor if he proves that the claimant was not in fact the owner of the goods attached, without further proving that the judgment debtor was their owner.

Held further: That the dismissal of a claim, which is the equivalent of an absolution judgment, is not competent on the merits in interpleader proceedings of the nature in question here.

Cases referred to:

de Villiers *v.* de Villiers, 1947 (1) S.A. 635.

Rose and Another *v.* Alpha Secretaries, Limited, 1947 (4) S.A. 511.

Gleneagles Farm Dairy *v.* Schombee, 1949 (1) S.A. 830.

Gobo *v.* Davies, 1915 E.D.L.D. 136.

Memani *v.* Worasi, 1955 N.A.C. 115.

Hulumbe *v.* Jussob, 1927 T.P.D. 1008.

Becker *v.* Wertheim, Becker and Leveson, 41 P.H.F. 34.

Legislation referred to:

Rule 14, Government Notice No. 2887 of 1951.

Appeal from the Court of the Native Commissioner, Queenstown.

Balk (President):—

The first matter to be considered in this case was an application for re-instatement of the appeal on the roll, condonation of its late noting and the amendment of the notice of appeal by the addition of a further ground.

The application for condonation was strenously opposed by Mr. Heathcote, who appeared on behalf of the respondent. In the first place he submitted that the affidavit filed in support of the application did not disclose sufficient cause to justify condonation. But viewed in its proper perspective, there can be no doubt that the supporting affidavit shows that the applicant took the necessary steps to have the appeal noted and prosecuted timeously and that it was entirely due to the negligence of a professional assistant employed at the time by the applicant's attorney that this was not done. It was also clear that the blame lay with the professional assistant for the failure to apply at the previous session of this Court for condonation of the late noting of the appeal with the result that it was then struck off the roll, with costs. Mr. Heathcote took the further point that the supporting affidavit did not indicate that fresh security for the respondent's costs of appeal had been lodged to replace the initial security which had been absorbed by the taxed costs awarded to the respondent when the appeal was struck off the roll. But Mr. Barnes, who appeared for the applicant, produced documentary proof that fresh security had actually been lodged on the 18th February, 1958; and, apart from the fact that objection was not taken in the manner provided by Rule 14 of the Rules of this Court on account of the failure to mention in the supporting affidavit that fresh security had been lodged, it seemed clear that no prejudice to the respondent had resulted therefrom. Mr. Heathcote also contended that the applicant's prospects of success on appeal were slender in view of the specific finding on credibility by the Native Commissioner's Court *a quo*. But it was apparent from the record that that Court had misdirected itself as regards the incidence of the onus of proof so that it could not be said to be clear from its judgment that the applicant had no prospect of success on appeal and there was, therefore, no justification for refusing the application on that ground, see de Villiers *v.* de Villiers, 1947 (1) S.A. 635 (A.D.), at page 637. Applying the principles enunciated in Rose and Another *v.* Alpha Secretaries, Limited, 1957 (4) S.A. 511 (A.D.) to the circumstances of the instant case, this Court came to the conclusion that the applicant had shown good cause and accordingly granted the whole application, but ordered the applicant to pay the costs thereof.

Turning to the appeal, the Court *a quo* dismissed, with costs, a claim in interpleader proceedings resulting from the attachment by the Messenger of that Court of certain six head of cattle under a warrant of execution in a civil action.

The appeal is brought by the claimant on the following grounds, which include the additional ground approved of by this Court on application as indicated above:—

"1. In delivering verbal judgment the Native Commissioner said, *inter alia,* that knowing the Native mind he was satisfied that the cattle belonged to the whole family and he judgment debtor as senior member of that family was owner thereof. It is submitted that the Native Commissioner erred in taking judicial cognisance of the Native mind, particularly as direct evidence was given by claimant, and Judgment Debtor which was corroborated by Dr. J. v. A. Steytler to the effect that the cattle were possessed and owned by Claimant.

2. Claimant proved, by means of his own evidence corroborated by that of judgment Debtor and Dr. J. v. A. Steytler, that he had full possession and ownership of the cattle at the time of the attachment and this shifted the onus on Judgment Creditor to disprove such title to the cattle which said onus of proof Judgment Creditor failed to discharge for the following reasons:—

   (*a*) The only witness for Judgment Creditor was the Messenger of Court who carried out the attachment.

   (*b*) The evidence of the said Messenger of Court is largely hearsay.

   (*c*) The said Messenger's evidence as to ownership of the cattle is unreliable in as much as he admits that he 'decided on information received', that the cattle belonged to Judgment Debtor, and that he (the Messenger) also enquired from the Native gardener and Mr. Promitz.

   (*d*) Claimant's sister whom the said Messenger of Court alleges to have said that the cattle belonged to her father was not called as a witness to corroborate the Messenger's evidence although she was available.

3. The Native Commissioner erred in law in finding that the evidence for Judgment Creditor was sufficient to disclose that the Judgment Debtor was possessor and owner of the cattle.

4. The judgment is against the weight of evidence as well as against the probabilities thereof.

5. It is submitted that the Native Commissioner erred in giving his judgment of which the record reads "Interpleader dismissed with costs" and that in giving judgment the Native Commissioner should have declared the property either executable or not executable as the case may be."

The Native Commissioner *a quo* found that the cattle were in the ostensible possession of the claimant when they were attached by the Messenger of the Court and rightly so, for it emerges from Dr. Steytler's uncontroverted testimony that, whilst he permitted both the judgment debtor and the claimant to reside on his farm on which the cattle were running at the time of their attachment, it was not to the judgment debtor but to the claimant that Dr. Steytler gave the right to run the cattle on the farm, so that the cattle must be taken to have been in the claimant's ostensible possession when they were attached. The Native Commissioner, however, states in his reasons for judgment that the onus to prove ownership of the cattle rested on the claimant. But in this conclusion he is wrong for the ostensible possession of the cattle by the claimant raised a presumption that he was their owner, see Gleneagles Farm Dairy *v.* Schombee, 1949 (1) S.A. 830 (A.D.), at page 838, so that the onus of proof, i.e., the onus of rebutting the presumption of ownership arising from the claimant's possession of the cattle, rested on the judgment creditor, see Gobo *v.* Davies, 1915 E.D.L.D. 136, at page 140 and Memani *v.* Worasi, 1955 N.A.C. 115 (S), at page 116. Here it should be mentioned that the onus of rebutting such presumption is discharged by the execution creditor if he proves that the claimant was not in fact the owner of the goods attached without further proving that the judgment debtor was their owner, see Hulumbe *v.* Jussob, 1927 T.P.D. 1008. Although the Native Commissioner states that the onus of proof rested on the claimant, it is apparent from his reasons for judgment that his ultimate approach was correct for he quotes the relevant passage anent the presumption from page 838 of the report of the judgment in Gleneagles' case (supra) and then goes on to show how that presumption was rebutted in the instant case.

Proceeding to a consideration of the evidence on the basis that the onus of proof rested on the judgment creditor, the claimant himself gave evidence and called Dr. Steytler and the judgment debtor, whilst the Messenger of the Court was the only witness for the judgment creditor. It is manifest from Dr. Steytler's testimony that he did not of his own knowledge know that the cattle were the claimant's property and, to my mind, the cogent reasons given by the Native Commissioner for accepting the Messenger's evidence and rejecting that of the claimant and the judgment debtor, cannot be gainsaid. From the Messenger's evidence it is clear that at the time of the attachment of the cattle, the claimant's sister stated in the presence of the Messenger and the claimant that the cattle belonged to her father, the judgment debtor, and the claimant did not deny her statement at the time, nor did he then claim the cattle as his property. It is true that, as pointed out in the argument on behalf of the appellant, it does not appear to have been put to the claimant in cross-examination that his sister made that statement. But this omission appears to me to be of little moment in view of the claimant's reply under cross-examination that he had in fact claimed that the cattle were his property when they were attached. To my mind it is hardly conceivable that, had the cattle in fact belonged to the claimant, he would not have claimed them when they were attached, particularly when his sister mentioned that the cattle belonged to their father, the judgement debtor. Her statement is, of course, not admissible as probative of the truth thereof as she was not called, but only as indicative of the claimant's reaction thereto. In the circumstances there can, in my view, be no doubt that the judgment creditor rebutted the presumption of ownership of the cattle in the claimant arising from their being in his possession on attachment and that the judgment creditor, therefore, discharged the onus of proof resting on him.

As regards the first ground of appeal, the Native Commissioner states in his reasons for judgment that the claimant's attorney misunderstood his use of the phrase "I know the Native mind" in his verbal judgment and that he did not take cognisance thereof to find that the cattle belonged to the whole family. The Native Commissioner goes on to explain that he merely used the expression to indicate that in the case of Natives it is very difficult to tell who the lawful owner is of stock found in possession of any particular individual, and that more often than not it will be found that the cattle belong to the whole family. Whilst, as submitted by Mr. Barnes on behalf of the appellant, this is a general sation which ought not to have been imported by the Native Commissioner, this aspect cannot, however, be said to affect the issue since, for the reasons given above, it is abundantly clear that the case turns on the Messenger's testimony.

The same applies to the Native Commissioner's conclusion that in any event the judgment debtor was the owner of the cattle as he was the kraalhead, a premise, which, as pointed out by Mr. Barnes, finds no support in the evidence.

Dealing with paragraph (*d*) of the second ground of appeal, it seems to me that in the circumstances of this case, there is no justification for drawing an inference more adverse to the judgment creditor than to the claimant from the failure to call the latter's sister as a witness, see Gleneagles' case (*supra*), page 840.

Turning to the fifth ground of appeal, the Native Commissioner states in his reasons for judgment that in his view the dismissal of the interpleader claim resulted in the restoration of the position which obtained prior to the institution of the interpleader proceedings. But this view is not correct in that the dismissal of a claim is the equivalent of an absolution judgment, see Becker *v.* Wertheim, Becker and Leveson, 41 P.H., F. 34 (A.D.), and such

a judgment is not competent on the merits in interpleader proceedings of the nature in question, as the issue to be decided is whether or not the property attached is executable and an absolution judgment, not being final, leaves this issue in doubt, see Gobo's case (*supra*), at page 138. The Native Commissioner's judgment accordingly falls to be corrected in this respect since, as is clear from what has been stated above, the judgment creditor discharged the onus of proof resting on him. This finding, i.e., that the judgment creditor discharged that onus, also disposes of the remaining grounds of appeal.

In the result the appeal falls to be dismissed, with costs, but the judgment of the Court *a quo* should be altered to read: "The six head of cattle are declared executable, with costs".

For Appellant: B. Barnes of King William's Town.

For Respondent: E. M. Heathcote of King William's Town.

SOUTHERN NATIVE APPEAL COURT.

MASIZA *v* NINI.

N.A.C. CASE No. 54 OF 1957.

KING WILLIAM'S TOWN: 14th March, 1958. Before Balk, President, Warner and Pike, Members of the Court.

LAW OF DELICT.

Damages for trespass—When bona fide assertion of right of no avail.

Summary: Action for damages based on trespass. The facts appear from the judgment.

Held: That a plea by defendant that he acted bona fide in the assertion of a right would be of no avail unless as a fact the right existed.

Case referred to:

Shahmahomed *v.* Hendricks and Another, 1920 A.D. 151.

Appeal from the Court of the Native Commissioner, Whittlesea.

Warner (Permanent Member):

Plaintiff (present appellant) sued defendant (present respondent) in a Native Commissioner's Court for an order:—

"1. Declaring him to be entitled to exercise occupational rights to and over Lot No. 158, Shiloh Mission Station.

2. An Order of Ejectment against Defendant.

3. Costs of Suit."

His particulars of claim were as follows:—

"1. Plaintiff and defendant are Natives as defined by Act No. 38 of 1927, as amended.

2. On 27th August, 1956, arable Lot No. 158, situate in Shiloh Mission Station, was transferred from Enoch Masiza to plaintiff, who is lawfully entitled to exercise occupational rights thereto.

3. The defendant has wrongfully and unlawfully occupied the said Lot No. 158 in Shiloh Misison Station and despite demand fails to vacate same."

Defendant filed the following plea and counterclaim:—

"1. Ad Para. 1: Defendant admits.

2. Ad Para. 2: Defendant has no knowledge of the allegations contained in this paragraph and puts plaintiff to proof thereof.

3. Ad Para. 3: Defendant denies the allegations contained in this paragraph and puts plaintiff to proof thereof.

COUNTERCLAIM.

1. The parties shall for the sake of convenience be referred to as hereinbefore.

2. Defendant craves indulgence of the above Honourable Court that so much of his plea as is relevant to his counterclaim may be regarded as being incorporated herein.

3. Defendant states that in or about April, 1956, plaintiff wrongfully and unlawfully ploughed and sowed his seeds on arable Lot No. 468, situate at Shiloh Mission Station in the district of Queenstown, over which defendant has occupational rights, thereby preventing defendant and/or his agent, from ploughing and sowing his own seeds on the said Lot No. 468.

4. Defendant states that he intended to sow wheat on the said Lot No. 468 in or about April, 1956, and would have reaped 14 bags each valued at £3. 10s.
5. Defendant further states that he intended to sow mealies on the said Lot No. 468 in or about November, 1956, and would have reaped 20 bags each valued at £1. 19s. 6d.
6. In the premises set out above defendant has suffered damages to the extent of £88. 10s., being £49 value of 14 bags of wheat, and £39. 10s. value of 20 bags of mealies, for which he holds plaintiff liable in law, and for which he hereby makes claim.

Wherefore defendant prays for judgment against plaintiff for:—

1. An Order declaring him to be entitled to exercise occupational rights to and over Lot No. 468. Shiloh Mission Station.
2. An Order of ejectment against plaintiff.
3. Payment of the sum of £88. 10s. damages.
4. Costs of the suit."

The following judgment was given:—

"Judgment for defendant, with costs, together with damages in the amount of £10 in respect of his counterclaim."

On the claim in convention plaintiff appealed on a number of grounds in regard to the facts which amount to nothing more than that the judgment is against the weight of evidence and, on a point of law, that the onus was on defendant. The latter point was not canvassed in the Court *a quo* and the pleadings clearly indicate that the onus was on the plaintiff.

As stated by the Native Commissioner in his reasons for judgment, the decision in this case as to who was entitled to the rights to the land claimed by the parties rests almost entirely upon the documentary evidence produced in Court.

These documents show that one Enoch Masiza owned one arable allotment in Shiloh Mission and in 1932 his rights of occupation were cancelled for non-payment of rates. In 1936 defendant purchased the rights of occupation in respect of this land by payment of the arrear rates due, and on 28th May, 1938, he was issued with a certificate of occupation by the Native Commissioner, Whittlesea, relating to Arable Allotment No. 468.

The original register of the Board at page 228 described Enoch Masiza's land as "Garden Lot No. 288". Prior to the allotment of a land to defendant a new register was compiled and the land allotted to him was described as "Garden Lot No. 468", but the page on which these particulars appear contained the following entry: "14.7.36—purchased rights No. 228."

On another page in this register appears an entry relating to Lot No. 158. It describes the occupier as Enoch Masiza and bears the entry: "Transfers—26.7.56 from Enoch Masiza to Thomas Masiza". The latter is the plaintiff in the instant action and it is on this entry that he bases his claim, a certificate of occupation having been issued to him by the Native Commissioner on the 27th August, 1956.

It is thus clear that two certificates of occupation have been issued in respect of the allotment originally allotted to Enoch Masiza.

Plaintiff's contention is that defendant acquired rights to a land other than that previously allotted to Enoch Masiza, but took possession of this land and occupied it until it was allotted to plaintiff.

The Native Commissioner has stated that the members of the Board who gave evidence did not exhibit much intelligence and did not appear to understand much about the transfer of lands in their area, and it is manifest that errors have been made in the records of the Board. Nevertheless, the case is capable of decision on the probabilities.

The Native Commisisoner very carefully considered these before deciding that the preponderance lay with defendant. He has furnished sound reasons for his decision and, in my opinion, it is correct.

In regard to the award of damages on the counterclaim, it was contended in pursuance of the ground of appeal that, as plaintiff acted under colour of right and in pursuance of a certificate of occupation issued by the Native Commisisoner, he was not liable in law for any damages. This contention is unsound as it was laid down in the case of Shahmahomed *v.* Hendricks and Another, 1920 A.D. 151, at page 158, that "a plea that he acted bona fide in the assertion of a right would be of no avail unless as a fact the right existed". In the instant case plaintiff deprived defendant of the use and occupation of his land. He failed to prove the existance of the right to do so, the certificate of occupation issued to him being, as is clear from what has been said above, null and void. He was, therefore, correctly ordered to pay damages.

The appeal falls to be dismissed with costs.

For Appellant: E. M. Heathcote of King William's Town.

For Respondent: R. S. Canca of Lady Frere.

SOUTHERN NATIVE APPEAL COURT.

SGATYA *v* MADLEBA.

N.A.C. CASE No. 3 OF 1958.

KING WILLIAM'S TOWN: 25th July, 1958. Before Balk, President, Harvey and Welman, Members of the Court.

PRACTICE AND PROCEDURE.

Appeal—Condonation of late noting—Award of attorney and client costs.

CONFLICT OF LAWS.

Marriage—Dowry paid in consideration of customary union followed by civil marriage—Claim for restoration of dowry after divorce granted on ground of wife's single act of adultery—Repudiation of wife prior to divorce.

Summary: In the matter of the application for condonation of the late noting of the appeal it transpired that the appellant's attorneys were in the main responsible for the delay and the appellant had an arguable case on appeal on the merits.

The plaintiff (now respondent) claimed from the defendant (present appellant) the return of the dowry paid for the latter's daughter, Noteru, less the recognised deductions, in consequence of the dissolution by the Native Divorce Court of his (plaintiff's) civil marriage to Noteru on the ground of her adultery. The dowry agreement was entered into in connection with a customary union contracted between the plaintiff and Noteru prior to their civil marriage. The defendant resisted the claim on the ground that the plaintiff had repudiated Noteru because of a single act of adultery on her part so that in Native law he was not entitled to the return of any of the dowry.

The lower Court, after entering judgment for the plaintiff on the claim, with costs, awarded him on his attorney's application attorney and client costs in respect of the final day's hearing.

Held: That the correct approach as regards the application for condonation of the late noting of the appeal is not solely from the angle of the negligence of the appellant's attorney, but rather from the standpoint of whether in all the circumstances of the case sufficient cause has been shown and that on this basis the instant application should be granted.

Held further: That the principles underlying the civil marriage obtain in case of conflict between such principles and the Native custom regulating the incidents of the dowry, and that in contracting a civil marriage with the man with whom she is associated in a customary union in respect of which the dowry agreement was made, the bride binds the dowry holder in so far as the modification by the marriage of the Native law incidents of the dowry agreement is concerned. Accordingly the husband is entitled to recover the dowry less the recognised deductions when the civil marriage is dissolved on the ground of a single act of adultery on the wife's part notwithstanding that Native custom precludes him from doing so in those circumstances.

Held further: That the Court below had not exercised a judicial discretion in awarding the attorney and client costs in that the award was not made in accordance with the recognised principles, no misconduct on the defendant's part being apparent, nor had it been shown that the defendant's application for a postponement which was granted had the effect of unnecessarily delaying the action.

Cases referred to:

Klaas *v.* Gcwabe, 1957 N.A.C. 68 (S).
Mzizi *v.* Pamla, 1953 N.A.C. 71 (S).
Ledwaba *v.* Ledwaba, 1 N.A.C. (N.E.) 398.
Raphuti and Ano. *v.* Mametsi, 1946 N.A.C. (T. and N.) 19.
Fuzile *v.* Ntloko, 1944 N.A.C. (C. and O.) 2.
Nyeleka *v.* Nyeleka, 1953 N.A.C. 85 (S).
Mhonjiwa *v.* Scellam, 1957 N.A.C. 41 (S).

Appeal from the Court of the Native Commissioner, Sterkspruit.
Balk (President):

The first matter to be dealt with in this case was an application for condonation of the late noting of the appeal.

The Native Commissioner's Court *a quo* entered judgment for the plaintiff (now respondent) on the claim in the action on the 5th November, 1957, and thereupon reserved judgment on an application by the plaintiff's attorney for attorney and client costs. On the 11th idem that Court awarded the plaintiff attorney and client costs in respect of the final day's hearing, i.e., the hearing of the 5th November, 1957. A request, in writing, by the defendant's (present applicant's) attorneys for a written judgment was lodged with the clerk of the Court on the 27th November, 1957; but as this request was not made within seven days after judgment, advantage could not be taken of the provision in rule 4 of this Court allowing an appeal to be noted within fourteen days after the delivery of the written judgment and the alternative period prescribed in that rule therefore obtained so that the appeal had to be noted within twenty-one days after judgment to be timeous, viz., by the 29th November, 1957, in so far as the judgment on the claim was concerned and by the 5th December, 1957, as regards the award of attorney and client costs, see Klaas *v.* Gcwabe, 1957 N.A.C. 68 (S).

It emerges from the affidavits filed in support of the application that the defendant duly instructed his attorneys on the 4th December, 1957, to note the appeal, that they posted a notice of appeal to the Clerk of the Court on the 12th *idem* which in the ordinary course should have reached him two days later and that on learning on the 17th *idem* that he had not received the notice, they posted a fresh notice of appeal to him the next day. As is apparent from what has been stated above, the notice of appeal which was posted on the 12th December, 1957, was then already

out of time. In addition that notice was not stamped as required by Rule 76 (4) of the rules for Native Commissioners' Courts read with Item 10 (*a*) of Table C of the Second Annexure to those rules; nor was the notice of appeal which was subsequently posted to the Clerk of the Court so stamped until the 24th January, 1958, so that the appeal fell to be regarded as having been noted on that date, see Klaas's case (*supra*). It followed that the defendant's attorneys were in the main to blame for the delay since the defendant had instructed them timeously to note the appeal against the award of the attorney and client costs and was only a few days late in his instructions to them anent the noting of the appeal from the judgment on the claim. Moreover, the merits of the proposed appeal were put in issue and it appeared to this Court that the defendant had an arguable case. In these circumstances and bearing in mind that the correct approach, as dictated by Rose and Another *v.* Alpha Secretaries, Ltd., 1947 (4) S.A. 511 (A.D.), is not solely from the angle of the negligence of the applicant's attorneys but rather from the standpoint whether in all the circumstances of the case sufficient cause has been shown, this Court granted the application.

Turning to the appeal, the plaintiff (now respondent) sued the defendant (present appellant) for the return of twenty head of dowry cattle or their value, £104, in consequence of the dissolution by the Native Divorce Court of his civil marriage to the defendant's daughter, Noteru, on the ground of her adultery. In claiming these cattle the plaintiff made allowance for the customary deductions, in this instance two head. It is unnecessary to consider this aspect further as these deductions are not in dispute.

In his plea the defendant denied liability for the return of the cattle claimed on the grounds that the plaintiff had made no complaint to him regarding Noteru's conduct and that the plaintiff had repudiated her.

Judgment was entered for the plaintiff for nineteen head of cattle or their value, £95, and costs. In addition the plaintiff was awarded attorney and client costs in respect of the final day's hearing.

The appeal is brought on the ground that the judgment, including the award of attorney and client costs, is against the weight of the evidence. A further ground of appeal is that "the judgment is bad in law in that the Assistant Native Commissioner failed to apply Native Law and Custom, coming to the conclusion that a repudiation by respondent of his wife, is not a recognised Native Custom by which respondent can forfeit his right to the refund of the dowry cattle paid".

It is manifest from the evidence that twenty head of cattle and one horse were paid on behalf of the plaintiff to the defendant as dowry for Noteru and that the plaintiff repudiated her because of her adultery before divorcing her on that ground. It is not disputed that the plaintiff contracted a civil marriage with Noteru on the 11th April, 1950; nor is it disputed that the Court below was justified in finding on the evidence that the plaintiff had obtained a decree of divorce from her in the Southern Native Divorce Court on the 21st March, 1957, on the ground of her adultery.

In the argument advanced on behalf of the appellant reliance was placed on the following passage which occurs at page 78 of the report of the judgment in Mzizi *v.* Pamla, 1953 N.A.C. 71 (S):—

> "When the plaintiff has proved the divorce by means of the order of divorce, the onus shifts to defendant to prove that plaintiff has forfeited his right to a refund of the *lobolo* paid because of some recognised Native Custom, and if he has not forfeited such right, to prove what deductions are allowed by the Customs of the tribe."

But that passage, which, with respect, is unfortunately somewhat loosely worded, falls to be read in its context, *i.e.*, in the light of the cases cited with approval earlier on the same page, when it becomes apparent that the passage means no more than that the husband forfeits his right to the return of the dowry on the ground of some recognised Natice Custom only where such custom does not conflict with the principles underlying the civil marriage in connection with which the dowry was paid. That this is the position is quite clear from the judgment in Mbonjiwa *v.* Scellam, 1957 N.A.C. 41 (S), where the authorities are reviewed and it is laid down that a dowry agreement made in connection with a civil marriage must be regarded as ancillary to, and modified by, the principles underlying such marriage or, in other words, that effect is given to the incidents of such a dowry agreement as are dictated by Native Custom in so far as they do not conflict with the principles underlying the civil marriage but where there is such a conflct then those principles prevail.

It follows that the Native Custom sanctioning the forfeiture of the husband's right to recover the dowry paid for his wife, should he repudiate her and so dissolve their customary union because of a single act of adultery on her part—only one such act is relied upon in the instant case-conflicts with the principles underlying a civil marriage, which allow of the husband's obtaining a decree of divorce from his wife on the ground of a single act of adultery on her part. Here it must be borne in mind that the custom sanctioning the forfeiture is based on the concept that such repudiation and dissolution is wrong. Accordingly, the fact that the plaintiff repudiated Noteru because of her adultery before divorcing her on that ground does not debar him from recovering the dowry paid for her, the position being the same as if he had obtained the divorce without a prior repudiation as his divorcing her on the ground in question is in itself in Native Law tantamount to a repudiation. It is true that, according to the evidence, the union between the plaintiff and Noteru was in the first instance a customary one and that the dowry agreement was entered into in respect of that union. But the subsequent civil marriage between the plaintiff and Noteru superseded and to all intents and purposes extinguished their customary union, see Ledwaba *v.* Ledwaba, 1 N.A.C. (N.E.) 398, at pages 401 and 402, and Raphuti and Another *v.* Mametsi, 1946 N.A.C. (T. & N.) 19, at page 20. Moreover, a civil mariage must be taken automatically to bind, not only the bridegroom and bride, but also the dowry holder, in so far as the modification by the marriage of the Native Law incidents of the dowry agreement is concerned, even where such agreement was entered into in respect of a preceding customary union, since in Native Law it is the very essence of a dowry agreement that the conduct of the bride binds the dowry holder, the position being that the retention or restoration by him of the dowry is governed by whether or not she is at fault. This views gains support from the judgment in Fuzile *v.* Ntloko, 1944 N.A.C. (C. & O.) 2, see the antepenultimate paragraph on page 5. Consequently, the fact that the plaintiff's marriage to Noteru was preceded by a customary union between them does not alter the position that he is entitled to succeed in his claim for the return of the dowry on the ground of the dissolution of the marriage owing to her adultery and the appeal in this respect accordingly fails.

Proceeding to a consideration of the award of the attorney and client costs to the plaintiff, the correct approach is, as pointed out in the argument on behalf of the respondent, that this Court will not interfere unless the Court below has not exercised its discretion judicially, see Nel *v.* Waterberg Landbouwers Ko-operatiewe Vereniging, 1946 A.D. 597, at page 609.

It is not possible to gather from the Assistant Native Commissioner's reasons for judgment with any degree of certainty why he awarded the costs in question as those reasons, in the main, outline contentions advanced on behalf of the plaintiff and

it is uncertain to what extent those contentions were accepted by him. It is clear, however, that in making the award the Assistant Native Commissioner relied upon the decision in Nyeleka *v.* Nyeleka, 1953 N.A.C. 85 (S) where it is laid down, at page 87, that the ground for making such an order is gross misconduct by the opposite party. The only indication in the record of possible misconduct on the part of the defendant is the denial in his plea that any dowry as alleged by the plaintiff was paid. But, viewed in its proper perspective, this denial cannot be regarded as dishonest and, therefore, not as misconduct on the defendant's part, for the plaintiff averred in the particulars of his claim that the dowry had been paid for Noteru, who at all material times was his wife married according to civil rites, whereas it is manifest from the evidence that the dowry agreement was in fact made in respect of their customary union which preceded their marriage.

In Nel's case (*supra*), at page 607, it is stated that the true explanation of awards of attorney and client costs not expressly authorised by statute (as is the case here) seems to be—

> "that, by reason of special considerations arising either from the circumstances which give rise to the action or from the conduct of the losing party, the Court in a particular case considers it just, by means of such an order, to ensure more effectually than it can do by means of a judgment for party and party costs that the successful party will not be out of pocket in respect of the expense caused to him by the litigation. Theoretically, a party and party bill taxed in accordance with the tariff will be reasonably sufficient for that purpose. But in fact a party may have incurred expense which is reasonably necessary but is not chargeable in the party and party bill. See Hearle & McEwan *v.* Mitchell's Executor (1922, T.P.D. 192). Therefore in a particular case the Court will try to ensure, as far as it can, that the successful party is recouped."

Applying these principles to the instant case, it seems that the application by the defendant's attorney at the close of the plaintiff's case on the first day of the trial in the Court below, i.e. on the 4th October, 1957, for a postponement, calls for consideration. The defendant's attorney intimated that he required the postponement to call five witnesses and that the witness whom he wished to call first, was indisposed. The application was opposed by the plaintiff's attorney but, according to the record, the hearing was postponed "by agreement" to the 5th November, 1957. At the resumed hearing on that date, the defendant's attorney closed his case after the defendant only had given evidence. In his evidence the defendant admitted that twenty head of cattle and one horse had been paid as dowry for Noteru, which was in keeping with the evidence for the plaintiff in this respect except for the horse in regard to the paiyment of which the evidence for the plaintiff was silent. The defendant's attorney had admitted on the first day of the trial that the evidence adduced by the plaintiff as regards the dissolution of his marriage to Noteru on the ground of her adultery proved that fact. The only aspect, therefore, in respect of which the defence needed to call evidence was the alleged repudiation of Noteru by the plaintiff and, to establish this, the defendant's evidence alone was adequate in view of the admissions in this respect in the evidence for the plaintiff. Here it should be mentioned that the defendant's persistence in his defence based on the repudiation in question cannot be regarded as frivolous in the light of the above-quoted passage in Mzizi's case which, on the face of it, appeared to support such a defence, particularly as the report of Mbonjiwa's case (*supra*) had not yet been published at the time. In the circumstances there can be no doubt that the application for the postponement on the grounds advanced by the defendant's attorney was based on a misconception of what was required, but the question whether the application had the effect of unnecessarily delaying the trial of the action still remained, see Reid

N.O. *v.* Royal Insurance Co. Ltd., 1951 (1) S.A. 713 (T.P.D.), at page 720. Whilst the application was still being dealt with in the Court below, it was, according to the record, already 4 p.m., so that it is by no means certain from the record that the action would have been finalised on that day had the defendant only then been called and his case closed after he had given evidence, bearing in mind that argument by the attorneys for both parties still had to be heard; and from the Assistant Native Commissioner's reason for judgment it would appear that the action could indeed not have been disposed of on the first day of trial in view of "argument and objections raised over irrelevant rifles". The Assistant Native Commissioner does not state specifically who was responsible for such argument and objections, but he adds that he had to mediate between the attorneys to arrive at a convenient settlement acceptable to both, which suggests that both attorneys were responsible for the argument and objections. However that may be, the record does not indicate what the position is in this respect. It follows that the record does not establish that conduct on the part of the defence had the effect of unnecessarily delaying the trial of the action. That being so, and as, *ex facie* the record, there appear to be no other material factors calling for consideration in so far as the award of the attorney and client costs to the plaintiff is concerned, it is clear that the Assistant Native Commissioner did not exercise a judicial discretion in making the award so that it falls to be set aside. Here it may be as well to mention that the Assistant Native Commissioner's statement in his reasons for judgment that, as a result of the pretrial conference, it was decided that the *quntum* of the dowry paid was to be the only matter in issue, is not borne out by the record.

In the result the appeal should be allowed in part, with costs, and the judgment of the Court below altered to read: "For plaintiff for nineteen head of cattle or their value, £95, and costs. The application for attorney and client costs is refused."

A further matter calls for mention, viz., that a whole line was omitted at the foot of page 2 of the certified copies of the record which resulted in the time of this Court being unnecessarily taken up in the course of the argument. The gravity of lapses of this nature, i.e., that they may lead to the appeal being dealt with on incorrect premises, should be brought home by the Native Commissioner to the officer responsible to obviate a recurrence.

For Appellant: J. D. K. Saayman of Zastron.

For Respondent: W. M. Tsotsi of Lady Frere.

NORTH-EASTERN NATIVE APPEAL COURT.

SABELA *v* **NJILO.**

N.A.C. CASE No. 49 OF 1957.

PIETERMARITZBURG: 16th April, 1958. Before Menge, President, Ashton and Oftebro, Members of the Court.

PRACTICE AND PROCEDURE.

Appeal from Chief's Sourt—Lapsed judgment.

Summary: The applicant successfully applied for condonation of late noting of an appeal against a judgment of the Native Commissioner who had allowed an appeal against a Chief's judgment altering the latter to one for defendant with costs. The Chief's judgment had lapsed prior to the hearing of the appeal by the Native Commissioner.

Held: That a final judgment was not possible in an appeal from a lapsed judgment of a Chief and that the appeal should have been struck off the roll.

Statutes referred to:

Sections 7 (2) and 9 (2) of the rules for Chiefs' Courts.

Appeal from the Court of Native Commissioner, Pietermaritzburg.

Menge, President, delivering the judgment of the Court:

This is an application for condonation of late noting of appeal. Plaintiff sued defendant before a Chief for £23 for cutting down certain wattle trees which plaintiff claimed were his. The Chief gave judgment for plaintiff on 21st May, 1955. An appeal was noted on 25th August, 1956, and at the same time the defendant applied for condonation of late noting of that appeal by reason of the fact (which was not disputed) that the Chief's written reasons were only furnished on 18th August, 1956. There is nothing on the record to show that the Native Commissioner ever authorised the registration of the Chief's judgment under section 7 (2) of the Rules for Chief's Courts.

At the hearing before the Native Commissioner the plaintiff was in default, and after evidence was given by the defendant (i.e. the appellant before the Native Commissioner, who is now the respondent) the Native Commisioner reversed the Chief's judgment in favour of one for defendant. This was on the 5th February, 1957. An appeal was noted on the 10th June, and at the same time an application for condonation of the late noting of the appeal was filed.

The application for condonation was not apposed and we granted it. Mr. van Heerden, who appeared before us for the appellant (respondent in the Native Commissioner's Court and plaintiff in the Chief's Court) then submitted (as the Native Commissioner has already set out in his reasons for judgment) that the appeal had lapsed in terms of section 9 (2) of the Chiefs' Courts Rules when the matter came before the Native Commissioner. Mr. Manning for respondent had to concede this, for that is indeed the position. When the Native Commissioner heard the matter there was no longer a judgment to be appealed against, the Chief's judgment having lapsed for want of registration, and the appeal should have been struck off. It was not competent for him to alter the judgment to one for defendent and in that manner to deprive the plaintiff of his rights to take further steps. The appellant before the Native Commissioner had to come to Court for relief and the fact that he did so, erroneously, by way of appeal instead of, for instance, by way of stay of execution, could hardly have added to the expenses. Consequently, he was entitled to his costs.

In the result the appeal is upheld with costs save as to costs of application for condonation of late noting of apppeal and the Native Commissioner's judgment is altered to read: "Appeal struck off roll with costs against respondent (i.e. plaintiff in the Chief's Court)."

For Appellant: Adv. J. A. van Heerden instructed by C. C. C. Raulstone and Co.

Ror Respondent: A. Manning.

NORTH-EASTERN NATIVE APPEAL COURT.

MOCHE *v.* MOCHE.

N.A.C. CASE No. 95 OF 1957.

PRETORIA: 6th June, 1958. Before Menge, President, Nel and O'Connell, Members of the Court.

PRACTICE AND PROCEDURE.

Joinder of parties—Action for transfer of undivided share in land acquired by prescription.

Summary: Certain 23 co-owners of a farm held in undivided shares had parcelled out the farm among themselves. Plaintiff acquired by prescription the portion which had been allotted to defendant. He thereupon sued defendant, who had a separate titled deed to his 1/23rd undivided share, for transfer of that share. Defendant pleaded *in limine* that the summons was bad in that the other co-owners had not been joined. The Native Commissioner dismissed this special plea, and, after hearing evidence, gave judgment for plaintiff. On appeal only the question of non-joinder was raised.

Held: That where land held in undivided shares has been parcelled out among the co-owners and transfer of a share in respect of which a separate title deed is in existence is claimed on the ground of acquisition by prescription, it is not necessary to join as co-defendants those co-owners whose portions are not affected by the adverse occupation.

Statutes referred to:

Section *two* (2) of Act No. 18 of 1943.

Cases referred to:

Le Roux, *v.* Malherbe, 2 Buchanan 192.

Williams *v.* Rhodes Fruit Farms Ltd., 1917 C.P.D. 6.

Amalgamated Engineering Union *v.* Minister of Labour, 1949 (3) S.A. 637.

Muller's Executors *v.* Small Farms Ltd. 1910 T.S. 199.

Appeal from the Court of Native Commissioner, Pretoria.

Menge, President:

Plaintiff sued defendant for the transfer of property. His case was that in 1950 he had acquired by prescription a 1/23rd share in a farm which was held in undivided shares by 23 co-owners, of whom the defendant was one and each of whom had his own separate title deed. Plaintiff maintained that he had occupied the portion allotted to defendant adversely to him *nec vi, nec clam, nec precario* ever since 1920. It was common cause that the co-owners had divided the land up roughly among themselves and that the portion which the plaintiff claimed had been so allotted to defendant.

The defendant pleaded a denial of the acquisition of the prescriptive right; but he also pleaded *in limine* that the summons was bad because the owners of the other individed shares had not been joined as co-defendants. The Native Commissioner did not uphold this special plea and he also refused a stay of the proceedings to enable defendant to appeal on the point. Evidence was then heard and thereafter the Native Commissioner gave judgment for plaintiff with costs, ordering the defendant to do all that is necessary to effect transfer of the share to plaintiff, and failing this, authorising the Messenger of the Court to do so.

Defendant appealed on a number of grounds concerning the merits and questions of law, but Mr. Cooper who appeared before us for the defendant abandoned all the grounds save two which read as follows:—

> "The Native Commissioner erred in law in holding that it was not necessary to join the other 22 co-owners where prescriptive user is being exercised against all these co-owners."
>
> "The Native Commissioner erred in concluding that because an undivided shareholding could be sued for and/or transferred, that this in any way enabled the Court to come to the conclusion it did without having insisted on joinder of the other co-owners."

As regards the merits Mr. Cooper was prepared to concede that there had been adverse user *nec vi, nec clam, nec precario* for over 30 years. He did not contend that any portion of the farm other than that allotted to defendant had in fact been occupied by plaintiff; but he contended that adverse user was exercised, not against the defendant alone, as the plaintiff would have it, but of necessity against all the co-owners simply because the land was held in undivided shares, and consequently joinder of the other co-owners was necessary.

Mr. Joubert, for the plaintiff (now respondent) contended that plaintiff's adverse user was exercised against defendant alone; that his claim is against defendant alone, and that the other co-owners have nothing whatsover to do with the matter.

A great deal of case law was cited in argument, but Mr. Joubert informed us that he had not been able to find any decided case directly in point. To this extent, then, the matter is *res nova*. Mr. Cooper relied strongly on Williams *v.* Rhodes Fruit Farms Ltd., 1917 C.P.D. 6, but this case does not support him. There the plaintiff sought to acquire rights to land as a member of the Pniel Institute which held certain rights in the land, and to succeed in his claim he had to seek a declaration that the Pniel Institute had become possessed of the ground by prescription. The Institute's rights were directly affected—even though, possibly, not adversely—and consequently it was held that the Institute should have been joined. Searle, J., giving judgment said:—

> "Now with regard to the land which he says has been acquired by prescription he asks the Court to declare that the Institute has become possessed of this bround by prescription . . . This Court is not in the habit of declaring the rights of people in land without having before it all those whose names are registered in respect of the title of that particular piece of land."

Similarly in the earlier cases referred to in the judgment (one dealing with water rights and the other with a right of way, claimed by virtue of ownership) the rights of certain third parties who did not have notice would have been directly affected. But what is the position when the rights of other co-owners are not affected?

Le Roux *v.* Malherbe, 2 Buchanan 192, is a clear authority for the proposition that a definite undivided share in land can be acquired by prescription. Mr. Cooper did not dispute this, but he pointed out, rightly, that this case did not dispose of his argument as regards non-joinder.

I am inclined to agree with Mr. Joubert that plaintiff's adverse user was exercised against the defendant and against defendant only. The land had been shared out by the co-owners among themselves, apparently to their mutual satisfaction, many years ago, and the others would, consequently, be estopped from now claiming any interest in the defendant's share, save, no doubt, in the event of registration of subdivisional title. They would, therefore, have no concern whatsoever with plaintiff's claim to acquire defendant's share of the farm. Citing Amalgamated Engineering Union *v.* Minister of Labour, 1949 (3) SA 637, Mr. Joubert urged that to qualify for joinder the other co-owners would have to have a direct and substantial interest in the claim. But it is really immaterial whether the adverse user was exercised only against the defendant or against all the co-owners as Mr. Cooper has submitted. Adverse user for the prescribed period is admitted over a certain portion of the farm representing the extent which a holder of a 1/23rd undivided share may occupy. Consequently plaintiff already in 1950 had become the owner *ipso jure* of a 1/23rd undivided share, in terms of section 2 (2) of the Prescription Act, 1943. This adverse user was exercised against someone, and against whosoever he or they may be plaintiff, as owner, is entitled to claim registration of his title. Plaintiff is not seeking —as Mr. Cooper's argument seems to imply—to become the owner, but to have his ownership title registered. He therefore brings his action against the only person who, he considers, is

affected by this claim—namely the defendant; and he is affected to the extent that he is asked to surrender his title. That title is the only subject matter in dispute. Nothing is wanted from the other co-owners who all hold separate title deeds to their undivided shares. Not only have they no direct or substantial interest in this claim but they are not even remotely concerned.

The Native Commissioner's judgment is correct and the appeal is dismissed with costs.

Nel, Member: It was contended on behalf of appellant that all the co-owners must be joined in every case concerning acquisitive prescription of immovable property. I do not consider that this is essential.

The general rule is that "where the judgment sought is a declaration of rights in relation to land the registered owners of that land must be before the Court, for the Court is not in the habit of declaring the rights of persons of land without having before it all those whose names are registered in respect of the title of that particular piece of land". (See Beck's Theory & Principles of Pleading in Civil Actions, page 11.)

But according to Beck at page 10, "it seems that joinder is only essential of those parties who have such an indivisible interest in the subject matter of the action that the judgment sought must necessarily affect them". I cannot see why it should be essential in a case in which other parties may have similar rights depending on a similar title, but who are not necessarily affected by any judgment in an action in which they are not parties.

In the case of Muller's Executors *v.* Small Farms 1910 T.P.D. 199, Mason J, pointed out at page 189 that there are numerous cases in which exceptions of non-joinder have not been allowed.

The onus was consequently clearly on the appellant to prove that the co-owners had a direct and substantial interest in respondent's claim and that they would be prejudiced by any judgment given if they were not joined as defendants. This appellant has failed to do. He contended that the co-owners had to be joined as defendants because of the sole fact that they were in accordance with their title deeds co-owners of the share claimed by the respondent.

It is not apparent to me that the rights of the other co-owners are affected by respondent's claim. Respondent is not concerned with their titles. The right he claims is registration as the owner of that share which is registered in the name of appellant. And if, in consequence thereof, he becomes registered as owner of that one twenty-third share the rights of the other co-owners would in no way be infringed. They would in no way be prejudiced. They would merely have to negotiate with respondent instead of appellant when negotiating about subdivision of the farm. They would be in a similar position, in respect of the relative one twenty-third undivided share, as they would be for example in the case of sale thereof, or devolution thereof in a deceased estate. Adverse user has been against appellant only.

I have read the judgment of the President and agree with him.

O'Connell, Member: The question we are called upon to answer is simply this: "Is plaintiff's summons fatally defective because he has failed to join all the other co-owners as co-defendants?" In approaching this problem, I have applied the touchstone mentioned by Fagan, A. J. A. (as he then was) in Amalgamated Engineering Union versus Minister of Labour S.A.L.R. 1949 (3) at page 657 and have posed myself this question: "In what manner, and to what extent, would the Court's order affect the interests of the other co-owners?"

As the evidence shows, the farm was purchased in 1913 by 23 co-purchasers. Each co-purchaser received a title deed showing him to be the owner of a one twenty-third undivided share of the farm. By agreement each co-purchaser was allotted a defined portion of the farm for his own use. The farm was not worked on a communal basis but each co-purchaser worked the portion

allotted to him for his own exclusive benefit. Plaintiff has openly so used and enjoyed the portion allotted to defendant for a period in excess of 30 years and no objection to his so doing has ever been made by any of the other co-purchasers.

In the light of these facts, it cannot be said that the other co-owners have a direct, proprietary or substantial interest in the portion allotted to defendant. I cannot see in what way their interests would be affected if defendant's portion were to be transferred to plaintiff. I would not affect their rights of ownership because they would still each retain their respective 1/23rd shares unimpaired. The only change that the Court's order would bring about would be the substitution of plaintiff for defendant as the registered owner of the latter's undivided 1/23rd share and such change would in no way affect the interests of the other co-owners.

Counsel for defendant submitted that, because transfer was claimed on the ground that Plaintiff had acquired ownership by prescription, a different approach to the question of joinder of parties from that in the cases of acquisition by other modes was called for. I have been unable to find any authority in support of this contention which is accordingly rejected.

The other co-owners cannot be said to be necessary parties to the action and the question must, therefore, be answered in the negative.

I concur in the judgment of the learned President and agree that the appeal be dismissed with costs.

For appellant: Adv. C. Cooper, instructed by Solomon & Nicholson.

For Respondent: Adv. C. P. Joubert, instructed by Austin Goudvis, Sapirstein & Kuyper.

NORTH-EASTERN NATIVE APPEAL COURT.

LANGA AND ANOTHER *v.* KHUZWAYO.

N.A.C. CASE No. 10 OF 1958.

VRYHEID: 2nd April, 1958. Before Menge, President, Ashton and Schultz, Members of the Court.

ASSAULT IN NATIVE LAW.

Assault actionable in Natal Native Law—Responsibility of Kraalhead.

Summary: Plaintiff (now respondent) sued the defendants, father and son, jointly for £1,500 damages, the latter in respect of an assault on plaintiff and the former as kraalhead. £100 were awarded. The defendants appealed on the merits and failed, but the Court considered the legal position of the liability of the father as kraalheid.

Held (Menge, President, dissenting): That assault is an actionable wrong in Natal Native law, for which the kraalhead is responsible.

Statutes referred to:

Sections *eleven* (1), *fifteen* and *twenty-four,* Act No. 38 of 1927.

Sections 130 and 141 of the Natal Code of Native Law.

Cases referred to:

Sipongomana *v.* Nkulu & Others, 1901, N.H.C. 26.
Madumo *v.* Manne, 1932, N.A.C. (T. & N.) 16.
Mbata *v.* Mbata, 1937, N.A.C. (T. & N.) 75.
Mkungana & Others *v.* Dumke, 1939, N.A.C. (C. & O.) 68.
Nzuza *v.* Biyela & Others, 1951, N.A.C. (N.-E.) 319.

Appeal from the Court of the Native Commissioner, Babanango.

Menge, President, dissenting:

In the Native Commissioner's Court plaintiff sued defendants for £1,500 damages for injuries alleged to have been caused in an assault on him by defendant 1. Defendant 2, his father, is joined as kraalhead of defendant 1.

Defendant 1 pleaded a denial of the assault, and, in the alternative, somewhat inconsistently, self-defence *and* provocation. Defendant 2 denied that he was liable in respect of the assault.

Evidence was heard for both parties, who were represented but for the defence only defendant 1 gave evidence.

The Native Commissioner awarded £100 damages and costs. The defendants appealed on the facts and on certain further grounds which were abandoned by Mr. Uys at the hearing of the appeal. One of these was that the award was excessive.

As to the facts we are unable to find fault with the Native Commissioner's conclusions. It is common cause that the plaintiff lost the sight of one of his eyes as a result of a blow from an axe delivered by defendant 1. The onus then rested upon defendant to prove the self-defence or provocation, but he failed to discharge that onus. The only difficulty arises from the question whether defendant 2 is liable. Mr. Uys did not argue that there is no liability in law. Nevertheless, a mistaken view of the law on the part of the parties does not bind the Court; and the fact that the appellant has not taken the point on appeal makes no difference as this Court has "full power of review (section *fifteen* of Act No. 38 of 1927). It is very necessary that these powers should readily be used, because legal practitioners are seldom well versed in the finer points of Native law and administration and look to the Courts for guidance. It follows that as regards the second defendant the judgment can only stand if the Court is satisfied that he is liable in law.

In the record, after the addresses at the conclusion of the evidence, there appears the following note by the Native Commissioner:—

> "Native Commissioner queries with parties fact that no indication has been given by either side of what law they base their case on. As claims for damages as in present circumstances are well recognised in Natal Native law he proposes to apply Native law."

This is a wrong approach. Since Act No. 38 of 1927, there is no such thing as basing one's case on any particular system of law, or, as it is sometimes said, bringing a case under one system or another. The position is that a person who considers that his legal right have been infringed or who seeks redress simply sets out the cause of his complaint in his summons. Any suggestion that one system of law or the other should be applied to that complaint would be quite out of place. Being a Court of *law* [section *ten* (2)] it is the duty of the Native Commissioner to deal with the matter under the ordinary law of the land. There is only one exception: When questions of customs followed by Natives are involved, then section *eleven* (1) gives the Native Commissioner a discretion to apply Native law to such customs subject to certain conditions.

Now, in the present case in so far as the plaintiff's claim against defendant 1 for damages for assault is concerned and the defence thereto, no question of customs followed by Natives is involved at all if one follows the meaning assigned to the word "involving" by the Appellate Division in *ex parte* Minister of Native Affairs *in re* Yako versus Beyi, 1948 (1) S.A. 391. And indeed the Native Commissioner did not decide this claim according to Native law, not even the amount of compensation to be paid. He decided the case against first defendant fairly on orthodox common law principles. But in regard to the claim against second defendant the Native Commissioner had a dis-

creation because, not only was a question of customs followed by Natives involved, viz. the liability of a kraalhead, but the very cause of action is governed by and dependant on Native law. The Native Commissioner decided to apply Native law to this claim, no doubt because such a claim is not known to common law. The only question to be decided then, is whether in Native law a kraalhead is responsible for a delict committed by an inmate of his kraal when the action against the inmate is one decided under common law and in which no question of customs followed by Natives is even involved. One only needs to state this proposition to realise that there is something wrong. It may be simply that Native law should not be applied because the result, in terms of the proviso to section *eleven* (1), would be "opposed to the principles of a public policy or natural justice". But these considerations are an unsafe guide: *quot homines tot sententiae*. It may be as well to enquire whether it is at all possible to apply Native law to the second claim. Clearly Native law can only be applicable if assault is actionable in Native law for, in the face of such decisions as Madumo *v.* Manne, 1932, N.A.C. (T. & N.) 16, no one will wish to argue that the kraalhead was liable even if there was no action against the wrongdoer. This narrows the enquiry down to the question whether assault is actionable in Natal Native law. Outside Natal the rule has always been that it is not [see Madumo's case above and also Mkunqana & Others *v.* Dumke, 1939, N.A.C. (C. & O.) 68, where McLoughlin, President, said: "In pure Native law, no action lies at the suit of an individual who has been injured in his person for the action is one which can be instituted only by the Chief of the injured person, it being a case of blood"].

In pursuing this further enquiry the first rule to be observed is that any law which imposes a liability on an innocent person for the wrongful acts committed by another is a very harsh measure which must be strictly interpreted; the more so because the reasons upon which the liability of the kraalhead rested in Native law have largely ceased to exist under modern conditions, which favour the growth of individualism. These reasons were that the kraalhead in Native life had control over his kraal inmates; that he was responsible to his chief for their good behaviour, and that he alone had *de jure* ownership of all their property.

The Native Commissioner's contention that claims for damages for assault are "well recognised in Natal Native law" seems to have its roots in the case of Sipongomana *v.* Nkuku & Others, 1901, N.H.C. 26. The headnote to this case reads: "*Held:* That a cause of action does lie, under Native law, for damages caused through the killing of a man by others"; but that is incorrect. That is what the editor decided. The Court decided something quite different. It held that injury to a person, actionable in common law, is actionable under a statute which makes only claims known to Native law actionable unless it is manifestly unjust not to allow an exception. As was said later in Kanyile *v.* Zuma & Others, 1929, N.H.C. 10: "The law as laid down in the case Sipongwana (sic) versus Nkuku & Others is in accord with the principles and policy of natural equity by which we are required to be guided under the provisions of 80th section of the Courts Act, 1998 . . .". This case did not and could not decide that personal injury was actionable in Native law. The learned judges were agreed that it was not, except—in the view of the Judge President—among some tribes.

The ruling in Sipongomana's case served a very necessary purpose at that time and right up to 1927, when section *eighty* of the Natal Courts Act was repealed and the entire structure altered by section *eleven* of the Native Administration Act. The importance of this change and the editor's mistake in Sipongamana's case were overlooked by McLoughlin, President, when he said in Mbata *v.* Mbata, 1937, N.A.C. (T. & N.) 75 (a Natal case): "It is true that in old Native custom the injured party had no claim for personal recompense, the Chief being regarded by Native law as the proper person to prosecute, but in view

of the decision of the Native High Court in Sipongomana *v.* Sikuku and 2 Others, 1901, N.H.C. 26, this Court considers itself bound to give a personal right of action in assault cases". There was no need for the Court to hold itself bound to give a right of action; that right already existed—in common law. This deep-rooted misunderstanding as to the effect of section *eleven* of the Act was removed when the matter of Yako *v.* Beyi came before the Appellate Division, but subsequently it again raised its head in cases such as Nzuza *v.* Biyela & Others, 1951, N.A.C. (T. & N.) 319. In that case the Court also misconstrued the effect of Sipongomana's case.

So far then as pure Native law is concerned the position in Natal is no different and never was to what it is elsewhere in the Union. Assault is not actionable. If in any particular tribe or circumstances it was actionable that would, of course, require proof.

Does the Natal Code alter this in any way? Nowhere it is laid specifically that assault is actionable. But sections 141 and 130 would appear to be in point. The former makes a kraal-head liable in respect of delicts committed by an inmate. This can only refer to delicts known to Native law as modified by the Code and not to other common law delicts, for the Code is not just a set of laws applicable to Natives, but a code to Native law. That flows from section *twenty-four* of the Act read with section *one* of Natal Law, No. 19 of 1891, and section *five* of Natal Law, No. 44 of 1887. No one would seriously suggest for instance that in terms of a code of *Native law* a kraalhead should be sold up lock, stock and barrel because his major son, who happens to stay with him, drove a motor vehicle negligently on his way to town or defrauded someone by forging a cheque.

Section 130 of the Code does not take matters any further. It makes any "wrongful act committed against any Native" actionable. By "wrongful act" cannot be meant a mere moral wrong because the Code is not a code of behaviour but a code of law. The expression can only mean an act in respect of which the person against whom it has been committed has a right of redress; and for the reasons already given this must be a right of redress in Native law. To hold otherwise—to construe the words "a wrongful act" as including common law delicts—would be a senseless tautology, or at least an indifferently expressed and quite irrevelant enunciation of a well-known rule of common law. True, in Native law there is an action for personal injury. But it lies only with the Chief, not with the person injured. The Code does not alter this position.

For these reasons it is clear that assault is not actionable in Natal Native law. That being so there is no claim against the second defendant in the present case. The appeal should be upheld as regards the second defendant. However, in view of the majority opinion it is ordered that the appeal is dismissed with costs, but the Native Commissioner's judgment is altered to read:—

> "For plaintiff for £100 and costs against both defendants, the one paying the other to be absolved."

Ashton, Permanent Member, with whom Schultz, Member, concurs:

Before proceeding to a discussion of the merits of this case it would seem necessary to deal first with the points raised by the learned President as to whether the Native Commissioner was correct in ruling that the case be decided under Native law and custom and whether under Native law and custom a claim for damages arising out of an assault exists.

It is my view that an Appeal Court has no right to rule that a Native Commissioner has not exercised properly the discretion imposed in him by section *eleven* (1) of Act No. 38 of 1927 unless it is clear that he was manifestly wrong in his decision and far from that being the position in the case now on appeal it is my view that the Native Commissioner's decision was right.

In the first place the Court's approach to the matter should be whether plaintiff is debarred from bringing his action under whichever law it would seem he has brought his case. In the case of Yako v. Beyi, 1948 (1), S.A. 388 (A.D.), page 393, the learned Judge of Appeal said: "The matter that is really sought to be determined is whether a Native woman as such is *debarred* from bringing an action for damages for seduction against a Native man in a Native Commissioner's Court" and he proceeded to consider the question and to answer it in that sense.

In the case now before this Court it is clear from the inclusion of first defendant's kraalhead as second defendant and subject (only under Native law) to liability for the delict of the inmate of his kraal, that plaintiff brought his action under Native law. The fact that the damages sounded in money does not negative this view as it has become longstanding practice for damages sounding in money to be awarded in proper cases when claimed under Native law.

The Native Commissioner ruled that Native law should be applied and the parties have in no way queried that ruling. It is not for this Court of its own motion to say it was wrong and in my opinion it was right anyway.

The next point to consider is whether a claim for damages arising out of an assault exists under Native law.

Section 130 of the Natal Code of Native law (which incidentally comprises and constitutes Native law in Natal) provides that a wrongful act committed against a Native founds an action against the transgressing Native. In the case of Sipongomana *v.* Nkuku & Others, 1901, N.H.C. 26, the Native High Court held that a cause of action did lie under Native law for damages caused through the killing of a man by others. In reaching that conclusion the Court explained that in such actions the chief in earlier days took the necessary steps to compensate the sufferer but that as Chiefs in Natal never had paramount powers they could not confiscate the property of a transgressor and out of it compensate the person wronged. Campbell, J.P. on page 29 said: ". . . It would be manifestly unjust to deny such a personal right now, considering the changed relationship of Chief and people as well as the practice of the Courts". If it would have been unjust then to deny such a right how much more unjust would it be now.

The Courts of Natal and this Court have followed that 1901 decision in countless cases and it would be more than a bold step to rule contrary to it after half a century of recognition and acceptance. Whatever may have been *pure* Native law in Natal or in any of the other Provinces of the Union it is established in Natal that a claim for damages for assault is actionable under Native law and has been since 1901.

To rule otherwise without the conviction—after exhaustive argument on the point which the Court has not had in this case—that this and the Native High Court have been manifestly wrong is a step I am not prepared to take and consequently I find myself unable to agree with the learned President's view. Mr. Uys on behalf of defendant indicated that he did not rely on the defence that damages for assault was not actionable under Native law.

And now having expressed the view that the case was rightly heard under Native law and that an action did lie it remains to deal with the facts and the merits of the case:

Plaintiff sued two defendants jointly and severeally for £1,500 damages for wrongful and unlawful assault on the part of first defendant (who at the time was resident at second defendant's kraal) whereby plaintiff suffered damage to his eye, ears and arm.

Defendant denied the assault and alternatively if the injuries were found by the Court to have been inflicted by first defendant then they pleaded that the injuries were inflicted during first defendant's efforts to repel an unprovoked assault on him by plaintiff.

After hearing evidence for both plaintiff and the defendants the Native Commissioner gave judgment for plaintiff for £100 damages and costs.

Prior to the trial plaintiff successfully applied to the Native Commissioner for an interim-interdict against the defendants restraining the removal of cattle in their kraal and as a result the Messenger of the Court attached nine cattle belonging to the defendants.

The defendants were called upon in the order to appear before the Native Commissioner on the 1st August, 1957, to show cause "why this order should not become final" but on that date the parties did not appear and consequently, it would seem, the interim-interdict ceased to be of force and effect.

In due course defendants noted an appeal against the Native Commissioner's judgment on the grounds, firstly that the evidence showed that plaintiff received his injury in a fight and by sheer accident or in an effort by first defendant to repel an attack by plaintiff upon him; secondly, the Court erred in granting and confirming the interim-interdict and in finding that second defendant "was liable for the alleged assault on plaintiff by defendant No. 1 on the evidence adduced"; thirdly, "that the judgment was against the weight of evidence" and, finally, that the damages claimed or awarded were not proved and the award was excessive.

The facts found proved by the Native Commissioner were—

"(1) that defendant No. 1 unlawfully assaulted plaintiff with an axe;

(2) as a result of such assault the plaintiff has completely lost his right eye;

(3) that defendant No. 2 is the father of defendant No. 1;

(4) that defendant No. 1 resides in the kraal of his father defendant No. 2."

Nothing has been shown to justify the Court in saying that the Native Commissioner was wrong in his findings of fact and they are accordingly accepted as correct.

The Native Commissioner recorded that no indication was given by either side as to what law the claim should be dealt under and he adopted Native law. The correctness of this decision has already been dealt with.

The next point to consider is the amount of damages awarded, £100, which the Native Commissioner states is the equivalent of seven head of cattle.

The Native Commissioner based his award of damages on the evidence placed before him and defendants in their appeal have raised the point that the amount was excessive but they have not indicated in what respect they base their contention except by saying "taking into account the conduct of the parties shortly before and after the alleged assault". Mr. Uys abandoned the second and fourth grounds of his appeal.

An Appeal Court will only alter an award of this nature when it has been shown to be grossly excessive; this has not been done in this case and in any case the ground of appeal has been abandoned.

In the circumstances I think the appeal should be dismissed with costs but to make the Native Commissioner's judgment quite clear it should be altered to read:—

"For plaintiff for £100 and costs against both defendants, the one paying the other to be absolved."

For appellant: C. J. Uys.

For respondent: H. L. Myburgh.

NORTH-EASTERN NATIVE APPEAL COURT.

Ex Parte **MASILELA.**

N.A.C. CASE No. 40 OF 1958.

PRETORIA: 3rd June, 1958. Before Menge, President, in Chambers.

PRACTICE AND PROCEDURE.

Appeal ex parte.—*Review of act of Registrar.*

Summary: Applicant had unsuccesfully sought a vindicatory interdict against one FOSI MABUSA in the Native Commissioner's Court, Barberton, on an *ex parte* application. He thereupon sought to appeal against the Native Commissioner's decision without serving notice of appeal on Fosi Mabusa and without furnishing security for costs. The Registrar refused to enrol the appeal on the ground that service of the notice of appeal and security for costs were required in terms of Appeal Court rules 6 (1) and 5 (3) respectively, and because the fact that the original application was brought *ex parte* does not relieve the appellant of the necessity to bring before the Appeal Court the party who will be affected by the appeal if successful. On an application for a review of the refusal of the Registrar, under Appeal Court Rule 1 (2).

Held (dismissing the application for review): That on the authority of Van Schalkwyk's case, 1952 (2) S.A. 407 the respondent must be brought before the Court of appeal, and that unless this is done the Court has no jurisdiction to hear the appeal.

Cases referred to:

Ex parte Van Schalkwyk, N.O. and Hay N.O. 1952 (2) S.A. 407.

Statutes referred to:

Rules 1 (2), 5 (3) and 6 (1) of the Native Appeal Court rules.

For applicant: Dyason, Douglas, Muller & Meyer.

SOUTHERN NATIVE APPEAL COURT.

THINTA *v.* THINTA.

N.A.C. CASE No. 26 OF 1958.

KING WILLIAM'S TOWN: 15th and 16th October, 1958. Before Balk, President, Harvey and Leppan, Members of the Court.

PRACTICE AND PROCEDURE.

Jurisdiction of Native Appeal Court in case purporting to have been tried by Magistrate's Court—When ground on which appeal struck off roll taken ex mero motu, *no costs awarded.*

Summary: From the record it appeared that the action had been tried, and the judgment given in the Magistrate's Court as the words "In the Magistrate's Court" appeared at the head of the notes of the trial and the signature of the presiding judicial officer over the designation of "Magistrate" throughout the record. In the pleadings and the reasons for judgment, however, the heading "In the Native Commissioner's Court" appeared.

Held: That where, according to the record, the action purports to have been tried, and the judgment given, in the Magistrate's Court, a Native Appeal Court has no jurisdiction to decide the appeal even though the pleadings and the reasons for judgment are headed "In the Native Commissioner's Court".

Held further: That as the ground on which the appeal was struck off the roll was taken *ex mero motu,* there should be no order as to costs.

Cases referred to:

Rex *v.* Radebe & Others, 1945 A.D. 590.

Read *v.* S.A. Medical & Dental Council, 1949 (3) S.A. 997 (T.P.D.).

Yeni *v.* Jaca, 1953 N.A.C. 31 (N.E.).

Appeal from a civil case heard in Grahamstown.

Balk (President):—

This is an appeal from the judgment of a Court in a civil action.

Whilst this Court was considering argument advanced for both parties on the merits of the appeal, it came to its notice that, according to the record, the case appeared to have been tried, and the judgment appeared to have been given, in a Magistrate's Court and that it was, therefore, doubtful whether this Court had jurisdiction to determine the appeal regard being had to sections *thirteen* and *fifteen* of the Native Administration Act, 1927, which provide for the constitution of this Court and its jurisdiction.

This question was, therefore, raised by this Court *ex mero motu* and, at its request, was argued on behalf of both parties. That it was proper for this Court to take this course is apparent from Rex *v.* Radebe and Others, 1945 A.D. 590, at page 597.

In the course of the argument, Mr. Stewart, who appeared for respondent, applied for a postponement of the hearing of the appeal to permit his correspondents to go into the matter with the Magistrate concerned. Mr. Heathcote, who appeared for appellant, opposed the application. It was not clear to this Court that any useful purpose would be served by allowing a postponement.

Moreover, such a course would have mulcted the parties in additional costs; and here it must be borne in mind that a postponement for the purpose indicated would necessarily have involved a postponement to next session when it may well not be possible for this Court to be constituted as it is at present in that two of its members are Native Commissioners and may not be available then. The application was, therefore, refused. Here it should be mentioned that in reply to this Court Messrs. Stewart and Heathcote both gave the assurance that they had been allowed sufficient time to prepare their argument on the question of jurisdiction.

Mr. Heathcote conceded that, in the circumstances, this Court had no jurisdiction to decide the appeal. Mr. Stewart, however, contended that it had such jurisdiction as the pleadings and also the reasons for judgment were headed " In the Native Commissioner's Court " which, in his submission, indicated that the words " In the Magistrate's Court " appearing at the head of the notes of the trial and the signature of the presiding judicial officer over the designation of " Magistrate " throughout the record, constituted patent errors. But, the mere fact of the heading " In the Native Commissioner's Court " in the pleadings and reasons for judgment does not necessarily indicate that the heading " In the Magistrate's Court " preceding the notes of the trial was a patent error. Mr. Stewart also submitted that the pleadings and reasons for judgment formed part of the proceedings and that this aspect had to be borne in mind with reference to the language of the above-mentioned sections of the Native Administration Act, 1927, i.e. that those documents being part of the proceedings and being headed " In the Native Commissioner's Court " showed that this Court had jurisdiction within the meaning of those sections. But, in my view, the crucial part of the proceedings for the purposes of the sections must be taken to be the trial and judgment, regard being had to the language of the sections; and as those proceedings purport, according to the record, to be proceedings of the Magistrate's Court presided over by the Magistrate, this Court has no jurisdiction to determine the appeal.

The question of costs in this Court in the event of its holding that it had no such jurisdiction was also argued. Mr. Heathcote submitted that there should be no order as to costs in this Court as the respondent had not objected to the appeal in the manner provided by Rule 14 of the rules of this Court, and was, therefore, not entitled to any costs. Mr. Stewart, on the authority of Read *v.* S.A. Medical & Dental Council, 1949 (3) S.A. 997 (T.P.D.), at pages 1024 and 1025, contended that respondent was entitled to the costs. But, to my mind, it is not clear that that case is apposite here, firstly, because the point on which the appeal turned was taken by this Court *ex mero motu,* see Yeni *v.* Jaca, 1953 N.A.C. 31 (N.E.), at page 34; and, secondly, because there appears to be substance in Mr. Heathcote's argument.

In the result the appeal falls to be struck off the roll with no order as to costs.

Harvey, K. G. (Member): I concur.

Leppan, A. W. (Member): I concur.

For Appellant: Mr. E. Heathcote of King William's Town.

For Respondent: Mr. T. Stewart of King William's Town.

SOUTHERN NATIVE APPEAL COURT.

MGEDEZI *v.* **BONTSA and ANOTHER.**

N.A. C. CASE No. 29 OF 1958.

UMTATA: 30th September, 1958.

Before Balk, President, Grant and King, Members of the Court.

CONFLICT OF LAWS.

Liability of kraalhead for tort of inmate—System of law to be applied—Considerations.

Summary: Plaintiff (now appellant) sued first defendant for damages for seduction and pregnancy joining the father (second defendant) in his capacity as kraalhead. Consent judgment was entered against first defendant and the second defendant was absolved from the instance on his plea that by virtue of his common law marriage and the full emancipation of his son (first defendant), he (second defendant) was not liable.

Held: Liability of a kraalhead for a delict committed by an inmate of his kraal is based not on relationship but on the control which he is expected to exercise over all inmates of his kraal, so that a kraalhead's civil marriage does not in itself preclude such liability in a proper case.

Held further: That where it is shown that the kraalhead in the main observed Native law—particularly where he has done so to the extent that he was himself to blame for being sued in respect of a tort committed by an inmate of his kraal—Native law should be applied.

Cases referred to:

Tonjeni *v.* Tonjeni, 1947 N.A.C. (C. & O.) 8.

Skenjana *v.* Guza & Others, 1944 N.A.C. (C. & O.) 102.

Mhlokonyelwa *v.* Ngoma, 1 N.A.C. (S.D.) 197.

Nteteni *v.* Nkonhla, 1 N.A.C. 172.

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

Umvovo *v.* Umvovo, 1953 (1) S.A. 195 (A.D.).

Nombida *v.* Flaman, 1956 (2) N.A.C. 108 (S).

Appeal from the Court of the Native Commissioner at Qumbu.

Balk (President):—

The plaintiff sued the two defendants in a Native Commissioner's Court for three head of cattle or their value, £30, as damages for the seduction and pregnancy of his daughter, averring, *inter alia,* in the particulars of his claim, that the first defendant was the tort feasor and that the second defendant was liable for the first defendant's torts as the latter was unmarried and resident at the former's kraal.

Judgment was entered by the Native Commissioner's Court for plaintiff as prayed against the first defendant, by consent.

In his plea, as amended with the leave of that Court, (hereinafter referred to as the second defendant's amended plea), the second defendant averred that the first defendant was his lawful son by a Christian marriage and was fully emancipated and that he was accordingly not liable for the first defendant's torts.

The Assistant Native Commissioner *a quo* upheld this plea and absolved the second defendant from the instance.

The appeal from that judgment is brought by the plaintiff on the following grounds:—

"1. That the Assistant Native Commissioner erred in holding that defendant No. 2, by reason of the fact that he is married by Christian Rights, is not liable for the torts of defendant No. 1 his unmarried son who is an inmate of his kraal.

2. That the judgment is against the weight of evidence the proved facts and the probabilities of the case."

The uncontroverted evidence for the plaintiff establishes the alleged seduction and pregnancy and it is admitted in the defendants' plea that the first defendant was an inmate of the second defendant's kraal. It was admitted during the course of the trial in the Court below that the first defendant was unmarried at the time of the seduction. It follows that the only matter for decision is whether the Assistant Native Commissioner was correct in sustaining the second defendant's amended plea.

That the first defendant is the second defendant's son by a marriage according to Christian rites is borne out by the evidence adduced on behalf of the second defendant. There is, however, no evidence indicating that the first defendant was emancipated.

From the Assistant Native Commissioner's reasons for judgment, it appears that in upholding the second defendant's amended plea, he relied on the dictum in Tonjeni *v.* Tonjeni, 1947 N.A.C. (C. & O.) 8 that a civil marriage between Natives does not create "a house" in the sense of the definition of that term in section *thirty-five* of the Native Administration Act, 1927. As far as can be gathered from those reasons which are rather nebulous in this respect, he relied on that dictum because, as submitted in Seymour's Native Law in South Africa, at page 22, it indicates that the husband of a civil marriage cannot bear the relationship of kraalhead towards his children by such a marriage and, therefore, cannot be held liable under Native law for their delicts. But, as contended in the argument on behalf of the appellant, that proposition loses sight of the fact that the principle underlying the liability in Native law of a kraalhead for a delict committed by an inmate of his kraal is not relationship but the control which a kraalhead is expected to exercise over all the inmates of his kraal irrespective of whether they are relations of his or not, see Skenjana *v.* Guza & Others, 1944 N.A.C. (C. & O.) 102, at page 103, and Mhlokonyelwa *v.* Ngoma, 1 N.A.C. (S.D.) 197, so that the Assistant Native Commissioner erred in upholding the second defendant's amended plea on the basis of relationship.

Although the Assistant Native Commissioner does not expressly state that he applied common law in deciding the issue raised in the second defendant's amended plea, it is implicit in his reasons for judgment that he did apply that legal system. His reasons for doing so are contained in the following excerpt from his judgment:—

> "With the progress that the Native people have made and the fact that more and more of them are making use of the law of the land in their dealings, it is felt that the time is ripe for them to discard customs that are in conflict with the common law. I have not found the task an easy one but on the reasons mentioned above and the fact that the tendency is to discard Native law wherever it conflicts with the common law, I submit that the father of a Christian marriage should not be liable for the torts of persons living at his kraal, and that the perpetrator should be answerable for his own wrongs."

The reasons referred to in the sixth line of the foregoing passage have already been dealt with above. By "conflicts" in that passage the Assistant Native Commissioner appears to intend to convey that whereas Native law here provides a remedy against the second defendant, the common law does not do so, see Nteteni *v.* Nkohla, 1 N.A.C. 172, at page 173. It remains to consider whether the Assistant Native Commissioner exercised a proper discretion in applying common law regard being had to the principles enunciated in *ex parte* Minister of Native Affairs: *In re* Yako *v.* Beyi, 1948 (1), S.A. 388 (A.D.) read with Umvovo *v.* Umvovo, 1953 (1) S.A. 195 (A.D.). This aspect of the case was also fully argued before this Court.

The fact that the second defendant is married according to civil rites and that the first defendant is his son by such marriage are undoubtedly considerations favouring the application of common law. A further reason for preferring that legal system is that it is the more advanced one, see Nombida *v.* Flaman, 1956 (2) N.A.C. 108 (S), at page 110. But, to my mind, the overruling consideration in the instant case is that, as is manifest from the evidence, the second defendant in the main adheres to Native custom. That this is so is apparent from the fact that he paid dowry for his wife, acquiesced in the Native law procedure of the "stomach" being sent to him and when this was done, asked for the matter to be held in abeyance until the child was born so that it could be inspected to see whether it resembled the defendants' family; and thereafter he sent women to inspect the child who found that it bore no resemblance to the defendants' family which resulted in the institution of the instant action. It follows that not only did the second defendant in the main adhere to custom, but he did so to an extent that he has only himself to blame for the plaintiff's having sued him so that it would be manifestly unfair to allow the second defendant to take advantage of a defence open to him under common law only.

In these circumstances it seems to me that the Assistant Native Commissioner's decision to apply common law is not one that he could properly arrive at and that Native law falls to be applied to reach a just decision between the parties.

In the Court below, the plaintiff's attorney consented to there being no order as to costs in that Court and the attorneys who represented the parties in this Court agreed that there should be no order as to costs of appeal no matter what the outcome of the appeal was.

In the result the appeal falls to be allowed with no order as to costs and the judgment of the Court *a quo* altered to read: "For plaintiff against second defendant as prayed with no order as to costs".

Grant, D. S. (Member): I concur.

King, V. S. S. (Member): I concur.

For Appellant: Mr. E. C. Chisholm of Umtata.

For Respondents: Mr. K. Muggleston of Umtata.

SOUTHERN NATIVE APPEAL COURT.

ZAKHELE *v.* GOBIDOLO.

N.A.C. CASE No. 35 OF 1958.

PORT ST. JOHNS: 23rd September, 1958.

Before Balk, President, Midgley and Hastie, Members of the Court.

PRACTICE AND PROCEDURE.

Appeal from Chief's Court—New cause of action.

NATIVE LAW AND CUSTOM.

Close male relative of husband conniving at adultery of latter's wife.

Summary: Plaintiff (now appellant) sued defendant (now respondent) before a chief for five head of cattle or their value, £50, as damages for adultery committed by defendant with his wife, followed by her pregnancy. The appeal to the Native Commissioner's Court was allowed and the judgment of the lower Court altered to one for the plaintiff for three head of cattle or their value, £30, for damages for adultery only. Plaintiff's brother-in-law alleged in evidence that he had allowed plaintiff's wife and defendant to sleep together at his kraal.

Held: That in an appeal from the judgment of a Chief's Court in an action for damages for adultery followed by pregnancy, it is competent for the Native Commissioner's Court hearing the appeal to allow damages based on adultery only as the award cannot be said to be based on a new cause of action.

Held further: That it is contrary to custom for a close male relative of the plaintiff to have permitted the latter's wife to commit adultery at his (the relative's) kraal.

Semble: The notice of hearing of an appeal from the judgment of a Chief's Court (form N.A. 503) forms an integral part of the record and should always be included therein.

Cases referred to:

Bayele *v.* Mtetwa, 1953 N.A.C. 56.

Mtsewu *v.* Tyaliti, 4 N.A.C. 24.

Appeal from the Court of the Native Commissioner of Port St. Johns.

Balk (President):—

This is an appeal from the judgment of a Native Commissioner's Court allowing an appeal against the judgment of a Chief's Court and altering the latter judgment to one for plaintiff for three head of cattle or their value, £30, with costs.

The plaintiff's claim as restated in the Native Commissioner's Court was for five head of cattle or their value, £50, as damages for adultery committed by the defendant with his customary wife, Marela, followed by her pregnancy.

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

"1. The judgment is against the weight of evidence, the facts found proved and the probabilities of the case as a whole.

2. That as the case was an appeal from the Court of Deputy-Chief Lanyanzima Mvinjelwa as an action for damages for adultery and pregnancy claiming payment of five (5) head of cattle and the said claim was dismissed by the Chief's Court and judgment was entered for defendant, the judgment of the Native Commissioner's Court for three (3) head of cattle for damages for a catch in adultery was bad in law as such catch in adultery was not an issue before the Chief's Court, and was an entirely new cause of action before the Native Commissioner's Court, and should have been instituted by way of summons and not by an appeal."

Dealing with the second ground of appeal first, it was contended in the argument on behalf of the appellant on the authority of Biyela *v.* Mtetwa, 1953 N.A.C. 56 (N.E.), that it was not competent for the Native Commissioner's Court to have awarded the plaintiff damages for a "catch" in adultery unaccompanied by pregnancy in that the claim in the Chief's Court was for adultery followed by pregnancy and the former constituted a new cause of action. Whilst it is true that in basic Native law a husband could not be awarded damages if he based his claim on adultery resulting in pregnancy and proved the adultery but not pregnancy resulting therefrom, this principle was overruled and it was laid down that it was competent to award damages in such cases, see Mtsewu *v.* Tyaliti, 4 N.A.C. 24 and the authorities there cited, so that the award in the Native Commissioner's Court cannot be said to have been based on a new cause of action. It follows that the second ground of appeal fails.

Turning to the remaining ground of appeal, viz., the first ground, it is manifest from the plaintiff's evidence that he had no witness other than his wife at the Chief's Court because the other witness mentioned by her, viz., Nomgungwana refused to give evidence. It also emerges from that evidence that she had since mentioned the names of two other witnesses whom the plaintiff called at the Native Commissioner's Court, viz., Tyantolo and Nongazime. According to the chief's judgment, the plaintiff was accorded an opportunity in his Court of calling witnesses other than his wife, but he did not bring any other witnesses. In the absence of any explanation in the evidence for the plaintiff for Marela's failure to divulge the names of Tyantolo and Nongaziwe as witnesses at the Chief's Court, their evidence in the Native Commissioner's Court falls to be regarded as suspect; and unless their evidence is accepted the plaintiff's case is not established.

Then there are certain improbabilities in the evidence for plaintiff. It seems most unlikely that the defendant should have spent two nights at Tyantolo's kraal openly with the plaintiff's wife as testified to by Tyantolo, supported by Nongaziwe, seeing that, according to Marela, the defendant had intercourse with her near a land near her father's kraal when they first resumed intimacy after her customary union to the plaintiff and there was good reason why the defendant should not put himself in the hands of Tyantolo, who is the plaintiff's brother-in-law, by openly cohabiting with the plaintiff's wife at Tyantolo's kraal. Here it is significant that Marela stated in her evidence that she and the defendant were keeping their relations quiet because she was a married woman. Moreover, as pointed out in the argument on behalf of the appellant, there is a discrepancy in the evidence for the plaintiff which further militates against the success of his

case, viz., Tyantolo stated under cross-examination that the defendant had visited his kraal on a prior occasion, i.e., on an occasion before he had spent the two nights with Marela there, whereas, according to Marela, Tyantolo asked her who the defendant was when she came to his (Tyantolo's) kraal with him on the occasion that they spent the two nights there. Again, it is contrary to custom for a close male relative of the plaintiff, such as Tyantolo, to have permitted Marela to commit adultery at his kraal. Bearing these factors in mind and also that the onus of proof rested on the plaintiff as the defendant had denied the alleged adultery, the plaintiff cannot be said to have established his case.

As pointed out in the argument for respondent, it is obvious from the evidence of the defendant's only witness other than himself, namely, Mtshitshimbela, that the latter was prepared to go to any lengths and that his evidence that Marela had told him that the plaintiff did not want her and she had been to the headman to dissolve their customary union, is not in accordance with the probabilities bearing in mind that the plaintiff had then sent her to show her "stomach" to the defendant. Consequently the defendant also failed to establish his case.

Although it is clear from the chief's judgment that he found against plaintiff, he did not state specifically whether his judgment was one for the defendant or one of absolution. It was, however, conceded in argument for both parties before this Court that the chief's judgment amounted to one of absolution.

In the result the appeal falls to be allowed, with costs, and the judgment of the Court *a quo* altered to read:—

> The appeal from the judgment of the Chief's Court is dismissed, with costs, but that judgment is altered to read: 'Absolution from the instance, with costs'."

It is observed that the notice of hearing of the appeal from the judgment of the Chief's Court (form N.A. 503), did not accompany the record. This document forms an integral part of the record and should always be included therein.

Midgley and Hastie, Members, concurred.

For Appellant: Mr. J. G. S. Vabaza of Libode.

For Respondent: Mr. H. H. Birkett of Port St. Johns.

NORTH-EASTERN NATIVE APPEAL COURT.

NZUZA *v.* KUMALO.

N.A.C. CASE No. 49 OF 1958.

VRYHEID: 1st October, 1958. Before Menge, President, and Ashton and Schultz, Members of the Court.

NATAL CODE OF NATIVE LAW.

Meaning of section 86—Lobolo *cattle—Alternative money value.*

Summary: Plaintiff had obtained judgment against his wife of a customary union and against her father for a dissolution of the union, custody of the children and the return of his *lobolo* less the usual deductions for the children of the marriage. In an appeal by the father on the merits and on the ground that no alternative money value had been fixed for the *lobolo* cattle.

Held (on the facts): That the *lobolo* less the deductions made was returnable.

Held further: That the plaintiff was entitled to ask for specific performance, and that if he is unable to recover his actual stock he can, without proof of or agreement as to the value of the animals, claim payment at the rate of £5 per head.

Statutes cited: Section *eighty-six,* Proclamation No. 168 of 1932.

Appeal from the Court of Native Commissioner, Nongoma.

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

Before the Assistant Native Commissioner, Nongoma, plaintiff sued his wife by Native custom (first defendant) and one Mahlungwane (second defendant) for the return of his *lobolo* of 11 head of cattle and the custody of his two children. The second defendant is the father of first defendant. That appears from the evidence; the summons does not say so. The summons also does not claim dissolution of the customary union, but plaintiff asked for this in his evidence.

The plea discloses no defence. In so far as it means anything it admits the plaintiff's allegations. It is signed by both defendants (her and his mark) but it refers only to first defendant. There is no plea by the second defendant at all. That being so the Native Commissioner should have ascertained precisely on what grounds the defendants are opposing the acton before he heard evidence. The defendants are illiterate persons and the Clerk of the Court was obviously not capable of helping them with their plea.

Actually the evidence which was given does not take matters much further as far as the attitude of the defendants is concerned. The evidence for plaintiff discloses that he married first defendant in 1954; that he paid 11 head of cattle to second defendant; that there were two children; that first defendant deserted plaintiff and went to stay with second defendant in 1955 and that she has not returned to plaintiff despite the latter's attempts to induce her to return. All this the defence evidence does not attack. One is still as much in the dark about the defence as at the close of pleadings. In these circumstances it is perhaps unfortunate that, according to the record, the parties were not asked to address the Court before judgment was given. However, the Native Commissioner found for plaintiff. He granted dissolution of the customary union; awarded plaintiff custody of the children and the return of eight head of cattle. He also declared second defendant to be the guardian of first defendant. There was no order as to costs.

An appeal is now brought by the second defendant only. The grounds are stated as follows:—

> "1. That the judgment is against the evidence and the weight of the evidence.
>
> 2. That the learned Native Commissioner erred in finding if he did so find, that any or all the blame attached to the respondent's wife in connection with the proceedings of the dissolution of the customary union and under the circumstances disclosed the learned Native Commissioner should not have ordered the appellant to return any cattle to the respondent or at least should have ordered a lesser number than that which he did so order.
>
> 3. That the learned Native Commissioner erred in failing to fix an alternative value in money for the said cattle."

Having regard to what has already been said there is no need to deal further with ground 1. Grounds 2 and 3 never occurred to defendant during the proceedings. They are an after-thought. However, neither of these assists the defendant. As to ground 2 there is nothing in the record of this case to suggest that the

plaintiff should not recover all his *lobolo*, i.e. 10 head of cattle less one beast for each of the two children. Mr White who appeared before us for the appellant argued that one beast should at least be deducted in respect of a third child which, according to first defendent's evidence, was born in April, 1958. This child was born three months after the plea was filed. No mention of a pregnancy was made in the plea, nor was the child mentioned in the cross-examination of plaintiff when the case was heard in May. The child was first mentioned by first defendant in her evidence. It must have been conceived in 1957; but the Native Commissioner found—and in our opinion rightly so—that the desertion took place in 1955. Consequently it cannot be said that plaintiff is the father of this child in the face of his denial which appears from the cross-examination of the first defendant. The position is apparently accepted by the first defendant who is not appealing. Consequently no deduction can be made in respect of this child. As to the third ground plaintiff asked for the return of his *lobolo* cattle, that is specific animals, and if these are still in the possession of defendant, there seems to be no reason why specific performance should not be decreed. If specific performance is no longer possible, then no doubt section 86 of the Code applies. This section reads as follows:—

> "86. *Lobolo* shall consist of fair average cattle or their equivalent in other stock or property and for the purposes of any dispute the value of each head of *lobolo* cattle shall be regarded as five pounds; provided that the Supreme Chief may by proclamation vary this assessment from time to time."

Unfortunately the meaning of this section is, like so many provisions of the Code, far from clear. What is the effect of the words "for the purposes of any dispute"? Grammatically the word "dispute" here relates to value; the dispute must be about the value and not, as Mr. White suggested, about the liability to pay or refund *lobolo*. Otherwise strange results might follow: for instance, in an action for the return of *lobolo* a defendant may in his plea admit the receipt of say six head of cattle valued at £20 each and deny liability for the refund. If then the word "dispute" in section 86 relates to any dispute connected with the *lobolo*, including a dispute as to liability for a refund, this very denial of liability would—in spite of the admission as to the value—preclude the plaintiff obtaining more than £5 for each animal.

But even if the "dispute" relates only to the value of *lobolo* cattle anomalous results must follow. Suppose that in the foregoing example the plaintiff had paid to defendant, perhaps at the latter's special request, instead of six head of ordinary cattle, two very fine stud cows fairly valued at £60 each. Defendant may realise that he has no defence to a claim for the refund of this *lobolo;* but he can nevertheless virtually defeat the plaintiff's claim by merely disputing the value. He need merely allege that the value is, say, £50 per head in order to have the plaintiff's claim reduced *ipso facto* to—£5 per head. It seems to be impossible to make sense of this section unless one reads into it after the words "five pounds" some such qualification as "in the absence of proof of or agreement on the value" . . . In other words the value assigned by a party to *lobolo* cattle may not by virtue of the provisions of section 86 be disputed if it does not exceed £5.

In this case there was no dispute as the money value of the cattle at all. No such value was even mentioned, much less proved. Consequently, if plaintiff cannot recover the actual eight head of stock claimed, he is entitled to fix a money value which cannot be disputed and which, therefore, requires no proof, viz. £5 per head. In other words, where the value of *lobolo* cattle is not proved or agreed on the provisions of section 86 of the Code come into play.

The appeal is dismissed with costs.

Ashton, Permanent member:—

I agree that the appeal should be dismissed with costs and would just like to add a few remarks.

In regard to the third ground of appeal no claim was made for the money equivalent of the *lobolo* cattle and no evidence as to value was placed before the Assistant Native Commissioner. He was accordingly not wrong in fixing no monetary equivalent.

In any case where the value of lobolo cattle is not proved or agreed on then and then only do the provisions of section 86 of the Natal Native code come into play. The point is not well taken and Mr. White agreed that his point was probably premature.

In regard to the number of cattle returnable the husband is not interested in the adulterine child and I do not feel that the Assistant Native Commissioner's award should be altered.

For Appellant: W. E. White.

Respondent in person.

NORTH-EASTERN NATIVE APPEAL COURT.

XABA *v.* MDHLULI.

N.A.C. CASE No. 52 OF 1958.

VRYHEID: 29th September, 1958. Before Menge, President, and Ashton and Vosloo, Members of the Court.

PRACTICE AND PROCEDURE.

Messenger of the Court—Meaning of Native Commissioner's Court Rule 14.

Summary: A Native deputy-messenger of the court, having been sued in a matter arising out of the performance of his duties set up the defence that only his principal and not he should have been sued. The Native Commissioner upheld this defence under Rule 14 of the rules for Native Commissioners' Courts. On appeal—

Held: Rule 14 does not alter the common law liability of a deputy-messenger of the court for damage caused by his own wrongful acts.

Appeal from the Court of Native Commissioner, Vryheid.

Menge (President): In this matter plaintiff (the present appellant) sued defendant (respondent) for £30 on a cause of action which is somewhat indifferently set out, but which sufficiently avers misappropriation of funds belonging to the plaintiff.

The original plea does not make sense. An amendment was, however, allowed at the commencement of the proceedings from which it appears that the defendant did come into possession of the £30, but that he disposed of portion thereof in a lawful manner and handed the balance over to plaintiff. The parties were not represented beyond the stage of filing pleadings.

At the hearing the Native Commissioner rightly placed the onus to begin on the defendant. It appears from his evidence that he was at the time Deputy Messenger of the Court; that he received the £30 in question in that capacity for the credit of plaintiff; that he attached portion thereof to satisfy certain writs against the plaintiff, and that he paid out the balance of £15. 10s. 3d. to the plaintiff.

At the close of the defendant's evidence the Native Commissioner granted a request for the dismissal of the summons on the grounds that the defendant was only a servant of the European messenger and that he cannot be liable because Native Commissioners' Courts Rule 14 makes the messenger himself responsible.

Plaintiff now appeals on various grounds only one of which is in point, namely, that plaintiff was not given an opportunity to answer defendant's allegation that he was not the Court Messenger.

The appeal must succeed. In his evidence the defendant stated, in reply to the Native Commissioner, that someone else was the messenger; that he was in the messenger's employ on a monthly basis, and that not he but the messenger should have been sued, as principal. Directly thereafter, according to the record, the summons was dismissed without the plaintiff having been given an opportunity to deal with this defence. That was unfortunate because it is not a valid defence at all. The Native Commissioner considers that the words "for whose actions as such he shall be responsible" in Rule 14 absolve the defendant from liability. But that is not so. At common law the wrongdoer is always himself responsible for the damage he has caused. If a regulation makes someone else responsible that in itself does not absolve the tortfeasor, for the common law is not presumed to have been altered unless the language used is clear (see Steyn *Uitleg van Wette,* Hoofstuk III). Rule 14 does no more than to make the principal, i.e. the messenger, himself, liable as well as the deputy.

The appeal is allowed with costs. The Native Commissioner's judgment is set aside and the matter referred back for further hearing.

Ashton and Vosloo, Members, concurred.

Parties in person.

NORTH-EASTERN NATIVE APPEAL COURT.

MONNAKGOTLA *v.* PITJE.

N.A.C. CASE No. 56 OF 1958.

PRETORIA: 8th September, 1958. Before Menge, President, Ashton and Steenkamp, Members of the Court.

PRACTICE AND PROCEDURE.

Fraud—Rescission of judgment on ground of—Refusal to rescind rescission judgment—Appealability—Review—Powers of Native Appeal Court to expunge from record and to grant condonation of late filing of notice of review.

Summary: Appeal and review in a matter where a Native Commissioner's court had refused to rescind a judgment granted by default which had rescinded a prior default judgment on the ground of fraud. The facts appear from the judgment.

Held: A Native Commissioner's court has the power under Rule 73 (*a*) to rescind a judgment granted by default rescinding a prior default judgment.

Held further: That a refusal so to rescind is appealable if the prior rescission was based on fraud.

Held further: (On the facts) that no fraud had been disclosed and that the original application for rescission was barred even if fraud had been disclosed.

Held further: That the Native Appeal Court has the power to expunge from the Native Commissioner's court record remarks which are unfounded, irrelevant and prejudicial.

Held lastly: That the word "knowledge" as used in Rule 74 (9) means knowledge of the facts on which the allegation is based, not necessarily possession of all the evidence required to prove those facts.

Semble: The Native Appeal Court has power to condone the late filing of an application for review.

Cases referred to: Botha *v.* Muir, 1952 (2) S.A. 358 distinguished.

Statutes, etc., referred to:

Section 15, Act 38 of 1927.

Native Appeal Court Rules 22 and 26.

Native Commissioners' Courts Rules 73 (*a*), 74 (9) and 81 (2).

Appeal and review from the Court of the Native Commissioner, Pretoria.

Menge, President, delivering the judgment of the Court:—

This appeal arises out of a refusal by the Additional Native Commissioner to rescind a default judgment rescinding a prior default judgment. The proceedings were entirely on affidavit and the rather peculiar history of the matter as revealed therein is somewhat as follows:

Defendant in the original action, who is now the respondent, at one time owed to the appellant (plaintiff in the original action) the sum of £600 in respect of a loan. On the 20th January, 1947 defendant and plaintiff signed an agreement in terms of which plaintiff accepted in full settlement of this debt a "one-half share in the profits of the business of" defendant. The terms of this document are rather vague; but the defendant sought to use it as evidence of an agreement, and as the value of the matter thereof was manifestly more than £10 it required to be stamped. It was not stamped and the Court had no right to admit it, because of the provisions of section *twenty-two* of the Stamp Duties and Fees Act No. 30 of 1911. (It has since been validated at the request of this Court). According to the defendant this agreement became mislaid by him; and as apparently no profits had materialised thereunder plaintiff demanded repayment of his loan. Prostestations based on the agreement were of no avail and so (says the defendant): "for the sake of peace because I had been unable to trace the agreement entered into on the 20th January, 1947, I, on seeing an attorney in Pretoria and being advised by him that should I not be able to produce the original contract, I would have to pay the amount claimed from me, signed an Acknowledgment of Debt, . . ."

In terms of this acknowledgment of debt signed on the 8th August, 1950, defendant then owed to plaintiff the sum of £767. 3s. 3d. plus certain interest and also £38. 4s. collection charges, all of which defendant undertook to repay in monthly instalments of £15 as from 7th September, 1950; and the document goes on to say that "In the event of any one instalment not being paid on due date, the balance still owing will immediately become due and payable". In 1952 the instalments were considerably in arrear and plaintiff sued for the full amount still due to him.

Defendant entered appearance but did not file a plea. He had asked his attorney to defend the action, but (he says): "My said attorney then informed me that if I could not produce the agreement entered into on the 20th January, 1947, I would have considerable difficulty in proving that I was not liable in the amount claimed by the respondent. Having been advised accordingly, it was apparently pointless to try and defend the matter and for that reason, I did not enter appearance to defend.

"I do not know on what date Judgment was entered against me, but the Messenger of the Court subsequently called at my place of business and demanded payment from me in terms of a Writ of Execution.

"Since that date I on various occasions, called at the offices of the respondent's attorney in order to make arrangements for the poyment of the money's alleged to be due to the respondent."

Eventually on the 12th March, 1952, the Clerk of the Court entered judgment by default. Attempts were made to levy execution, the first (according to plaintiff) on the 9th April, 1952.

In March, 1957, defendant found the missing Agreement, but it was only on the 12th February, 1958, when settlement was again demanded, that defendant applied for rescission of the judgment. The notice of application is indifferently drawn. No judgment is specified therein and no reference is made to the affidavit which, so one infers, accompanied it and from which I have already quoted. No grounds are set out on which rescission is claimed, but according to the affidavit already referred to it is clear that fraud is relied on. Notwithstanding what defendant said earlier in his affidavit (*vide* the first of the passages quoted above) he ends up by saying: "I have been misled by the fraudulent misrepresentation of the Respondent in that he, the respondent, well knowing of the existence and actual contents of the Agreement, forced me into signing the Acknowledgment of Debt on the 8th day of August, 1950".

On this application the judgment was rescinded on the 3rd March, 1958.

The plaintiff had decided to oppose the application for rescission, but owing apparently to a clerical error in the office of his attorney it was thought that the application would only be heard on the 5th March, 1958. Consequently on the 3rd April, 1958, plaintiff was in turn in default. He thereupon applied for a rescission of the order of the 3rd March, rescinding the original judgment. This application was refused on the 6th June, 1958, on the ground that there is no provision for the rescission of a judgment rescinding a judgment.

On the 20th June, 1958, plaintiff noted an appeal against each of these judgments. He has at the same time brought both judgments in review. Finally he has asked for condonation of the late noting of the appeal and review concerning the earlier judgment on the ground that plaintiff had sought first to exhaust his remedies in proceedings before the Native Commissioner which were only finalised on the 6th June, 1958.

This Court granted condonation as regards the appeal, but refused condonation of the late noting of the review. It is probable that this Court can by virtue of the powers conferred by section *fifteen* of the Native Administration Act, 1927, or even under Rule 26 condone the late filing of an application for review notwithstanding the absence of such provision in Rule 22; but we feel that the grounds on which this particular application is based do not amount to a "grave irregularity or illegality" for the purposes of that rule and that, therefore, the appeal, which is in any event now before us, is the proper procedure.

Consequently the following matters are now before this Court:—

(*a*) A first appeal gainst the rescission judgment of 3rd March, 1958, on the grounds (omitting one which it is not necessary to deal with) that no fraud has been disclosed and that, even if it had, the application was out of time;

(*b*) a second appeal against the judgment of 6th June, 1958, refusing rescission of the rescinding judgment on the ground that "the Native Commissioner erred in holding that there is no provision in the rules of the Native Commissioner's Court for the rescission of an Order rescinding a judgment granted by default"; and

(*c*) an application for a review of the proceedings which culminated in the judgment of 6th June, 1958, and in which is sought an order setting aside the default judgment and expunging from the record certain remarks made by the Additional Native Commissioner when he gave that judgment.

Counsel first dealt with the application to expunge. It appears that the Additional Native Commissioner on that occasion made certain remarks which impute dishonest conduct to a member of the firm of attorneys acting for plaintiff. On the information which the Additional Native Commissioner had before him these remarks were completely unfounded and unnecessary. (The judgment goes on to deal further with the remarks and then continues): Mr. Roberts asked that these remarks and also some further remarks in the same strain appearing in the Additional Native Commissioner's reasons for judgment be expunged from the record. He submitted that this Court has the right to do this at common law and under section *fifteen* of the Native Administration Act, 1927.

Mr. Prinsloo who appeared before us on behalf of the defendant intimated that he did not actually oppose the application, but he nevertheless addressed the Court at some length pointing out that, although he considered the remarks to be improper and held no brief for the Native Commissioner on this issue, it did not really affect the parties in the present appeal in as much as the Additional Native Commissioner did not, according to his written reasons, let his views on the articled clerk's conduct influence his decision on the issue between the parties. This raises the question whether the plaintiff has a sufficient interest to bring the application. If he has not, then important questions of procedure and, as the articled clerk concerned is not a native, even of jurisdiction present themselves. True, Mr. Roberts himself described the offending remarks as completely irrelevant, but he also argued that they were prejudicial to the plaintiff. There can be no doubt that that is so. After all the plaintiff had relied on the articled clerk's affidavit to support his case—a case which, in terms of the Native Commissioner's judgment, still had to be decided. Clearly he is prejudiced if the Native Commissioner then holds that the affidavit is tainted with fraud.

It follows that the plaintiff had a sufficient interest in the matter to bring the application; and it certainly is well founded The reasons for judgment form part of the record; consequently there, too, the offending passages must be expunged. The Court clearly has the power to do this under section *fifteen* of the Act. For these reasons we ordered the Registrar to expunge from the record the passages referred to in paragraph 6 (*a*) of the application for review, namely the last paragraph on page 28 and paragraphs 7 and 8 on pages 55, 56 and 57 of the record.

The view we have taken concerning the appeals before us make it unnecessary to deal further with the application for review and with the submission of Mr. Roberts that the Native Commissioner's refusal to rescind the rescinding judgment is a "grave irregularity or illegality" for the purposes of Rule 22. In regard to the first appeal Mr. Peart contended that no fraud has been disclosed and that even if it has the application before the Native Commissioner was barred by lapse of time. As regards the second appeal he maintained that the Native Commissioner was clearly wrong in holding that there was no provision for rescinding a recission judgment. He felt, however, that he had difficulty in showing that the refusal was appealable. He relied on the application for review in this regard, but maintained that if the first appeal was successful all the legal aspects of the second appeal would be purely academic.

Mr. Prinsloo argued that fraud was disclosed and that the evidence thereof only came to light in March, 1957, when the agreement was found. He also argued that the order attacked

in the second appeal is not appealable and that, in any event, the Native Commissioner had no power to rescind a rescission judgment.

We consider that the plaintiff must succeed on the first appeal. The defendant was on his own showing in wilful default on the 12th March, 1952, but in bringing his application for rescission of the default judgment he relied (successfully as it turned out) on fraud, a factor which, as Mr. Peart correctly pointed out, makes that rescission appeable [see Terblanche *v.* Thyssen & Another, 1957 (4) SA. 244]. Actually there is nothing whatsoever to support the allegation of fraud on the part of the plaintiff. Mr. Prinsloo admitted that it was not fraud in the usual sense but he thought that it was nevertheless fraud for the purposes of the Native Commissioners' Courts Rule 73. Mr. Peart argued with much force that in the light of Schierhout *v.* Union Government, 1927 AD. 94, fraud cannot be anything short of the conduct defined as such for the purposes of criminal law. Be that as it may, at least there must be some falsehood or deceit—*dolus malus;* yet nothing in the affidavit of the defendant even suggests any falsehood or deceit either by spoken word or in the conduct of the plaintiff.

But even if we are wrong in concluding that no fraud is disclosed, the application for rescission was still barred by Native Commissioners' Courts Rule 74 (9), there being no application for removal of the bar under Rule 84 (5). It is clear that whatever fraud there was must have been known to defendant for almost 8 years before he took action. The position here differs radically from that in Botha *v.* Muir, 1952(2) 358 where the meaning of the word "knowledge" of fraud as used in a rule corresponding to Rule 74(9) is discussed. In that case the party alleging fraud was for more than a year before he took action in possession of information which had aroused his suspicions and of which the learned judge said: "it seems to me to fall short of the required knowledge and merely amounts to information on which plaintiff could not reasonably be expected to take action'. It was only later, within 12 months of taking action, that he became possessed of "knowledge of the perjury sufficient for him to take action" (p. 365). In the present case, however, the defendant was ever since the 8th August, 1950, in possession of the full facts relating to what he considered was fraud. He did not merely suspect the existence of the agreement. *He knew it existed.* Finding it had a purely procedural value: it would facilitate proving what he wanted to establish. It did not add to the knowledge which he already possessed ever since the 8th August, 1950. To argue otherwise is to give to the word "knowledge" as used in Rule 74 (9) some such meaning as: Being in possession of all the evidence one would wish to produce.

It follows that the rescission of the default judgment must be set aside. That would have ended the matter, but it is necessary to deal with the second appeal because it affects the question of costs in the Court below.

The Additional Native Commissioner's reasons for judgment do not assist us; but Mr. Prinsloo contended that the refusal to rescind a judgment granted by default rescinding a prior default judgment did not fall within the ambit of Native Commissioners' Courts Rule 81 (2) as, apart from the question of costs, it did not have the effect of a final judgment. But he was unable to explain a difficulty which Steenkamp, Member, foresaw in this connection, namely, that the refusal has the effect of leaving as *res judicata* the Native Commissioner's decision that the judgment had been obtained by fraud—in other words, plaintiff will not in any future proceedings be able to remove the stigma of fraud attaching to his cause of action. Clearly, therefore, the refusal is appealable; and the appeal must also succeed because there is no reason whatsoever to suppose that such a refusal is not a judgment for the purposes of Native Commissioners' Courts Rule 73 (*a*).

The question of costs was not specifically argued but there does not appear to be any reason why these should not follow the ordinary rules. If the plaintiff had in the first instance appealed against the rescission of the default judgment all the further proceedings culminating in the second appeal would have become unnecessary and considerable costs would have been saved. What is more, he would have had a more advantageous decision than the procedure he adopted could have brought about. By asking that the rescission judgment be rescinded he pursued a lesser remedy in that, had the order been granted, he would still have had to defend the application for rescission. But, unfortunate as it may be, it is hardly possible to blame the plaintiff for adopting the course he did. He no doubt considered it his duty to exhaust his remedies in the Court below before risking an appeal against a rescission judgment granted on an application which, as I have already pointed out, was not very specific as to the actual *causa* relied on. Plaintiff could hardly have foreseen at that stage that the course he was taking might in the end occasion unnecessary costs. Besides, the defendant is himself very much to blame. Instead of agreeing to a rescission of the rescinding judgment and having his allegations squarely decided on the merits, he opposed the application on the basis of the tenuous argument that such a rescission is not technically possible. Indeed, there is very little in this record to evoke sympathy for the defendant.

Had the Additional Native Commissioner granted rescission of the rescission judgment, which he should have done, the proper order as to costs would have been costs in the cause, as was ordered when the original judgment was rescinded. It follows, therefore, that in the result the defendant must bear all the lower Court costs.

The appeals are allowed. The order of the Native Commissioner dated 3rd March, 1958, is set aside and for it is substituted: "Application refused with costs". The order of the 6th June, 1958, is set aside with an order that the defendant pay the costs of all the proceedings subsequent to the 3rd March, 1958. The respondent is ordered to pay the costs of the proceedings in this Court on the basis that the two appeals and the review constitute one appeal save as to their noting, and excluding any costs which may have been incurred in respect of the application to review the proceedings of the 3rd March, 1958.

For Appellant: Adv. A. A. Roberts, Q.C., with him Adv. R. H. Peart instructed by Metlerkamp, Ritson & Metlerkamp.

For Respondent: Mr. J. D. Prinsloo.

NORTH-EASTERN NATIVE APPEAL COURT.

LUKELE *v.* **MKALIPI.**

N.A.C. CASE No. 81 OF 1958.

PRETORIA: 3rd December, 1958. Before Menge, President, Nel and Lambley, Members of the Court.

PRACTICE AND PROCEDURE.

Practice and procedure—Default judgment illegally entered—Conflict of laws—Native law and statute law—Ordinance No. 6 of 1904 *(T.)—Applicability to* lobolo *payments—Costs where appeal unnecessary.*

Summary: A clerk of the Court had entered judgment by default on a damages claim. Thereafter execution was levied and interpleader proceedings were taken. In these it was

revealed that the interpleader claimant had received the cattle which were attached as genuine *lobolo* payments, but without obtaining the transfer certificate required by section 29 of Transvaal Ordinance No. 6 of 1904. The Native Commissioner dealt with the claim under Native law and custom, but nevertheless gave effect to the provisions of the Ordinance and disallowed the interpleader claim. In an appeal on the ground that the Native Commissioner in applying Native law ought not to have applied the provisions of the Ordinance which are foreign to Native law—

Held (By the Court *ex mero motu*): That the entire proceedings as from the entry of default judgment by the clerk of the court are null and void.

Held further: There should be no order as to costs of appeal.

Semble (As to appellant's grounds of appeal): That Native law can only be applied against the background of the ordinary law of the land.

Cases referred to:

Lenge *v.* Hlakotsa, 1954 N.A.C. 60.

Rex *v.* Ngeshang, 1949 (3) S.A. 843.

Lushaba *v.* Cindi, 1946 N.A.C. (T. & N.) 27.

Statutes referred to:

Section 29, Ordinance No. 6 of 1904 (T.).

Appeal from the Court of Native Commissioner, Piet Retief.

Menge (President):

This is an appeal in an interpleader action. The record before us discloses the following happenings: The plaintiff, Betnell Mkalipi, in an action in the court below issued summons against the defendant, Jamloed Ndaba, on the 25th January, 1958, for £50 damages for assault. The defendant remained in default, and on the 21st February, 1958, the Clerk of the Court entered a judgment for plaintiff reading as follows: "Judgment by default for £50". This, incidentally, was not disclosed on the copies of the record which were furnished, *although these copies were certified as true copies.* But it appears from the original, where the Clerk of the Court's entry is reflected on the cover N.A. 253. This omission caused considerable inconvenience. Actually the Clerk of the Court was wrong in filing the interpleader proceedings with the record of the original action. It had nothing to do with the latter and formed a separate action for the purposes of Rule 7 of the Native Commissioner's Courts Rules (see Lenge *v.* Hlakotsa, 1954 N.A.C. 60). Having, however, combined the proceedings in one record, it was his duty to see that complete copies of the whole record were furnished.

On the 8th July, a writ of execution was issued. This included 30s. costs claimed in the summons.

Prior to the action the defendant was in possession of certain cattle; but these had already been "pointed out" to one Zefania Lukele as *lobolo* for the latter's daughter. Lukele was unable to accommodate the cattle at the time on the farm where he stayed and so they remained with the defendant. In January, at about the time of the assault, this farm changed hands and thereupon, with the permission of the new owner, Lukele took delivery of the cattle. Unfortunately it was omitted to comply with the provisions of section 29 of Transvaal Ordinance No. 6 of 1904, which prohibits the acquisition "by purchase, barter or in any other way" of stock from a native without the prescribed formalities of a certificate from a justice of the peace or from two residents of substantial means in the neighbourhood certifying that the native in question is entitled to transfer the animals. Consequently, according to various decisions of the

Supreme Court and in particular to the judgment in the case of Rex *v.* Ngeshang 1949 (3) S.A. 843, the stock in question never passed out of the ownership of the defendant and never became the property of Lukele. Nevertheless, certain five head of these cattle were attached under the writ and placed, temporarily, in the possession of the plaintiff.

Thereupon Lukele interpleaded. The Native Commissioner heard the interpleader action on the 12th and 13th August. For the purposes of that trial the plaintiff in the original case was plaintiff for the purposes of the interpleader and the claimant, Lukele, the defendant. At the close of the hearing plaintiff's attorney relied on the failure to comply with the provisions of the Ordinance and asked that the stock be declared executable. The Native Commissioner upheld this contention. He declared the five head of cattle executable and dismissed Lukele's interpleader claim with costs. The latter now appeals on the following ground:—

> "Die Naturellekommissaris het die vyf (5) beeste van die appellant beslaglegbaar verklaar in stryd met die bepalings van die Reg in soverre dat die Naturellekommissaris, nadat hy sy diskressie ooreenkomstig Artikel II (1) van die Naturelle-Administrasiewet No. 38 van 1927, ten gunste van Naturelle Reg uitgeoefen het, nogtans artikel 29 van Ordonnansie 6 van 1904, wat strydig is met Naturelle Reg en gewoonte en geen betrekking het op *lobola*-transaksies nie, wat eie is aan die Naturelle Reg en deel daarvan vorm, toegepas het."

The notice of appeal cites Jamloed Ndaba as second respondent, but both counsel confirmed that he was not a party to the action.

The appeal must succeed on entirely different grounds. Consequently the ground of appeal set out above was not argued and not decided. But it can safely be said that the appellant's contention seems to rest on a misconception of the provisions of section *eleven* (1) of the Act. A Native Commissioner, in exercising the discretion which this provision vests in him, can only apply Native law against the general background of the law of the land. The fact that a dispute is decided in accordance with the principles of Native law does not exempt the parties concerned from compliance with the general law of the land on an entirely independent side issue. The subsidiary question whether the Ordinance is applicable to the acquisition of stock in a *lobolo* transaction has not yet been decided as far as we are aware, but in Lushaba *v.* Cindi 1946 N.A.C. (T. & N.) 27 this Court assumed that it is.

However, the reason why the appeal must succeed is that the entire proceedings subsequent to the application for default judgment are irregular and illegal. The Clerk of the Court had no right to enter judgment by default as this was a claim for damages. Only the Court had jurisdiction to enter such a judgment after assessing the amount recoverable [see Native Commissioners' Courts Rule 41 (7) and compare the case of Sloan *v.* Ringer, 15 Prentice-Hall 1930 (1) F. 64]. In the case before us there never was a valid judgment, and it is by no means certain that a Native Commissioner's Court would have awarded £50 after hearing evidence. Consequently the writ issued is also invalid. It is not what it purports to be. No valid execution can be levied under a judgment which is null and void *ab initio;* and anything done on the authority of such a writ is illegal.

This Court cannot avoid raising this issue even though the parties did not raise it, because whatever judgment this Court were to give on the basis of the original default judgment would also be illegal (see Lewis & Marks *v.* Middel, 1904 T.S. 291 at page 303 where the judgment reads: " . . . upon proof of invalidity the decision may be disregarded, in the same way as a

decision given without jurisdiction, without the necessity of a formal order setting it aside"). Mr. Grobbelaar, for the respondent, felt that he was unable to dispute the Court's conclusions on this issue.

This is the second case heard by us in this Session where a Clerk of the Court has entered a default judgment on a damages claim. I think it is very unfortunate that such mistakes should occur and that litigants should thereby be involved in unnecessary costs. The present proceedings will have to be taken up afresh as from the stage where application was made for default judgment; but it is hoped that the views we have expressed on the appellant's grounds of appeal and on other aspects of the case will induce all the parties to arrive at some reasonable settlement.

On the question of costs Mr. van Rooyen contended on behalf of the appellant that he should be awarded costs because the respondent was neglectful in not making sure that his writ of attachment had been validly issued. Mr. Grobbelaar considered that there should be no order. He submitted that the respondent was entitled to assume—as everybody concerned with the case had assumed—that the writ was validly issued. The position is that the appeal had of necessity to succeed on a ground not raised by the appellant; the ground on which the appeal was brought was at least to some extent based on a misconception, and in any event the appeal was, on the record placed before us, not necessary and could have been avoided with the exercise of due care. We feel, therefore, that there should be no order as to costs.

The appeal is upheld with no order as to costs. The judgment of the Native Commissioner and all the proceedings subsequent to the request for default judgment are set aside and the matter is referred back for hearing.

Nel & Lanbley, Members, concurred.

For Appellant: Adv. R. van Rooyen instructed by Smit & Vorster.

For Respondent: Adv. T. Grobbelaar instructed by H. Olmesdahl.

VERSLAE

VAN DIE

NATURELLE-APPÈLHOWE

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