Section *ten* of the Native Administration Act, 1927 (Act No. 38 of 1927), under which Native Commissioner's Courts are constituted, provides that a Court of a Native Commissioner shall not have jurisdiction unless—

(*a*) the defendant or respondent in that case resides or carries on business or is employed in the area of jurisdiction of that court; or

(*b*) the cause of action in that case arose in that area; or

(*c*) the parties to the proceedings in that case have agreed in writing to the Court's jurisdiction.

The parties concerned in the case before us are the execution creditor and the claimant and neither of these can, in our view, be termed the defendant or respondent for the purposes of paragraph (*a*) cited above. But even if it can be argued that as the interpleader summons in a case of this sort is taken out by the Messenger of the Court and that for this reason both the execution creditor and the claimant are the respondents in the matter then in order to found jurisdiction under this paragraph it would still be necessary that both the execution creditor and the claimant should comply with the requirements of paragraph (*a*) and this is not the case here as, while the execution creditor resides in the district of Vryheid, the claimant resides in the district of Mahlabatini. It is evident from the wording of Section *ten* itself that at the time it was framed the legislature did envisage the hearing of interpleader cases between Natives by Native Commissioner's Courts and had it intended to confer jurisdiction upon a Native Commissioner by virtue of the fact that the parties to an interpleader action resided or carried on business or were employed within the area of jurisdiction of such a Native Commissioner one would have expected specific provision for this to be made as is indeed the case in Magistrates' Courts [See Section 28 (1) (*e*) of Act No. 32 of 1944]. We find, therefore, that paragraph (*a*) of Section *ten* did not confer jurisdiction upon the Native Commissioner of Vryheid to hear this action.

Nor could he derive jurisdiction from paragraph (*b*) of that Section as the cause of the action, i.e. the attachment in execution of the cattle, took place in the district of Mahlabatini and not Vryheid.

It was argued by the respondent, who appeared in person, that because the claimant had failed to object to the jurisdiction of the Court this had the same effect as if he had in fact consented to such jurisdiction. Unfortunately for this argument, however, the terms of the proviso to section 10 (3) are peremptory and the legislature has seen fit to require that no jurisdiction shall be conferred on a Native Commissioner by the mere agreement of the parties unless such agreement is in writing. This requirement is clear and unequivocal and automatically precludes an inference of consent by implication.

For these reasons this Court holds that the Native Commissioner had no jurisdiction to try this action. The appeal must succeed on this ground and it becomes unnecessary to consider the remaining grounds of appeal. The appeal is accordingly allowed and the Native Commissioner's judgment is altered to one of "Summons dismissed". There will be no order as to costs in this Court as the point is one which should have been raised in the court below, and there will be no order as to costs in the court below as the summons was issued by the messenger of the court and not the execution creditor and the question of jurisdiction in that Court should have been raised *in limine*.

Richards and Ahrens, Members, concur.

For Appellant: Adv. W. O. H. Menge.

Respondent in person.

VERSLAE

VAN DIE

BANTOE-APPÈLHOWE

1962

REPORTS

OF THE

BANTU APPEAL COURTS

THE GOVERNMENT PRINTER, PRETORIA
DIE STAATSDRUKKER, PRETORIA
G.P.-S.3241595—1962-63—700.

3241595—5

CORRECTION NOTICE.

Volume 1962 (1 and 2); Case 48/61; page 35 line 41 and page 36 line 29:— ...

"Rules for Native Commissioners' Courts" should read *"Rules for Native Appeal Courts"*.

REPORTS

OF THE

NATIVE APPEAL COURTS

1962 (1 & 2)

VERSLAE

VAN DIE

NATURELLE-APPÈLHOWE

THE GOVERNMENT PRINTER, PRETORIA
DIE STAATSDRUKKER, PRETORIA
C.P.-S.2841433—1962-63—700.

ERRATA.

1960 N.A.C., page 22:—

The Case " Gulani vs. Gamkile, 1 N.A.C. (S.D.) 279 at page 282 " referred to in paragraph two of page 22 of the Native Appeal Court Reports for the year 1960, should read:—

" Sibovana vs. Dlokova 1 N.A.C. (S.D.) 281, at page 282 ".

AMPTENARE VAN DIE BANTOE-APPÈLHOWE.
OFFICERS OF THE BANTU APPEAL COURTS.

SENTRALE BANTOE-APPÈLHOF.
CENTRAL BANTU APPEAL COURT.

VOORSITTER/PRESIDENT: N. P. J. O'CONNELL.
PERMANENTE LID/PERMANENT MEMBER: R. S. G. GOLD.

NOORDOOSTELIKE BANTOE-APPÈLHOF.
NORTH-EASTERN BANTU APPEAL COURT.

VOORSITTER/PRESIDENT: J. P. COWAN.
PERMANENTE LID/PERMANENT MEMBER: R. M. CRAIG.

SUIDELIKE BANTOE-APPÈLHOF.
SOUTHERN BANTU APPEAL COURT.

VOORSITTER/PRESIDENT: H. BALK.
PERMANENTE LID/PERMANENT MEMBER: E. J. H. YATES.

3241595—6

Bladwyser van Sake Case Index 1962

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CENTRAL NATIVE APPEAL COURT.

HLOHLANDLEMAGE vs. MGATLE.

N.A.C. CASE No. 19 OF 1961.

BLOEMFONTEIN: 9th February, 1962. Before O'Connell, President, Gold and Carstens, Members of the Court.

NATIVE LAW AND CUSTOM.

Native woman—Locus standi in judicio—*Right to bring action for seduction of daughter. Duty of Court to rule* mero motu *on* Locus standi in judicio.

Summary: Plaintiff, a Native woman, sued Defendant for damages for the seduction and consequent pregnancy of Plaintiff's daughter. The Native Commissioner applied common law and found for Plaintiff.

Held: That, having purported to apply common law, the Native Commissioner should have dismissed the claim since Plaintiff has no cause of action under common law.

Held further: That, having regard to the pleadings, the evidence and the agreement as to the quantum of damages, the Native Commissioner should have applied Native law and custom.

Held further: That under Native law and custom a woman has no *locus standi in judicio.*

Held further: That under Native law and custom a woman has not the right to sue for damages for the seduction of her daughter.

Held further: That the Native Commissioner should *mero motu* have ruled that Plaintiff had no *locus standi in judicio.*

Cases referred to:

Webb versus Longai, 4 E.D.C. 8.
Sinachoma versus Sinachoma, 1943, N.A. (N. & T.) 28.
Mashinini versus Mashinini, 1947, N.A.C. (N. & T.) 25.
Mkwane versus Bangani, 1937, N.A.C. (C. & O.) 185.

For Appellant: Mr. van Deventer i/b S. P. Strydom and Naude, Theunissen.

Respondent in default.

O'Connell, President, delivering the judgment of the Court:

For the sake of convenience, the parties will throughout this judgment be referred to as Plaintiff and Defendant.

The Plaintiff sued the Defendant in the Native Commissioner's Court. Her summons reads as follows:—

"(1) Beide die Eiser en Verweerder is Naturelle.

(2) Eiser is die moeder en natuurlike voog van Bellina.

(3) As gevolg van onwettige gemeenskap wat Verweerder met gemelde Bellina gehad het, het gesegde Bellina op 24 Januarie 1961 geboorte gegee aan 'n kind waarvan Verweerder die vader is.

(4) As gevolg van gemelde gemeenskap het Eiser skade gely in die bedrag van 3 beeste.

Nieteenstaande aanmaning geweier of versuim Verweerder om die gemelde 3 beeste te lewer.

Weshalwe vra Eiser om vonnis teen Verweerder om lewering van 3 beeste of betaling van hulle waarde naamlik R60.00."

Save for admitting that the parties are Natives, the Defendant pleaded a denial to all the allegations in the summons.

Paragraph (4) of his plea reads as follows:—

"Verweerder ontken ook dat die waarde van drie beeste volgens Naturelle geloof R60.00 bedra maar pleit dat die waarde van drie beeste R36.00 bedra volgens Naturelle geloof en volgens sy kennis."

After hearing evidence tendered by the parties, the Native Commissioner entered judgment for the Plaintiff. From the record and from the Native Commissioner's written reasons for judgment, it appears that the legal representatives of the parties had agreed that if the Court found that the Defendant was the father of the Plaintiff's daughter's child judgment should be for £8 specific damages and two head of cattle or £10. The judgment recorded, however, reads "Vonnis vir Eiser vir R36 met koste".

Against this judgment, the Defendant has noted an appeal on the following grounds:—

"(*a*) Die Naturelle Kommissaris het fouteer om te bevind dat die Verweerder die vader van die kind is.

(*b*) Eiser het aanspreeklikheid teenoor Verweerder probeer bewys nie uit hoofde van seduksie nie maar uit hoofde daarvan dat Verweerder die vader van die kind, en die Naturelle Kommissaris moes bevind het dat Verweerder nie die vader van dié was nie of kon gewees het nie.

(*c*) Die Naturelle Kommissaris het fouteer om die Eiser se getuienis te aanvaar en dié van Verweerder te verwerp.

(*d*) Die Naturelle Kommissaris moes bevind het dat Eiser nie sy eis bewys het op 'n oorwig van waarskynlikhede.

(*e*) Die Naturelle Kommissaris het fouteer om te bevind dat Eiser enige skade gely het.

(*f*) Die Naturelle Kommissaris het fouteer om te bevind dat die Eiser die aksie kan bring."

Good cause having been shown, an application for the condonation of the late noting of the appeal was granted.

In his written reasons for judgment, the Native Commissioner states that he applied the common law to the case. He gives no reasons for this decision.

It is not clear why, in view of the pleadings, the Native Commissioner decided to apply the Common Law and, furthermore, why, having decided to apply it, he did not dismiss the summons because under that system of law the Plaintiff clearly had no cause of action. The Plaintiff's daughter should have sued, duly assisted by her guardian if, indeed, she was a minor—

Webb versus Langai, 4 E.D.C. 8.

It is clear from the pleadings, from the evidence adduced and from the agreement between the parties as to the quantum of damages to be awarded if paternity was proved, that the action was one for decision under Native law and custom. The Native Commissioner should, therefore, have applied that law and custom and not the common law.

From a number of recent cases in this Court it appears that the provisions of Native law and custom governing the status of women under that custom are not as well understood as they should be and it is, therefore, deemed desirable to restate those provisions.

It is accepted law, under Native law and custom, that a Native woman is a minor and that she has no *locus standi in judicio*—see *Sinachoma versus Sinachoma*, 1943, N.A. (N. & T.) 28 and *Mashinini versus Mashinini*, 1947, N.A.C. (N. & T.) 25. Furthermore, under that custom a woman has not the right to sue for damages for the seduction of her daughter. The proper person to sue is the heir of the girl's father, or, if he is a minor, his guardian—*Mkwane versus Bangani*, 1937, N.A.C. (C. & O.) 185.

Even though the point was not raised before him, the Native Commissioner should *mero motu* have ruled that the Plaintiff in the present case had no *locus standi* (*Mashinini's case—supra*) and have dismissed the summons.

The appeal is upheld, with costs, and the judgment of the Court *a quo* is altered to read "Summons dismissed, with costs".

Gold and Carstens, Members, concurred.

CENTRAL NATIVE APPEAL COURT.

MPETE and BOIKANYO vs. BOIKANYO.

N.A.C. CASE No. 20 OF 1961.

JOHANNESBURG: 26th April, 1962. Before O'Connell, President, Gold and Gafney, Members of the Court.

PRACTICE-PROCEDURE.

Condonation of late noting of appeal refused where appellants' explanation false—Default judgment granted when co-defendant present—Gross irregularity—Court exercising review powers mero motu—Locus standi *of female partner of Native customary union when custody of her children in issue.*

Summary: Respondent sued first Appellant for the return of his wife or refund of *lobola* and custody of the minor children of the union. Second Appellant, the female partner in the customary union, was joined as co-defendant. Appellants were not legally represented on trial day and first Appellant was in default. The evidence made it clear that second Appellant was in Court, but she was given no opportunity to take part in proceedings. Judgment, including an order granting custody of the minor children to Respondent, was given by default. Application for rescission of this judgment having been refused, an appeal was noted out of time.

Held: That the explanation given by Appellants' for the late noting being false, condonation should be refused.

Held further: The Court raising the point *mero motu*, that the grant of a default judgment against a co-defendant who was in Court at the time and was given no opportunity of taking part in the proceedings constituted a gross irregularity and that the default judgment should be set aside on review.

Held further: That the *locus standi in judicio* of the female partner /in a Native customary union in an action involving custody of her minor children must be determined as if she were a European.

Cases referred to:

Ueckermann versus Feinstein, 1903, T.S. 913.

Ngakane versus Maalaphi, 1955, N.A.C. 123.

Legislation referred to:

Section 15, Act No. 38 of 1927.

O'Connell, President, delivering the judgment of the Court:

When the case between the Plaintiff (now the Respondent) and the Defendants (now the Appellants) was called in the Native Commissioner's Court on the 26th June, 1961, the Plaintiff and his attorney were present but the Defendants were absent. The Plaintiff's attorney thereupon applied to the Court for judgment by default and called the Plaintiff who was duly sworn and gave evidence in support of his claim. The opening sentences of his evidence read as follows: "I am the Plaintiff. I know Sophie, she has just entered the Court. She is my wife. By Native Custom". (Sophie is the second Defendant). At the conclusion of the Plaintiff's evidence, after he had been examined by the Court, the following judgment was entered:

> "By default for Plaintiff, with costs, as follows:—
>
> (1) First Defendant is ordered to return the woman Sophie to Plaintiff within one month from date failing which the customary union will be dismissed and First Defendant is to return to Plaintiff £15 in respect of the *lobola* paid.
>
> (2) The custody of the four minor children are (sic) given to the Plaintiff's father."

Thereafter, on the 16th August, 1961, an application by the Defendants for the rescission of this default judgment was refused with costs. Against this refusal, an appeal was noted on the 22nd November, 1961, and notice was at the same time given that application would be made to this Court for condonation of the late noting of appeal and for an extension of time within which to note an appeal. Affidavits by the First and Second Defendants in support of the application accompanied the notice.

The reason advanced by the Defendants for their failure to note their appeal timeously is that, until they were advised to the contrary by Mr. Attorney Silver on the 3rd November, 1961, they were unaware that they were entitled to appeal against the Native Commissioner's judgment. Even if this were true, it would not constitute just cause for the granting of the application because ignorance of the rules of court cannot avail as an excuse for non-compliance with those rules. But Mr. Attorney Rom, who acted for the Defendants in the matter of the application for rescission of the default judgment, has stated in an affidavit that on the 16th August, 1961, (the day on which the application for rescission was refused) he informed the Defendants they could either accept the judgment or note an appeal and that he explained to them carefully that, if they wished to appeal, the period for noting the appeal was limited to twenty-one days and would expire approximately on the 6th September, 1961. Mr. Silver who appeared in this Court for the Defendants, correctly conceded that he could not question Mr. Rom's bona fides or the truth of his evidence but he submitted that the Defendants had possibly not understood Mr. Rom. This Court unhesitatingly accepts Mr. Rom's version and finds that the claim by the Defendants that they did not know of their right to appeal until the 3rd November, 1961, is false. The application for condonation of the late noting of the appeal is accordingly refused with costs. But this, however, does not dispose of the matter.

The Court *mero muto* raised the point whether the proceedings in the Native Commissioner's Court on the 26th June, 1961, were not irregular because of the failure to afford the second Defendant an opportunity to cross-examine the Plaintiff or to put her case before the Court.

Mr. Silver urged that the proceedings were irregular and that this Court should exercise its power of review and set them aside. Mr. Helman, who appeared for the Plaintiff, submitted that the Second Defendant was concerned only with the custody issue and that she had suffered no prejudice because it was open to her at any time to move for a variation of the custody order.

This Court is normally slow to invoke the wide powers conferred on it by Section 15 of its constituent Act but here is a case in which, notwithstanding clear evidence to the effect that a party to the action was present in Court, the Native Commissioner proceeded to enter a default judgment against that party. His proceeding with the case in these circumstances deprived the second Defendant of the opportunity of placing her case before the Court and was a very gross irregularity (*Ueckermann versus Feinstein,* 1903, T.S. 913). It is also not clear to this Court how, in the light of the Plaintiff's evidence, the attorney for the Plaintiff could persist in his claim for a default judgment.

This Court, therefore, in the interests of justice reviews the proceedings and sets aside the default judgment entered on the 26th June, 1961.

The Native Commissioner, in his "reasons for judgment", remarks *inter alia* "Having refused the application for rescission of the default judgment by first applicant, the second applicant could no longer proceed with the application as she had no *locus standi in judicio*". His attention is drawn to the ruling of this Court in *Ngakane versus Maalaphi,* 1955, N.A.C. 123, that "the female partner of a customary union must be joined as co-defendant (the underlining is mine) in a matrimonial action by the male partner in which he claims the custody of the children of the union whether or not she is in possession of the children". Though this Court, as presently constituted, cannot, with respect, agree with all the reasons given for that ruling, it nevertheless respectfully agrees that the capacity of the woman to defend has to be determined as if she were a European and that she requires no assistance in defending the action in so far as the custody of the children is in issue.

Gold and Gafney, Members, concurred.

SOUTHERN NATIVE APPEAL COURT.

TABATA vs. SIDINANA.

N.A.C. CASE No. 4 OF 1959.

KING WILLIAM'S TOWN: 9th March, 1959. Before Balk, President, Yates and Gray, Members of the Court.

EVIDENCE.

Evidence by Chief on appeal to Native Commissioner's Court of admissions made before him whilst presiding at trial in Court of first instance.

Summary: The Defendant (present Appellant) appealed to the Native Commissioner's Court against the judgment of a Chief's Court for Plaintiff (now Respondent) in an action in which the latter sued the Defendant for damages for the seduction and pregnancy of his daughter, Gladys.

The Chief who presided at the trial of the case in the Court of first instance gave evidence for the Plaintiff in the Native Commissioner's Court at the hearing of the appeal from his judgment of admissions made by the Defendant at the trial before him.

Held: That the evidence of the Chief who presided at the trial of the case in the Court of first instance, as regards admissions made by the Defendant at such trial was admissible in the Native Commissioner's Court when the case came before it on appeal.

The President in the course of his judgment stated:—

"The appeal is brought on the grounds that the judgment 'is bad in law and against the weight of evidence in that the Native Commissioner whilst rejecting the evidence of the girls Gladys and Deborah, wrongly relied on the evidence of the Headman (sic,—actually, the Chief) and based his judgment thereon'.

The Plaintiff's attorney conceded, and the Native Commissioner found, that Gladys, who testified for the Plaintiff, was not a satisfactory witness. The Native Commissioner also found that the Plaintiff's witness, Deborah Ndzayi, who, as is common cause, was the 'go-between' for Gladys and the Defendant, was also an unsatisfactory witness. These findings are borne out by the material inconsistencies in Gladys' testimony and by the material discrepancies between her and Deborah's evidence as to the period that the latter acted as 'go-between' for her and the Defendant. It follows that as both Gladys and Deborah, were unworthy of credence, the Defendant, whose evidence was consistent, was entitled to succeed unless the testimony of the Plaintiff's remaining witness, viz., Chief Kwatsha, was acceptable; for, according to the Chief's testimony, the Defendant made admissions at the hearing of the case before him in the Chief's Court which established the Plaintiff's case, see *MacDonald versus Stander,* 1935, A.D. 325, at page 334. Mr. Randell, in his argument on behalf of the Appellant, contended that the Chief's evidence was inadmissible as the latter had tried the case in the Chief's Court. Mr. Randell advanced no authority in support of this contention but, in *Zondo versus Mncede,* 1945, N.A.C. (N. & T.) 94, at page 95, it was laid down that the practice of calling a Chief, who had presided at the Court of first instance, as a witness in the Native Commissioner's Court when the case came before the last-mentioned Court on appeal, was wrong and should be discontinued. But, with respect, I consider that this ruling ought not to be followed in that a Chief's Court is in general not, as is the case here, a Court of record and where, as here, one of the parties desires to prove admissions made by the other in the course of his evidence in a Chief's Court or conflicting statements made in such a Court by any of the witnesses, justice demands that, in the absence of any record to prove such admissions or statements, it should be open to the party concerned to call the Chief who presided at the Court of first instance to substantiate these matters on the appeal being heard in the Native Commissioner's Court. It follows that Chief Kwatsha was both a competent and compellable witness at the hearing of the appeal in the Native Commissioner's Court notwithstanding that he had presided at the trial of the case in the Chief's Court."

The President after analysing the Chief's evidence concluded that it was not acceptable and the appeal was accordingly allowed, with costs, and the judgment of the Native Commissioner's Court altered to one for defendant, with costs.

Cases referred to:

MacDonald versus Stander, 1935, A.D. 325, at page 334.

Zondo versus Mncede, 1945, N.A.C. (N. & T.) 94, at page 95.

SOUTHERN NATIVE APPEAL COURT.

TUNGATA vs. MBOBI.

N.A.C. CASE No. 34 OF 1961.

UMTATA: 24th January, 1962. Before Balk, President, Yates and Fourie, Members of the Court.

MAINTENANCE.

Maintenance—illegitimate child—contribution by natural father—assessment of.

Summary: In an action by the Plaintiff claiming maintenance for her illegitimate child at the rate of R10.00 per month from its natural father, the defendant, the Native Commissioner awarded R5.00 per month.

Held: That this sum was a reasonable contribution to be made by the Defendant in the circumstances of the case.

Appeal from the judgment of the Assistant Native Commissioner, Tsolo.

Balk (President):

This is an appeal from the judgment of a Native Commissioner's Court for Plaintiff (now Respondent) in an action in which she sued the Defendant (present Appellant) for damages for her seduction by him and for £5 per month as maintenance for the resultant child.

The appeal is confined to that Court's Order for the child's maintenance in the sum of R5.00 per month and is brought on the ground that this award is excessive " particulary as Plaintiff failed to adduce any evidence justifying the award of this amount and having regard to the Defendant's income and the number of persons dependant upon him ".

According to the Plaintiff's evidence, she and the child live at the kraal of her cousin who is a storekeeper and supplies the child's needs on condition that the Plaintiff is to be responsible for the repayment of this expenditure to him. He tells her the cost. An amount of R10.00 per month is spent on the child for food, clothes and doctor's expenses. The Plaintiff is no longer employed as a shop assistant as she remains at home to look after the child.

The Defendant testified that he was married and had one child of the marriage and also supported his mother, three unmarried sisters and a younger brother aged 12 years, his father being dead. The defendant admitted that his salary in his present post would be either R32.00 or R42.00 per month to be determined according to his qualifications. He also admitted that he owned seven head of cattle and had received R100.00 as dowry for his sister.

The Plaintiff's evidence in regard to the cost of the child's maintenance was not seriously challenged under cross-examination in that she was not questioned in regard to the details of the monthly expenditure involved. It is true that she admitted that the child had not yet been weaned but this is not necessarily indicative that supplementary food was not bought for it. Then there are the other items mentioned by her, namely, clothes and medical expenses. In the assessment of the cost of these items and food the Plaintiff's testimony that she had passed standard VI at school and had taken a three years' industrial course was,

as is apparent from the Assistant Native Commissioner's reasons for judgment, taken into account by him as indicative of the child's maintenance at a higher standard of living than amongst primitives and properly so.

As pointed out by the Native Commissioner in those reasons, the defendant's salary is on his own showing either R32.00 or R42.00 per month and in addition he has the assets mentioned above. As also pointed out by the Native Commissioner the Defendant did not disclose to what extent he contributed towards the support of his mother, three unmarried sisters and younger brother, i.e., the monthly cost of such support; nor is there any indication that they were unable to work and maintain themselves.

His primary duty as regards maintenance is to his wife, legitimate child and illegitimate infant so that in any event he cannot be heard to say that he is unable to make a proper contribution towards the illegitimate child's support because of his obligations in this respect to his mother, sisters and brother in the absence of any evidence that they are unable to work and maintain themselves.

The Native Commissioner concludes his reasons for judgment by stating that he considered R5.00 per month to be a reasonable contribution to be made by the Defendant for the illegitimate child's maintenance taking into consideration both the needs of the child as dictated by the Plaintiff's standard of living and the defendant's means; and in my judgment this represents a very fair assessment in all the circumstances of the case.

The appeal should accordingly be dismissed, with costs.

Yates and Fouric, Members, concurred.

For Appellant: Mr. K. Muggleston of Umtata.

For Respondent: Mr. F. G. Airey of Umtata.

SOUTHERN NATIVE APPEAL COURT.

BILITANI vs. KWINI.

N.A.C. CASE No. 32 OF 1961.

UMTATA: 25th January, 1962. Before Balk, President, Yates and Fourie, Members of the Court.

NATIVE CUSTOM.

Adultery—taking of "stomach"—duty in this respect of male relative having charge of husband's kraal—effect of unsatisfactory explanation for delay.

Summary: This was an appeal from the judgment of a Native Commissioner's Court for Plaintiff as prayed, with costs, in an action for damages for adultery alleged to have been committed by the Defendant (Appellant) with the Plaintiff's wife, Nopakamile.

Held: That, in accordance with custom, it was the duty of the Plaintiff's male relative who had charge of his kraal to have taken Nopakamile's "stomach" to the defendant as soon as she had reported the alleged adultery to him in the absence of the Plaintiff and the "eye" of his kraal.

Held further: That, in the circumstances, Nopakamile's only explanation for the delay in taking action against the Defendant viz., that it was not contrary to custom, was untenable and that her evidence fell to be treated as suspect.

Cases referred to:

Tsalo versus Nozathswa, 1 N.A.C. (S.D.) 272, at page 273.

The President in the course of his judgment stated:—

"Nopakamile admitted in cross-examination that she was only taken to the Defendant's kraal in connection with the alleged adultery when the resultant child was already four months old. She also admitted that she had reported the alleged adultery before the birth of her child to her cousin, Mtshas, at whose kraal she was staying and who was looking after her and the Plaintiff's kraal during the latter's absence and that of his younger brother who was the 'eye' of that kraal. In the circumstances it was Mtshas' duty in accordance with custom to have taken Nopakamile's 'stomach' to the Defendant as soon as she had reported the alleged adultery to him so that her explanation that the delay in taking action against the Defendant in the matter was not contrary to custom, is untenable. That being so and there being no other explanation for the delay, the Native Commissioner erred in holding that Nopakamile's explanation in this respect was sound and her evidence that it was the Defendant who had committed the adultery with her falls to be treated as suspect, as contended by Mr. Airey in his argument on behalf of the Appellant, see *Tsalo versus Nozathswa,* 1 N.A.C. (S.D.) 272, at page 273."

The remainder of the judgment is not material to this report.

Yates and Fourie, Members, concurred.

SOUTHERN NATIVE APPEAL COURT.

PAYI vs. PAYI.

N.A.C. CASE No. 52 OF 1961.

UMTATA: 25th January, 1962. Before Balk, President, Yates and Fourie, Members of the Court.

NATIVE CUSTOM.

Dowry—Ukukwenzelelele *custom distinguished from custom whereunder whole or bulk of dowry paid by father for son's wife or by kraalhead for inmate's wife.*

Summary: Plaintiff (now Respondent) successfully sued the Defendant (present Appellant) in a Chief's Civil Court for the dowry paid for the latter's daughter and was awarded eleven head of cattle. Plaintiff in his particulars of claim averred that he was the Defendant's elder brother and that he had paid as dowry for Defendant's wife thirteen head of cattle and ten sheep.

An appeal to the Native Commissioner's Court was dismissed and the Chief's judgment confirmed. From that judgment the Defendant appealed to this Court on the grounds, *inter alia,* that, in order to succeed the Plaintiff had to establish that the Defendant had agreed to return the dowry cattle paid by the Plaintiff for Defendant's wife.

Held: That the provision of the whole or the bulk of the dowry by the father for his son's wife or by a kraalhead for an inmate's wife, irrespective of whether there is a family or clan relationship between them, automatically entitles the provider of the dowry to recoup himself from

that paid for the eldest daughter of the customary union in respect of which the dowry was provided and that this custom is distinguishable from the *ukukwenzelelele* custom whereunder a male relative or friend of the bridegroom contributes a minor portion of the dowry for the latter's wife, i.e. a beast or two, such contribution being, according to the most recent decision of this Court, presumed to be a gift in the absence of an express stipulation to the contrary.

Cases referred to:

Mehlomlungu versus Gumasholo, 1960, (3 & 4) N.A.C. 60 (S), at page 62.

Nketshenketshe versus Gobo, 1959, N.A.C. 57 (S), at page 59.

Appeal from the judgment of the Additional Native Commissioner, Umtata.

Balk (President):

This case had its inception in a Chief's Court in which the Plaintiff (now Respondent) successfully sued the Defendant (present Appellant) for the dowry paid for the latter's daughter, Nontombizanana, and was awarded eleven head of cattle.

The appeal against that judgment to the Native Commissioner's Court by the Defendant was dismissed, with costs, and the award by the Chief's Court confirmed.

The appeal from the judgment of the Native Commissioner's Court to this Court is brought on the following grounds:—

" 1. In order to succeed the Plaintiff had to establish that the Defendant agreed to return the dowry cattle paid by the Plaintiff for Defendant's wife, if such dowry was paid by the Plaintiff at all.

2. In any event, the evidence does not establish that the said dowry was paid by the Plaintiff (now Respondent) and not by the Defendant himself (now the Appellant)."

The Plaintiff's claim, as restated in the Native Commissioner's Court, reads:—

" 1. The Parties are Natives.

2. Plaintiff is the elder brother of the Defendant and paid as dowry for Defendant's wife thirteen head of cattle and ten sheep.

3. According to custom the said dowry became refundable from the dowry of the Defendant's eldest daughter on her marriage.

4. Defendant's eldest daughter, one Nontombizanana, has been given in marriage and the Defendant has received ten head of cattle and ten sheep as dowry but notwithstanding demand refuses to pay the said dowry to Plaintiff.

5. Plaintiff instituted action in the Court of the Paramount Chief Sabata Dalindyebo and judgment was given in his favour and Plaintiff now prays that the appeal be dismissed with costs and the judgment of the Chief re-affirmed."

The onus of proof in the Native Commissioner's Court rested on the Plaintiff as the Defendant in his statement of defence denied the basis of the Plaintiff's claim i.e. the payment by the latter of his own cattle as dowry for the Defendant's wife.

It is common cause that the Plaintiff is the Defendant's elder brother and was the Defendant's kraalhead at the time when dowry was paid for the Defendant's wife. It is also common cause that this dowry amounted to thirteen head of cattle and ten sheep and that the Defendant received ten head of cattle and ten sheep as dowry for his eldest daughter, Nontombizanana, the ten sheep being equivalent to one beast.

It follows that the only point of fact at issue is whether the dowry stock paid by the Plaintiff for the Defendant's wife was the Plaintiff's property as testified to by him or that of the Defendant as alleged by the latter in his evidence; for in the latter event the Plaintiff would have no claim to the dowry paid for the Defendant's eldest daughter whereas in the former event the Plaintiff would be entitled to the lastmentioned dowry, such right flowing automatically from the operation of Native law and custom, see *Mehlomlungu versus Gumasholo*, 1960, (3 & 4) N.A.C. 60 (S), at page 62.

At this juncture it is convenient to deal with the first ground of appeal and with Mr. Muggleston's submissions thereanent in his argument on behalf of the Appellant, firstly, that according to the evidence of the Plaintiff's own witness, Mofu, the *ukukwenzelelele* custom obtained in the instant case and, secondly, that the definition of that custom by the Native assessors in *Nketshenketshe versus Gobo*, 1959, N.A.C. 57 (S), at page 59, was sufficiently wide to be of application here.

Whilst it is true that Mofu made this statement and that the definition may lend itself to the construction contended for, the true position is that, as submitted by Mr. Airey in his argument for the Respondent, a case such as the instant one where the elder brother and kraalhead of his younger brother has allegedly provided from his own stock *the whole of the dowry* for his younger brother's wife, as is customary, fails to be distinguished from one in which a male relative or friend of the bridegroom contributes a minor portion of the dowry for the latter's wife, i.e., a beast or two, under the *ukukwenzelelele* custom. The former custom which includes like customary instances where *the whole or the bulk of the dowry* is provided by a father for his son's wife or by a kraalhead for an inmate's wife, irrespective of whether there is a family or clan relationship between them, forms no part of the *ukukwenzelelele* custom and, as already stated, automatically entitles the provider of the dowry to recoup himself from that paid for the eldest daughter of the customary union in respect of which the dowry was provided as contended by the Plaintiff in the instant case in the course of his evidence. In the case of the *ukukwenzelelele* custom, it was laid down in the most recent decision of this Court that there is no automatic right of recovery of the dowry stock contributed flowing from Native law and custom but that such a contribution is thereunder presumed to be a gift in the absence of an express stipulation to the contrary, see *Nketshenketshe's* case (*supra*), at page 60. It is perhaps as well to reiterate that the decision in that case relates solely to the *ukukwenzelelele* custom, i.e., *the contribution of a beast or two towards* the dowry, and has no application in the case of the custom whereunder *the whole or the bulk of the dowry is provided*, the position as to repayment in the latter event being governed by the judgment in *Mehlomlungu's* case (*supra*) as set out above. It is perhaps also as well to add that the decision in *Nketshenketshe's* case has reference to the *ukukwenzelelele* custom as practiced by the Gcaleka, Ngqika, Tembu and Pomvana tribes.

It follows that there is no substance in the first ground of appeal.

The remainder of the President's judgment is not material to this report.

The appeal was dismissed, with costs.

Yates and Fourie, Members, concurred.

For Appellant: Mr. K. Muggleston of Umtata.

For Respondent: Mr. F. G. Airey of Umtata.

SOUTHERN NATIVE APPEAL COURT.

GUBUNGWANA AND ANO vs. NUNGU.

N.A.C. CASE No. 31 OF 1961.

UMTATA: 29th January, 1962. Before Balk, President, Yates and Welman, Members of the Court.

PRACTICE AND PROCEDURE.

Service of process—Unsigned return by Messenger of Court of service of summons on the applicants affords no evidence of such service. Requirements of sub-rule (3) *of Rule* 31 *of Rules for Native Commissioner's Courts read with sub-rule* (8) *of that Rule.*

Summary: This was an appeal from the judgment of a Native Commissioner's Court refusing, with costs, an application for rescission of a default judgment and for setting aside of the warrant of execution issued in pursuance thereof.

The application was refused on the ground that it was out of time in that the default judgment had come to the applicants' knowledge on the 23rd February, 1961, and the application was not made within a month thereafter as required by Rule 74 (1) of the Rules for Native Commissioner's Courts in that it was not made until the 2nd May, 1961. According to the Messenger of the Court's return of service endorsed on the original summons both copies of the summons were served only on the first applicant as the second applicant's whereabouts were unknown at the time. The Messenger's return was not signed by him.

Held: That, as the messenger's return of service of the summons on the applicants endorsed on the original thereof was not signed by him it afforded no evidence of such service.

Held further: That even had the messenger signed the return, the service of the summons on the second applicant was bad as it followed from the Messenger's endorsement that the second applicant's whereabouts were unknown at the time of service, that the latter then neither resided, carried on business nor was employed at the place where the summons was served so that the service on him did not comply with the requirements of sub-rule (3) of Rule 31 and with sub-rule (8) of that Rule.

Cases referred to:

Mkize and Ano versus Mkize, 1953, N.A.C. 181 (N.E.), at page 184.

Masotsha versus Masotsha, 1960, N.A.C. 13 (S), at page 15.

Appeal from the judgment of the Assistant Native Commissioner, Ngqeleni.

Balk (President):

This is an appeal from the judgment of a Native Commissioner's Court refusing, with costs, an application for rescission of a default judgment and for the setting aside of the warrant of execution issued in pursuance thereof.

The appeal is confined to the refusal by the Assistant Native Commissioner of the application for rescission of the default judgment and is brought on the following grounds:—

"1. The judgment is against the weight of the evidence, the proved facts and the preponderance of probability.

2. The judgment is bad in law in that the presiding officer put the onus of proving that they were not in wilful default upon the application whereas the onus should have been put upon the Respondent to prove that the applicants were in fact in wilful default.

3. That in as much as the Respondent did not even attempt to prove that there had been any service of summons upon the applicants and the Messenger of the Court who is alleged to have served the summons was not called as a witness, the applicants were not aware of the action and they could not be reasonably expected to have known that the reference to a judgment in the Court of the Deputy Chief referred to the case between the applicants and Respondents, and the applicants were therefore not in wilful default even after the commencement of the civil judgment in the Deputy Chief's Court."

The rules hereinafter referred to are those for Native Commissioner's Courts.

The Assistant Native Commissioner refused the application on the ground that it was out of time in that the default judgment had come to the applicants' knowledge on the 23rd February, 1961, and the application was not made within a month thereafter as required by Rule 74 (1) in that it was not made until the 2nd May, 1961.

In finding that the applicants had not made the application timeously, the Native Commissioner came to the conclusion that their evidence that the summons in the case in which the default judgment was given, had not been served on them was insufficient to controvert the *prima facie* evidence of service on them of the summons arising, in terms of Rule 19, from the return of service endorsed by the Messenger of the Court on the summons, as the applicants were untruthful witnesses. But in coming to this conclusion the Native Commissioner lost sight of the fact that the return of service endorsed on the summons was unsigned so that it afforded no evidence of service. It is perhaps as well to add that even had the return been signed by the Messenger of the Court the service of the summons on the second applicant was bad in that, according to the return, both copies of the summons were served only on the first applicant as the second applicant's whereabouts were unknown at the time from which it follows that the second applicant then neither resided, carried on business nor was employed at the place where the summons was served and that the service on him did not comply with the requirements of sub-rule (3) of Rule 31 read with sub-rule (8) of that Rule, see *Mkize and Ano. versus Mkize* 1953, N.A.C. 181 (N.E.), at page 184.

As the return of service endorsed on the summons afforded no evidence of service for the reason given above there was no evidence at all of service of the summons on the applicants so that their evidence that it had not been served on them should have been accepted by the Native Commissioner who should accordingly have held that the default judgment against both the applicants was void *ab origine* and that their application for its rescission had been made timeously in terms of Rule 74 (9) which provides that an application of the nature in question in such a case may be made within one year after the applicants first had knowledge of the invalidity, see *Mkize's* case at pages 183 and 184 cited by Mr. Muggleston in support of his argument on behalf of the appellant to this effect.

That being so and as in the circumstances there can be no question that the applicants were in wilful default and as they showed good cause, including an apparently bona fide defence, the Native Commissioner ought, as submitted by Mr. Muggleston and properly conceded by Mr. Airey who appeared in this Court for the Respondent, to have granted the application for rescission

of the default judment in respect of both applicants in terms of Rule 74 (5), the provisions of which apply by virtue of Rule 74 (8), see *Masotsha versus Masotsha* 1960 N.A.C. 13 (S), at page 15.

The appeal should accordingly be allowed, with costs, and the judgment of the Native Commissioner's Court should be altered to one granting the application for rescission of the default judgment, with costs, in respect of both, applicants.

Yates and Welman, Members, concurred.

For Appellants: Mr. K. Muggleston of Umtata.

For Respondent: Mr. F. G. Airey of Umtata.

SOUTHERN NATIVE APPEAL COURT.

ZWENI vs. BONGA.

N.A.C. CASE No. 42 OF 1961.

UMTATA: 29th January, 1962. Before Balk, President, Yates and Welman, Members of the Court.

EVIDENCE.

Evidence—Defendant's main plea negatived by admission in his evidence—onus of proof on Defendant on his alternative plea—no room for absolution.

NATIVE LAW AND CUSTOM.

Guardianship of children claimed on ground of customary union with their mother who had contracted a prior customary union with another man—criterion whether prior dissolution of last-mentioned union—legitimation of children by second union. Putuma *by husband of wife irreconcilable with prior acceptance by him of* keta *cattle for her. Requirments on death of such cattle in payer's custody.*

Summary: This was an appeal from the judgment of a Native Commissioner's Court for Plaintiff (now Respondent) as prayed, with costs, in an action which he brought against the Defendant (present Appellant) for a declaration of rights that he was the legal guardian and " dowry-eater " of Yilata's daughter, Ntombomhlaba, and of two other of her children who were with the Defendant and claiming eight head of cattle alleged to have been received by the latter as dowry for Ntombomhlaba.

The Plaintiff founded his action on the customary union which, he averred in his summons, he had contracted with Yilata and which the Defendant denied in his main plea. This denial was negatived by the Defendant's admission in his evidence that the Plaintiff had entered into that customary union so that the Defendant was confined to his alternative plea that that union had been dissolved by *keta* and that subsequent to such dissolution he (Defendant) had entered into a customary union with Yilata and was the father and natural guardian of the three children in question.

In the course of their evidence for the Defendant, Yilata and her " dowry-eater " stated that the Plaintiff had accepted two *keta* cattle to dissolve his customary union with her. Under cross-examination Yilata stated that after his acceptance of the two *keta* cattle to dissolve her customary union with the Plaintiff he had come to *putuma* her, i.e., to get

her back, and her "dowry-eater" said that on the death of these two cattle in his possession, the Plaintiff not having fetched them, he (the "dowry-eater") had sold their skins but did not account for the proceeds to the plaintiff.

The evidence for the Defendant that he had entered into what purported to be a customary union with Yilata at the time stated by him and that he was the natural father of the three children was not disputed; nor the time the children were born as testified to by the Defendant.

Held: That as the Defendant had negatived his main plea by his admission in the course of his evidence of the customary union relied upon by the Plaintiff to found his claim, the onus of proof on the pleadings rested on the Defendant in terms of his alternative plea alleging the dissolution of that customary union at the time stated by him therein so that either one or the other of the parties was entitled to full judgment, there being no room for absolution from the instance.

Held further: That the criterion as regards the guardianship of the three children was whether there had been a dissolution of the Plaintiff's customary union with Yilata at the time stated by the Defendant.

Held further: That if there had been such a dissolution the three children fell to be regarded as legitimate children of the Defendant's subsequent customary union with Yilata even if born prior thereto as it was manifest from the evidence that they were born to Yilata some years after the alleged dissolution and that the Defendant was their natural father.

Held further: That it was most unlikely that the Plaintiff would have come to *putuma* Yilata, i.e., to get her back, after having accepted *keta* cattle to dissolve his customary union with her.

Held further: That custom demands that the proceeds of the sale of skins of cattle dying whilst in the custody of a person other than the owner are to be accounted for to the owner by the custodian.

Cases referred to:

Maqolo versus Mtimfa and Ano., 1943, N.A.C. (C. & O.) 33.

Arter versus Burt, 1922, A.D. 303, at page 306.

Novungwana versus Zabo, 1957, N.A.C. 114 (S), at page 117.

Mdibaniso versus Msolo, 1940, N.A.C. (C. & O.) 75, at pages 76 and 77.

Nogonomfana versus Ngane, 3 N.A.C. 35, at page 36.

Appeal from the judgment of the Assistant Native Commissioner, Ngqeleni.

Balk (President):

This is an appeal from the judgment of a Native Commissioner's Court for Plaintiff (now Respondent) as prayed, with costs, in an action which he brought against the Defendant (present Appellant) for a declaration of rights that he was the legal guardian and "dowry-eater" of Yilata's daughter, Ntombomhlaba, and of two other of her children who were with the Defendant and claiming eight head of cattle alleged to have been received by the latter as dowry for Ntombomhlaba.

In the particulars of claim in the summons the Plaintiff averred that he had contracted a customary union with Yilata many years ago and that this union still subsisted but he did not disclose whether Yilata gave birth to the three children during its subsistence. However, the Plaintiff's evidence that the births had taken place then cures the defect which, therefore, becomes a mere technicality at this the appeal stage.

In his plea the defendant admitted the receipt of the eight head of dowry cattle for Ntombomhlaba, but denied the alleged customary union between the Plaintiff and Yilata. In the alternative he pleaded that should the Court find that there had been such a customary union, it had been dissolved by *keta* many years ago and that he had subsequent to such dissolution entered into a customary union with Yilata and was the father and natural guardian of her daughter, Ntombomhlaba, and her other two children with him.

The appeal is confined to fact.

The Defendant's attorney gave notice in the Native Commissioner's Court of an application for the amendment of the Defendant's plea so as to include a special plea of *res judicata.* The presiding Assistant Native Commission did not record the outcome of the application as he ought to have done but there is a note that the special plea was dismissed so it would appear that he granted the application as otherwise it would not have been cognizable by the Court. However, that may be, the special plea calls for no further consideration as nothing turns on it in the appeal. It should be added that the Native Commissioner should have recorded that the granting of the application was moved in his Court and the attitude of the Plaintiff thereto in addition to the outcome.

In view of the admission by the Defendant in the course of his evidence that the Plaintiff had contracted a customary union with Yilata which was also borne out by the testimony of the Defendant's witnesses, Ntlamtini and Yilata, the Defendant had, in order to succeed, to establish his alternative plea, i.e., that the customary union between the Plaintiff and Yilata had been dissolved by *keta* and that he had thereafter entered into a customary union with her. That the Defendant entered into what purported to be a customary union with Yilata paying dowry in respect thereof to her uncle, Ntlamtini, who was her "dowry-eater", is, as submitted by Mr. Mugglcston in his argument on behalf of the Appellant, established by their uncontroverted evidence in this respect. The alleged dissolution of the customary union between the Plaintiff and Yilata prior to the union between the latter and the Defendant referred to above was, however, disputed by the Plaintiff in his evidence so that, as contended by Mr. Airey in his argument for the Respondent, if the Defendant failed to estabiish this dissolution upon which the validity of his union with Yilata and his claim to the guardianship of their three children was contingent, see *Maqolo versus Mtimfa and Ano.,* 1943, N.A.C. (C. & O.) 33, the Plaintiff was entitled to judgment, there being no room for absolution from the instance here as the onus of proof in this respect rested on the Defendant, see *Arter versus Burt,* 1922, A.D. 303, at page 306. Here it should be mentioned that whilst it is not clear from the evidence for the Defendant whether Yilata gave birth to the three children during the subsistence of his union with her, it is manifest therefrom that they were born some years after the alleged dissolution of the Plaintiff's customary union with Yilata so that if this dissolution was proved the children would fall to be regarded as legitimate children of the union between the Defendant and Yilata since this union would then be a valid customary one and the children would fall to be so regarded even if they were born before the Defenadnt's union with Yilata was entered into, see *Mdibaniso versus Msolo,* 1940, N.A.C. (C. & O.) 75, at pages 76 and 77. It should be added that the defence evidence as to when the union between the Defendant and Yilata took place was not rebutted and that it is common cause that the Defendant is the natural father of the three children.

Proceeding to a consideration of the question on which the appeal turns, viz., whether the alleged dissolution of the customary union between the Plaintiff and Yilata was proved, it is manifest from the Defendant's evidence that he has no first-hand knowledge thereof. His witnesses, Ntlamtini and Yilata,

testified that Yilata, with the concurrence of her "dowry-eater", Ntlamtini, restored two head of cattle to the Plaintiff in respect of dowry paid by the latter for her, to dissolve their customary union, these cattle being accepted by the Plaintiff for this purpose. Such a refund would, of course, have that effect, see *Novungwana versus Zabo,* 1957, N.A.C. 114 (S), at page 117. Yilata also testified that the Plaintiff had accused her of witchcraft and that he had threatened her with a knife and driven her away from his kraal but, as was properly conceded by Mr. Muggleston, it is manifest from her evidence that the alleged repudiation of her by the Plaintiff was not pursued with a view to bringing about the dissolution of their customary union without the restoration of any dowry by having the Plaintiff confirm the repudiation publicly before the Chief or Headman, see the report on *Novungwana's* case at the page referred to above.

The Native Commissioner states in his reasons for judgment that Yilata and Ntlamtini were far more satisfactory witnesses than the Plaintiff but that their evidence anent the delivery of the two head of cattle to dissolve the customary union between her and the Plaintiff contained discrepancies which could not be ignored. The first discrepancy referred to by him is that whereas Ntlamtini stated that the cattle had actually been taken to headman Tyokolo, Yilata said that the cattle were described but not taken to this Headman. It is difficult to gainsay the Native Commissioner's view that this is a material discrepancy even taking into account, as stressed by Mr. Muggleston, that the witnesses were testifying to events which had taken place some twenty-two years previously for they would be expected to remember whether or not they had in fact taken the cattle to the Headman in a matter so closely affecting them.

The remaining discrepancy mentioned by the Native Commissioner concerns whether Ntlamtini and Yilata went to the Plaintiff's attorney before or after the alleged delivery of the cattle to the Plaintiff at Ntlamtini's kraal. To my mind there is, as contended by Mr. Muggleston, no discrepancy here as it is manifest from a proper understanding of their evidence that they went to the attorney both before and after such delivery. The Native Commissioner went on to say that he did not accept Ntlamtini's and Yilata's evidence regarding the delivery of the cattle to the Plaintiff at Ntlamtini's kraal as neither witness was able to advance any reason why the Plaintiff did not remove these cattle after accepting them. While such a reason might well be one peculiarly within the knowledge of the Plaintiff and not have been known to the witnesses, it is extremely strange that the Plaintiff should not have removed the cattle from Ntlamtini's kraal if the latter and Yilata are to be believed that the cattle were delivered to the Plaintiff in response to an initial request by the latter and his attorney, that the Plaintiff accepted them both when offered to him at his attorney's office and at Ntlamtini's kraal and that he apparently made no arrangement with Ntlamtini for the cattle to be kept at the latter's kraal on his behalf. This feature accordingly, as stressed by Mr. Airey, constitutes a weighty improbability in the Defendant's case.

Then there is the inconsistency in the following passage from Yilata's evidence in cross-examination as regards the number of occasions on which the Plaintiff *putumaed* her:—

> "Plaintiff only '*putumaed*' me once. On second occasion he came to fetch the cattle. We appeared at attorney's office after Plaintiff came to the kraal to fetch the cattle. Plaintiff had come for his cattle saying he wanted his wife. He had come to '*putuma*' me. He did therefore *putuma* me on two occasions. I gave him the cattle at Ntlamtini's kraal and we subsequently came to Attorney Miller."

This inconsistency makes it difficult to escape the conclusion that she falsely tried to conceal the second *putuma* to lend colour to her testimony that the two head of cattle were offered to, and

accepted by, the Plaintiff at Ntlamtini's kraal to dissolve her customary union with the Plaintiff and that her evidence and that of Ntlamtini in this respect is false for the Plaintiff would hardly have come to Ntlamtini's kraal to *putuma* Yilata, i.e., to get her back, after having accepted at his attorney's office the two head of cattle tendered there to dissolve his customary union with Yilata.

I do not think that Ntlamtini's admission in cross-examination that the Plaintiff was entitled to the refund of only one dowry beast to dissolve his customary union with Yilata renders his allegation that he actually paid two head of cattle on this score improbable in view of his explanation that he did so on the advice of his attorney who might have given a good reason therefor, an aspect which was not canvassed.

I also do not think that Ntlamtini's admission that he sold the skins of the two head of dowry cattle which he alleged he had refunded to the Plaintiff and that he did not account for the proceeds thereof to the latter which is contrary to Native law and custom, see *Nogonomfana versus Ngane,* 3 N.A.C. 35, at page 36, makes the alleged refund improbable regard being had to his evidence that that he notified the Plaintiff of the death of these cattle coupled with the fact that he does not appear to have been asked in cross-examination why he had failed to account to the Plaintiff for the money for which he may have had a good explanation.

As against the defence evidence that the Plaintiff was aware from the inception of the Defendant's customary union with Yilata and that he had taken no action in the matter, there is the Plaintiff's testimony that he had successfully sued the Defendant in the Chief's Court for the customary "fine" for his adultery with Yilata after she had deserted him (Plaintiff) on the first occasion and that after she had again deserted him he searched for her but did not find her and next saw her in the year 1959 on his return from work. Admittedly, there are, as stressed by Mr. Muggleston, blatant inconsistencies in the Plaintiff's evidence, firstly, as regards whether Ntlamtini said at the Chief's Court that the customary union between the Plaintiff and Yilata had been dissolved and, secondly, as regards whether the Defendant had to the Plaintiff's knowledge been living with Yilata for many years. The Plaintiff's version of Yilata's subsequent desertion and his unsuccessful efforts to find her until the year 1959, however, gains support from Ntlamtini's admission in cross-examination that it was years before Yilata was found after she had deserted the Plaintiff. It is true that Ntlamtini added that it was about half a year but it is difficult to escape the conclusion that he did so in an effort to retrieve the position on realising the portent of his initial reply that Yilata could not be found for years bearing in mind that he gave no explanation as to how he came to make this reply and that, as stressed by Mr. Airey, it is in the nature of things inconceivable that it was a mistake. There is a further factor lending strength to this view, viz., Yilata's admission in her evidence that Ntlamtini had forced her to return to the Plaintiff after she had left his kraal for the first time and that she had not gone to Ntlamtini on leaving the Plaintiff's kraal for the second time as she feared that he would force her to return again to the Plaintiff. Admittedly, Yilata went on to say that she had returned to Ntlamtini's kraal two months after leaving the Plaintiff's kraal for the second time but her explanation for so doing, i.e., that she felt she should do as he instructed her, does not carry conviction as it does not dispose of the fear factor.

In the circumstances and bearing in mind that the Plaintiff had denied in his evidence that the two head of dowry cattle had been offered to him to dissolve his customary union with Yilata, the Native Commissioner cannot be said to be wrong in finding that the Defendant had failed to prove on a balance of

probability that the customary union between the Plaintiff and Yilata had been dissolved by the Plaintiff's acceptance of the two head of cattle and in therefore entering judgment for the Plaintiff, as prayed, with costs.

The appeal should accordingly be dismissed, with costs.

Yates and Welman, Members, concurred.

For Appellant: Mr. K. Muggleston of Umtata.

For Respondent: Mr. F. G. Airey of Umtata.

SOUTHERN NATIVE APPEAL COURT.

MOHLAOLI vs. RAMABELE.

N.A.C. CASE No. 9 OF 1961.

UMTATA: 1st February, 1962. Before Balk, President, Yates and Hastie, Members of the Court.

DELICT.

Permitting minor to attend initiation lodge and circumcising him without father's consent constitutes actionable wrong—no damages awarded as neither contumelia *nor patrimonial loss established.*

Summary: This was an appeal from the judgment of a Native Commissioner's Court decreeing absolution from the instance, with cost, at the conclusion of the trial of an action in which the Plaintiff (present Appellant) sued the Defendant (now Respondent) for damages in the sum of £50 for *contumelia* and patrimonial loss.

The wrongful conduct on the part of the Defendant as established by the evidence, in the main by the Defendant's admissions in the course of his testimony, amounted to this that he permitted the Plaintiff's minor son to attend an initiation lodge of which he was in charge and circumcised him there without the Plaintiff's consent.

Held: That the Defendant's conduct in permitting the Plaintiff's minor son to attend the initiation lodge of which the Defendant had charge and in circumcising him without the Plaintiff's consent constituted an actionable wrong.

Held further: That as neither *contumelia* nor patrimonial loss had been established, the Plaintiff was not entitled to damages.

Cases referred to:

O'Keeffe versus Argus Printing and Publishing Co. Ltd., and Ano., 1954, (3) S.A. 244 (C.P.D.), at page 247.

Stoffberg versus Elliott, 1923, C.P.D. 148, at page 152.

McKerron's Law of Delict, (Fifth Edition), at page 52.

Appeal from the judgment of the Native Commissioner, Matatiele.

Balk (President):

This is an appeal from the judgment of a Native Commissioner's Court decreeing absolution from the instance, with costs, at the conclusion of the trial of an action in which the Plaintiff

(present Appellant) sued the Defendant (now Respondent) for damages in the sum of £50 averring in the particulars of claim in the summons, as amended with the leave of that Court that—

" 1. Plaintiff and Defendant are Natives as defined by Act 38/1927.

2. In or about the period 4th September, 1959, to 23rd October, 1959, Defendant conducted tribal initiation ceremonies at a certain hill at or near Sibi's Location, District Matatiele.

3. Defendant admitted Plaintiff's minor son, George, then aged sixteen years, to the said ceremonies and for the purpose thereof caused George to be detained away from Plaintiff's custody during the aforesaid period and caused George to be circumcised.

4. The aforesaid admission of George to the ceremonies, detention of George away from Plaintiff's custody and circumcision of George were all done wrongfully, unlawfully and without Plaintiff's consent.

5. Plaintiff had previously by public ceremony renounced the tribal custom of initiation.

6. By reason of the aforesaid Defendant actuated by *animus injuriandi* inflicted a *contumelia* on Plaintiff.

7. Defendant further culpably caused patrimonial loss to Plaintiff as follows:—

(*a*) By reason of being absent from school while the said initiation ceremonies were taking place, George did not write the examinations and has to spend an extra year attending school and be maintained by Plaintiff during this extra year;

(*b*) by reason of having taken part in the said initiation ceremonies, George has lost certain clothes which he previously used to wear and Plaintiff has had to purchase new clothes for George.

8. The damages suffered by Plaintiff for the aforesaid *contumelia* and patrimonial loss amount to £50.

The Defendant pleaded as follows:—

" 1. Paragraph 1 of Plaintiff's claim is admitted.

2. Paragraph 2 of Plaintiff's claim is admitted. Defendant avers that the ceremonies were conducted strictly in accordance with Native Law and Custom.

3. Ad. paragraph 3. Defendant admits that Plaintiff's son George was present at the ceremonies but denies that he caused George to be detained away from Plaintiff's custody. Defendant avers that the said George attended the said ceremonies, was circumcised and remained throughout of his own volition and consent.

4. Defendant denies paragraph 4 of Plaintiff's claim and puts Plaintiff to the proof thereof.

5. Ad. paragraph 5. Defendant has no personal knowledge of this averment and puts Plaintiff to the proof thereof.

6. Ad. paragraph 6. Defendant denies that he acted *animus injuriandi* or that he inflicted a *contumelia* on Plaintiff and puts Plaintiff to the proof thereof. Defendant avers that the presence of the said George at the said ceremonies was the result of Plaintiff's negligence.

7. Defendant denies that he caused Plaintiff any patrimonial loss either culpably or otherwise and puts Plaintiff to the proof thereof.

8. In the premises Defendant denies that Plaintiff has suffered damages as alleged, or at all; or alternatively Defendant denies liability for any damages suffered by Plaintiff."

Further particulars were furnished on request both in respect of the claim and the Defendant's plea but it is unnecessary to set these out as they are not material to the appeal.

The appeal is brought on the following grounds:—

"1. The Judicial Officer erred in finding that Defendant was not actuated by *animus injuriandi*. It is therefore respectfully submitted that an amount of damage should have been awarded to Plaintiff in respect of *contumelia*.

2. The Judicial Officer erred in either considering that *animus injuriandi* is a requirement of liability for patrimonial loss or finding that Defendant was not guilty of *culpa*. It is therefore respectfully submitted that the amount of Plaintiff's patrimonial loss should also have been awarded to Plaintiff as damages."

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

The applicant's explanation for the initial delay in noting the appeal is that he left the venue of the trial, viz., Matatiele, for Umtata on business after the Native Commissioner's Court had reserved judgment in the case and that he only became aware that the judgment had gone against him when he received a letter to that effect from his attorney on his return to Matatiele. This explanation, cannot, as was stressed by Mr. Knopf in his argument on behalf of the respondent, be regarded as satisfactory as the applicant could have avoided the delay by arranging with his attorney to advise him of the outcome of the case at his Umtata address. Moreover, had the applicant telephoned to his attorney on receipt of his wife's letter intimating that the attorney wanted to see him he could still have had the appeal noted timeously. Furthermore, there is no explanation as regards the further delay in noting the appeal after the applicant received the letter from his attorney.

However, the merits of the proposed appeal were put in issue and as the applicant appeared *ex facie* the Native Commissioner's reasons for judgment to have a reasonable prospect of success on appeal and as the delay in its noting had not been lengthy, being less than two weeks, the Court following the decision in *Tong versus Ntwayabokwene*, 1956, N.A.C. 188 (S), at pages 189 and 190, cited by Mr. Airey in support of his argument on behalf of the applicant, granted the application for condonation.

Proceeding to a consideration of the appeal, the wrongful conduct on the part of the defendant as established by the evidence, in the main by the Defendant's admissions in the course of his testimony, amounts to this that he permitted the Plaintiff's minor son to attend an initiation lodge of which he was in charge and circumcised him there without the Plaintiff's consent.

In order to establish *contumelia* the Plaintiff had to show that the defendant had committed an intentional wrongful act which constituted an aggression upon his person, dignity or reputation, see *O'Keeffe versus Argus Printing and Publishing Co. Ltd., and Ano.*, 1954, (3) S.A. 244 (C.P.D.), at page 247, and the authorities there cited.

In the instant case there is no question of there having been any agression upon the Plaintiff's person; nor was his reputation involved as is manifested from his admission in cross-examination that he had not lost friends or status as a result of the Defendant's wrongful conduct. It remains to consider whether the Plaintiff suffered any indignity as a result of that conduct, i.e., whether the Plaintiff can reasonably be held to have been thereby subjected to offensive, degrading or humiliating treatment, see *O'Keeffe's* case at pages 247 to 249.

As pointed out by Mr. Knopf, the Plaintiff admitted in the course of his evidence that he did not know whether the Defendant had attended the feast at which he had publicly renounced the tribal custom of initiation and there is no other evidence that the Defendant was at that feast or that he was aware of the renunciation so that his evidence that he was unaware thereof being, as it is, uncontroverted falls to be accepted. But the absence of this knowledge does not necessarily connote the absence of *contumelia* in that, as is manifest from the evidence and as was submitted by Mr. Airey, the Defendant's wrongful conduct in permitting the Plaintiff's minor son to attend the initiation lodge and in circumcising him there without the Plaintiff's consent was intentional and, therefore, *animus injuriandi* is presumed and the Native Commissioner misdirected himself in finding that *animus injuriandi* had not been established, see *McKerron's Law of Delict* (Fifth Edition) at page 52 referred to by Mr. Airey; and the Defendant's wrongful conduct reasonably lends itself to an inference that the Plaintiff was thereby humiliated in the light of his evidence that he practised Christianity and that he had renounced the initiation custom. But, as was stressed by Mr. Knopf, the Plaintiff specifically stated in cross-examination that he did not feel insulted by the Defendant's wrongful conduct which had merely made him angry so that on his own showing he cannot be held to have been humiliated thereby; and after all he is the person in the best position to say whether or not he was humiliated. It is true that the Plaintiff stated in re-examination that his feelings were hurt but this does not necessarily imply humiliation. Moreover, the Plaintiff's admission that he did not feel humiliated finds support from his statement in his evidence in chief that what worried him was that after his son had been initiated he started running after girls and had stolen a pig.

It follows that the Plaintiff did not establish *contumelia* so that he was only entitled to damages if he proved patrimonial loss, see *Stoffberg versus Elliot,* 1923, C.P.D. 148, at page 152.

Turning to this aspect, the Native Commissioner found, as was stressed by Mr. Airey, that the Defendant's conduct had resulted in the schooling of the Plaintiff's minor son being interrupted and in his being set back a year which caused the Plaintiff certain loss. As pointed out by Mr. Knopf, however, this finding does not appear to be supported by the evidence as will be apparent from what follows. The Plaintiff's evidence that he heard that his son's teachers refused to readmit him to the school when he returned from his initiation is hearsay and thus not probative of such refusal. According to the Plaintiff's son in his testimony for the Plaintiff, he returned from the initiation lodge before the school examinations were held so that he could have taken them. Instead, he went about the location to be trained in the art of speaking and there is nothing to show that the Defendant was responsible therefor. There is also nothing in the Plaintiff's son's evidence to indicate that he would not have been accepted back at the school and allowed to write the examinations when he returned from the initiation lodge. On the contrary, his testimony that when he went back to school the year following that in which he was initiated, nothing particular happened suggests that he could have returned to school when he came back from the initiation lodge and taken the examinations the same year with apparently a reasonable prospect of passing as he stated he was good at his work and expected to pass his examinations. The Plaintiff, on the other hand, admitted in cross-examination that his son had prior to his undergoing the initiation failed a school examination and that there was no certainty that he would have passed his examinations had his schooling not been interrupted by the initiation. There is no evidence to support the Plaintiff's averment in his summons that his son lost certain clothes by his initiation, the evidence adduced by the Plaintiff in regard to loss being confined to that relating to his son's having been set back a year in his schooling. That being so and as it is apparent from

what has been stated above that the evidence adduced by the Plaintiff does not substantiate his allegation that his son lost a year's schooling owing to his initiation and seeing that *contumelia* was not establshed the Natve Commissoner cannot be said to be wrong in having decreed absolution from the instance, with costs.

The appeal should accordingly be dismissed, with costs.

Yates and Hastic, Members, concurred.

For Appellant: Mr. F. G. Airey of Umtata.

For Respondent: Mr. R. Knopf of Umtata.

SOUTHERN NATIVE APPEAL COURT.

CHECHE vs. NONDABULA.

N.A.C. CASE No. 50 OF 1961.

UMTATA: 1st February, 1962. Before Balk, President, Yates and Hastie, Members of the Court.

PRACTICE AND PROCEDURE.

Judgments—awards on individual claims to be specified—to be recorded in same terms as given verbally. Applications—necessity for recording nature and ontcome thereof. Presiding judicial officers—necessity for signing proceedings in correct capacity.

NATIVE CUSTOM.

Dowry—where quantum *fixed by custom—father associating himself with negotiations to obtain first wife for son—implications thereof in case of customary union and civil marriage—position where* quantum *of dowry not fixed by custom distinguished. Illigitimate son "acquired" by natural father by payment of "fine" for seduction of mother ranks as his son. Presumption against limitation by agreement of* quantum *of dowry payable where dowry fixed by custom. Whether claim for balance of dowry competent where wife has deserted husband.*

Summary: The Plaintiff (present Appellant) instituted an action in a Native Commissioner's Court against the Defendant (now Respondent) claiming—

(1) the delivery of certain eight head of cattle or alternatively payment of their value, £64;

(2) an order compelling the Defendant to have these cattle registered in his (Plaintiff's) stock card and in the latter's name in the dipping register; and

(3) the delivery of fourteen unspecified cattle and a horse or alternatively payment of their value, £127, and costs.

In the particulars of claim in his summons, the Plaintiff averred that the Defendant had delivered the eight head of cattle to him as dowry in respect of the marriage of his daughter, Nocingela, to the Defendant's son, Maime, and had refused to return them after they had come into his hands for dipping purposes as arranged as they had not

yet been registered in his (Plaintiff's) name in the dipping records and that fourteen head of cattle and a horse constituted the balance due in respect of this dowry under *Hlubi* custom which applied, the equivalent of three head of cattle having been paid in cash and in kind in addition to the eight.

In response to a request by the Defendant's attorneys' the following further particulars were furnished:—

"(1) The marriage between Defendant's son and Plaintiff's daughter was celebrated according to Christian rites.

(2) It was agreed that dowry would be payable in respect of the above marriage.

(3) Since the issue of summons seven of the eight head of cattle have been restored to Plaintiff. It is not known whether they have been transferred to Plaintiff's stock card.

(4) Plaintiff's daughter is not residing with Defendant's son at present."

The Defendant pleaded as follows:—

"1. That he admits that his son Maime married Plaintiff's daughter Nocingela but that he avers that the said Maime is illegitimate and for payment of whose dowry under Native law and custom he would not normally be responsible.

2. That he avers that he undertook to pay twelve head of cattle only in respect of the *lobola* owing in respect of the said marriage including the *nqhobo* beast.

3. That he has delivered to Plaintiff the equivalent of eleven head of cattle including seven of the eight head of cattle referred to in Plaintiff's Particulars of Claim.

4. That seven of the eight head of cattle referred to in Plaintiff's summons have now been registered in the name of the Plaintiff in the Dipping Register.

5. That he hereby consents to judgment for the delivery of one beast or its value £8 with costs to date.

Wherefore Defendant prays that the balance of Plaintiff's claim be dismissed, with costs."

The Assistant Native Commissioner entered judgment for the Plaintiff for three head of cattle or their value, R48.00, with costs, without specifying the *quantum* awarded on each claim.

According to the notice of appeal the Native Commissioner gave the following judgment:—

"In respect of Claims (1) and (2): in favour of Plaintiff for two head of cattle, or their value £16 (R32.00), and their registration in Plaintiff's stock card and in Plaintiff's name in the dipping register.

In respect of Claim (3): in favour of Plaintiff for one head of cattle or its value £8 (R16.00), and costs."

The attorneys representing the parties in this Court agreed that that was the judgment given and it was therefore accepted as such for the purposes of the appeal.

The appeal was confined to the Native Commissioner's judgment on claim (3) and brought on fact.

It was common cause that the parties belonged to the Hlubi tribe located in Ludidi's Location in the Matatiele District and that in this tribe the *quantum* of dowry payable in respect of a customary union was fixed by custom at twenty-five head of cattle and one horse.

Held: That it is customary in a tribe where the *quantum* of dowry is fixed by custom that a father associating himself with negotiations to obtain a first wife for his son thereby binds himself to pay the whole of the fixed dowry and so becomes personally liable therefor in the absence of circumstances indicating a contrary intention.

Held further: That in those circumstances the position is the same in the case of a civil marriage.

Held further: That the position is different in the case of a civil marriage where the *quantum* of dowry payable is not fixed by custom when an express agreement in regard thereto is essential.

Held further: That where the natural father of the boy pays the "fine" for the seduction of the mother of the boy which resulted in the latter's birth and where the latter grew up at his kraal, the father is deemed to have "acquired" the boy in the sense that the boy becomes a member of the father's family and falls to be regarded as his son in so far as the payment of the dowry for his first wife is concerned.

Held further: That there is a presumption against the Defendant's contention that he limited his liability in respect of dowry to twelve head of cattle as it is contrary to custom to do so.

Held further: That, as the Plaintiff intimated in his summons that his daughter was prepared to return to the Plaintiff's son which implies an offer by him to return her, there can be no objection to the Plaintiff's claim for the balance of the dowry on the ground of his daughter's desertion of the Defendant's son, by whom she had not been *putumaed.*

Per Curiam: The Native Commissioner ought to have specified the quantum awarded on each claim in that this was essential for the judgment to be definite in all respects. This aspect becomes important where, as here, the appeal cannot be decided without the award by the Court of first instance on each claim being known.

It must also be impressed on the Native Commissioner that a judgment falls to be recorded in the same terms as it is given verbally, that the nature of amendments to the pleadings applied for and the outcome of the application must be recorded by him and that all the proceedings in cases such as the instant one, i.e., civil cases between Natives, must be signed by him in his capacity as Assistant Native Commissioner and not as Assistant Bantu Affairs Commissioner or Assistant Magistrate as it is only in his capacity as Assistant Native Commissioner that he has jurisdiction in terms of section *ten* (2) of the Native Administration Act, 1927, to try such cases.

Cases referred to:

Mti. versus Mvacane and Maliwa, 3 N.A.C. 56, at page 57.

Cebe versus Silimela, 6 N.A.C. 14, at page 15.

Jeliza versus Nyamende and Ano., 1945, N.A.C. (C. & O.) 34, at page 35.

Ntabeni versus Mlobeli and Ano., 1 N.A.C. (S.D.) 158 at the foot of page 159.

Khemane versus Ned, 1 N.A.C. (S.D.) 15.

Dhlamini versus Kuboni and Ano., 1953, N.A.C. 230 (S), at pages 231 and 232.

Appeal from the judgment of the Assistant Native Commissioner, Matatiele.

Balk (President):

The Plaintiff (present Appellant) instituted an action in a Native Commissioner's Court against the Defendant (now Respondent) claiming—

(1) the delivery of certain eight head of cattle or alternatively payment of their value, £64;

(2) an order compelling the Defendant to have these cattle registered in his (Plaintiff's) stock card and in the latter's name in the dipping register; and

(3) the delivery of fourteen unspecified cattle and a horse or alternatively payment of their value, £172, and costs.

In the particulars of claim in his summons, the Plaintiff averred that the Defendant had delivered the eight head of cattle to him as dowry in respect of the marriage of his daughter, Nocingela, to the Defendant's son, Maime, and had refused to return them after they had come into his hands for dipping purposes as arranged as they had not yet been registered in his (Plaintiff's) name in the dipping records and that fourteen head of cattle and a horse constituted the balance due in respect of this dowry under *Hlubi* custom which applied, the equivalent of three head of cattle having been paid in cash and in kind in addition to the eight.

In response to a request by the Defendant's attorneys' the following further particulars were furnished:—

"(1) The marriage between Defendant's son and Plaintiff's daughter was celebrated according to Christian rites.

(2) It was agreed that dowry would be payable in respect of the above marriage.

(3) Since the issue of summons seven of the eight head of cattle have been restored to Plaintiff. It is not known whether they have been transferred to Plaintiff's stock card.

(4) Plaintiff's daughter is not residing with Defendant's son at present."

The Defendant pleaded as follows:—

"1. That he admits that his son Maime married Plaintiff's daughter Nocingela but that he avers that the said Maime is illegitimate and for payment of whose dowry under Native law and custom he would not normally be responsible.

2. That he avers that he undertook to pay twelve head of cattle only in respect of the *lobola* owing in respect of the said marriage including the *uchobo* beast.

3. That he has delivered to Plaintiff the equivalent of eleven head of cattle including seven of the eight head of cattle referred to in Plaintiff's Particulars of Claim.

4. That seven of the eight head of cattle referred to in Plaintiff's summons have now been registered in the name of the Plaintiff in the dipping register.

5. That he hereby consents to judgment for the delivery of one beast or its value, £8, with costs to date.

Wherefore Defendant prays that the balance of Plaintiff's claim may be dismissed with costs."

The Assistant Native Commissioner entered judgment for the Plaintiff for three head of cattle or their value, R48.00, with costs, without specifying the quantum awarded on each claim as he ought to have done in that this was essential for the judgment to be definite in all respects. This aspect becomes important where, as here, the appeal cannot be decided without the award by the Court of first instance on each claim being known.

According to the notice of appeal the Native Commissioner gave the following judgment:—

"In respect of Claims (1) and (2): in favour of Plaintiff for two head of cattle, or their value £16 (R32.00), and their registration in Plaintiff's stock card and in Plaintiff's name in the dipping register.

In respect of Claim (3): in favour of Plaintiff for one head of cattle or its value £8 (R16.00), and costs."

The attorneys representing the parties in this Court agreed that that was the judgment given and it will therefore be accepted as such for the purposes of the appeal. Why the Native Commissioner omitted the order for the registration of the stock in the dipping records from the judgment entered by him is not apparent. In this connection it must be impressed upon him that a judgment falls to be recorded in the same terms as it is given verbally. It is, to say the least, disturbing to find that he lost sight of such an elementary requirement.

The appeal is confined to the Native Commissioner's judgment on claim (3) and is brought on the following grounds:—

"1. That the Judgment in respect of Claim (3) should have been for fourteen head of cattle and one horse.

2. That the Native Commissioner erred in finding that Defendant had proved on a balance of probabilities an agreement between Plaintiff and Defendant, by which Defendant's liability for dowry in respect of Maime's marriage should be limited to twelve head of cattle."

As is apparent from the pleadings, it is common cause that the parties belong to the Hlubi tribe located in Ludidi's Location in the Matatiele District and that in this tribe the quantum of dowry payable in respect of a customary union is fixed by custom at twenty-five head of cattle and one horse.

It is customary in a tribe where the quantum of dowry is fixed by custom that a father associating himself with negotiations to procure a first wife for his son, as is common cause the Defendant did in the instant case by negotiating his son's marriage with the Plaintiff's daughter who became his son's first wife and by paying eight head of cattle on the hoof and the equivalent of three others in cash and kind to the Plaintiff as dowry for her, thereby binds himself to pay the whole of the fixed dowry and so becomes personally liable therefor, see *Mti versus Mvacane and Maliwa*, 3 N.A.C. 56, at page 57, *Cebe versus Silimela*, 6 N.A.C. 14, at page 15, and *Jeliza versus Nyamende and Ano.*, 1945, N.A.C. (C. & O.) 34, at page 35. This assumption stems from the custom that ordinarily a father is liable for the payment of the whole dowry in respect of a son's first wife so that his association with the negotiations leading to the son's customary union implies that he undertakes personal liability for the payment of the whole dowry in the absence of circumstances indicating a contrary intention.

It is true that here the son is illegitimate but this does not affect the position as it is manifest from the Defendant's evidence that he is the boy's natural father, that he paid the "fine" for the seduction of the mother of the boy which resulted in the latter's birth and that the latter grew up at his kraal so that, according to Native law and custom, the Defendant "acquired" the boy, i.e., the boy became a member of the Defendant's family and fell to be regarded as his son.

It is also true that the union between the Defendant's son and the Plaintiff's daughter here was not a customary one but a civil marriage and that it is stated in *Ntabeni versus Mlobeli and Ano.*, 1 N.A.C. (S.D.) 158, at the foot of page 159, that dowry cannot be claimed in respect of a civil marriage in the absence of an express agreement that it is to be paid, the reason being that

whereas the payment of dowry is an essential and so implied in the case of a customary union, this is not so in the case of a civil marriage. That dictum, however, has reference to the position in tribes in which the quantum of dowry payable is not fixed by custom and further dowry is obtained by recourse to *teleka,* i.e., the impounding of the wife by her people, see *Jeliza's* case (*supra*); for then there is no indication of the total dowry payable in consideration of a civil marriage unless fixed by express agreement; and recourse to *teleka* as is done to obtain further dowry in customary unions cannot be sanctioned in the case of civil marriages as it would be opposed to public policy in that it is contrary to the principles governing such marriages. The position is, as pointed out at page 160 of the report in *Ntabeni's* case, however, different where, as here, the quantum of dowry is fixed by custom for there is then a tacit understanding between the bridegroom's and bride's fathers when negotiations for the marriage are entered into that the full dowry is to be that fixed by custom and further, as is also customary as pointed out above, that the bridegroom's father holds himself personally liable for the payment of the quantum of the fixed dowry in the absence of any indication to the contrary so that where there is no such indication, there is an implied agreement between the negotiating parties that the bridegroom's father undertook to pay the whole of the fixed dowry and the judgment in *Ntabeni's* case should be understood accordingly.

It is perhaps as well to add that the Assistant Native Commissioner misdirected himself in holding that the fact that the Defendant's son here was not his eldest had a bearing on the quantum of dowry customarily payable for his wife by the Defendant as the criterion in this respect is not whether the son is the eldest but whether the dowry is payable in respect of the son's first wife.

It follows that, as contended by Mr. Airey in his argument on behalf of the appellant, in the instant case the parties must be held to have entered into an implied agreement that the Defendant would pay the whole of the dowry claimed by the Plaintiff seeing that, as will be apparent from what follows, the Defendant failed to establish that he had limited his liability in this respect to twelve head of cattle as alleged by him in his plea.

There is in the first place a presumption against the Defendant's contention that he had so limited his liability as it is contrary to custom to do so, see *Khemane versus Ned,* 1 N.A.C. (S.D.) 15. This presumption is accentuated here by the fact that, according to the Defendant's evidence, the parties agreed to the Defendant's limited liability after the marriage between the Defendant's son and the Plaintiff's daughter had in fact taken place as this allegation is most improbable seeing that at that stage, according to custom, an implied agreement already existed that the Defendant was to pay the full dowry for the Plaintiff's daughter. Then there is the fact that the Defendant was obviously dishonest as regards the number of cattle he took back from the Plaintiff. That this is so is apparent from his failure to disclose until he was cross-examined that he had also taken from the Plaintiff a calf in addition to the other dowry cattle; and here it must be borne in mind that the calf was the Plaintiff's property according to custom in that it was born after the marriage between the Defendant's son and the Plaintiff's daughter had taken place; and this must have been well known to the Defendant and his denial that it became the Plaintiff's property in the circumstances further detracts from his credibility.

In the circumstances the Defendant's evidence in regard to his having limited his liability in respect of the dowry in question obviously does not serve to establish his case; nor does that of his only witness for apart from the fact that this witness admitted that he did not know whether the Defendant was liable for more than twelve head of dowry cattle for the Plaintiff's daughter

which is at varience with his evidence that the Defendant had limited his liability to this number, his testimony in any event falls to be rejected in view of the decisive improbability in the Defendant's evidence referred to above. For the same reason the discrepancies in the evidence for the Plaintiff which were stressed by Mr Muggleston in his argument for the Respondent, are of no moment.

As the Plaintiff intimated in his summons that his daughter was prepared to return to the Plaintiff's son which implies an offer by him to return her, there can be no objection to the Plaintiff's claim on the grounds of his daughter's desertion of the Defendant's son who had not *putumaed* her, see *Dlamini versus Kuboni and Ano.*, 1953, N.A.C. 230 (S), at pages 231 and 232.

It should be added that the value placed by the Plaintiff on the cattle claimed in his summons was not disputed by the Defendant in his plea so that value falls to be accepted.

The Plaintiff was accordingly entitled to judgment as prayed, with costs, on claim (3) in addition to judgment for two head of cattle or their value on claim (1) and the order sought in claim (2), with costs, so that the appeal should be allowed, with costs, and the judgment of the Native Commissioner's Court altered to read as follows:—

"On Claim (1): For Plaintiff for two head of cattle or their value, R16.00 each, with costs.

On Claims (2) and (3): For Plaintiff as prayed, with costs."

Two further matters call for mention. Firstly, the Native Commissioner ought to have recorded in his notes of the proceedings the nature of the amendment to paragraph (8) of the particulars of claim in the summons applied for by the Plaintiff's attorney and the outcome of this application, the note in brackets on the summons itself as to what the amendment was not sufficing as it is not part and parcel of the proceedings. Secondly, the Native Commissioner signed the judgment entered by him and his certificate of record as Bantu Affairs Commissioner and Assistant Bantu Affairs Commissioner, respectively, and his reasons for judgment as Assistant Magistrate. In this connection it must be impressed on him that the records of all proceedings in civil cases between Natives, including the judgments and the reasons therefore, as well as the certificates of record, are to be signed by him as Assistant Native Commissioner as that is the only capacity in which he has jurisdiction, in terms of sections 10 (2) and 17 (4) of the Native Administration Act, 1927, to try such cases.

Yates and Hastie, Members, concurred.

For Appellant: Mr. F. G. Airey of Umtata.

For Respondent: Mr. K. Muggleston of Umtata.

SOUTHERN NATIVE APPEAL COURT.

MGOBOZA vs. NDLELA.

N.A.C. CASE No. 41 OF 1961.

UMTATA: 5th February, 1962. Before Balk, President, Yates and Hastie, Members of the Court.

COURT.

Jurisdiction to try Native Civil Cases.

PRACTICE AND PROCEDURE.

Presiding judicial officers—necessity for signing proceedings in correct capacity.

EVIDENCE.

Admissibility of presiding judicial officer's notes and evidence in prior criminal proceedings, the record of which put in by consent.

COSTS.

Award on counterclaim.

Summary: The presiding judicial officer signed his notes of the proceedings and his judgment as Assistant Magistrate. The certificate of record was signed by him as Assistant Bantu Affairs Commissioner. All the process in the action and the cover was headed, "In the Native Commissioner's Court".

It was apparent from the presiding judicial officer's reasons for judgment that he preferred the Defendant's evidence to that of the Plaintiff because of the discrepancies between the latter's description of the earmarks of the goats in dispute in his evidence in the instant case and the description of those earmarks in the record of the prior criminal proceedings by the presiding judicial officer derived by him from an inspection of the goats at that trial, the record of the lastmentioned proceedings having been put in by consent at the hearing of the instant case.

The presiding judicial officer also in the instant case appears to have relied upon the evidence in the prior criminal proceedings.

A counterclaim preferred by the Defendant was unsuccessful but the presiding judicial officer nevertheless awarded the Defendant costs thereof giving as his reason for so doing that the Plaintiff had caused the Defendant unnecessary expense by instituting the action.

Held: (President *dissentiente*) That, it was not only manifest that the presiding judicial officer held the appointment of Assistant Native Commissioner but also from the heading "In the Native Commissioner's Court" of all the process in the instant case and particularly from this heading on its cover on which the judgment was entered by him and from the designation over which he signed the certificate of record that the case was tried by him in his capacity as Assistant Native Commissioner and that his signature over the designation Assistant Magistrate was inadvertent.

The President regretted that he could not associate himself with this view as the judicial officer's signature of the notes of the proceedings and the judgment as Assistant Magistrate implied that he had tried the case in that capacity and that the other factor's did not suffice to show that he had not done so.

Per curiam: "Native Commissioners trying civil actions between Natives must sign all the proceedings therein as such as it is the only capacity in which they have jurisdiction."

Held further: That the information anent the earmarks of the goats gleaned by the presiding judicial officer in the criminal proceedings from their inspection was not admissible in the instant case as probative of those earmarks in the absence of an agreement between the parties that this information was to be so admitted and such an agreement was not implied from the mere handing in by consent of the record of the prior criminal proceedings at the trial of the instant case.

Held further: That the evidence in the record of the prior criminal proceedings was not admissible as evidence in the instant case in the absence of an agreement that it was to be so admissible.

Held further: That in accordance with the ordinary rule the costs on the counterclaim should have followed the event.

Cases referred to:

Thinta versus Thinta, 1958, N.A.C. 71 (S).

Scoble's Law of Evidence, (Third Edition), at page 185.

Hattingh versus Le Roux, 1939, E.D.L.D. 217, at page 220.

Masoka versus Mcunu, 1 N.A.C. (N.E.) 327, at page 330.

Godlimpi versus Ncobela, 1961, (2) P.H., R. 37 (S.N.A.C.).

Fourie versus Morley and Co., 1947, (2) S.A. 218 (N.P.D.) at pages 222 and 223.

Appeal from the judgment of the Assistant Native Commissioner, Matatiele.

Balk (President):

The Plaintiff (present Appellant) sued the Defendant (now Respondent) for the delivery of certain four goats or payment of their value, £10. 0s. 0d., averring in the particulars of claim in his summons that they were his property and that the Defendant had stolen or unlawfully removed them from him.

In her plea the Defendant admitted that she had the four goats claimed in her possession but denied the Plaintiff's averments and alleged that she was their owner. She preferred a counterclaim for damages for malicious prosecution.

The Plaintiff gave notice of an application to be made to the Native Commissioner's Court for the amendment of his summons so as to include two progeny of the four goats or their value, £1. 10s. 0d. each. The only indication that this application was made to the Court is the note of record by the presiding judicial officer that the Defendant's attorney had no objection to the proposed amendment of the summons and there is nothing to indicate whether he granted it. This aspect is, however, of no consequence in so far as the appeal is concerned as the attorneys who appeared for the parties in this Court agreed that the application had been granted. But it would have been important had they not done so and the Native Commissioner is enjoined in future cases to make proper notes of record of applications including that they are moved in Court and the Court's decision thereanent in addition to the attitude of the other party.

The presiding judicial officer signed his notes of the proceedings and his judgment in the instant case as Assistant Magistrate in which capacity he had, in terms of section 17 (4) read with section *ten* of the Native Administration Act, 1927, no jurisdiction to try it seeing that it is a civil action between Natives. It would appear from the fact that he signed the certificate of record as Assistant Bantu Affairs Commissioner that he also held the appointment of Assistant Native Commissioner as Native Commissioners are known as Bantu Affairs Commissioners administratively. But as their designation has not been changed accordingly in section *ten* (2) of the Native Administration Act, 1927, under which their jurisdiction in cases of the nature in question flows from their being Native Commissioners, they must continue to sign the records of all proceedings in such cases including their judgments and the reasons therefor as well as the certificates of record as Native Commissioners.

My brethren consider that it is not only manifest that the judicial officer held the appointment of Assistant Native Commissioner but also from the heading "In the Native Commis-

sioner's Court" of all the process in the instant case and particularly from this heading on its cover on which the judgment was entered by him and from the designation over which he signed the certificate of record that the case was tried by him in his capacity as Assistant Native Commissioner and that his signature over the designation of Assistant Magistrate was inadvertent.

I regret that I am unable to associate myself with this view as his signature of the notes of the proceedings and the judgment as Assistant Magistrate implies that he tried the case in that capacity and, to my mind, the other factors relied upon by my brethren do not, with respect, suffice to show that he did not do so. Their view, being the majority one, must prevail and constitutes the decision of the Court in this respect.

Consequently the irregularity falls to be regarded as no more than a technicality, as was conceded by the attorneys who appeared for the parties in this Court.

It is perhaps as well to add that had the minority view prevailed this Court would have had to hold that it had no jurisdiction to hear the appeal, see *Thinta versus Thinta,* 1958, N.A.C. 71 (S).

Turning to the appeal, the Native Commissioner entered judgment on the claim in convention "For Defendant for the return of four goats now in possession of Plaintiff or their value R20.00" and dismissed the counterclaim awarding the costs of the whole action to the Defendant.

The appeal from the judgment on the claim in convention is brought on the ground that the Native Commissioner erred in not finding that Plaintiff had proved on a balance of probabilities that he is the owner of the six goats claimed. As regards the counterclaim the appeal is confined to the award of costs to the Defendant in convention.

How the Native Commissioner came to award the four goats to the Defendant on the claim in convention is incomprehensible as, apart from the fact that the Defendant brought no spoliation proceedings or vindicatory action in respect of the recovery of the goats which she alleged in her evidence the Plaintiff had taken from her, a claim in convention admits of no more than a judgment for the Plaintiff in respect of his claim insofar as he has proved it or judgment for the Defendant in respect of his defence insofar as this has been established by him or absolution from the instance if the evidence does not justify the Court in giving judgment for either party, see Rule 54 of the Rules for Native Commissioners' Courts. That the Native Commissioner should have been unaware of so elementary a legal principle is, to say the least, disturbing.

Proceeding to a consideration of the evidence, the Native Commissioner states in his reasons for judgment that that of the Plaintiff's witness, O'Reilly, could not be accepted owing to the inconsistencies therein. That this is so cannot be gainsaid as will be apparent from what follows. After stating in cross-examination that he was certain that the Defendant had never come to him for the purpose of buying goats and that she had not enquired from him where she could buy goats, he admitted that in the preceding criminal proceedings, i.e., those in which the Defendant had been charged with the theft of the goats concerned in the instant case, he had stated in his evidence that the accused came to him in April or May, 1960 asking where she could get goats. He did not explain the inconsistency and in the circumstances the only reasonable inferance appears to be that he was prepared to bear false testimony against the Defendant in the respect in question until confronted with the record of his evidence in the criminal case when he realised

that it was no longer feasible. There is a further inconsistency in O'Reilly's evidence as regards the type of goats sold by Calder-Potts also indicating that he is unworthy of credence.

It is apparent from the Native Commissioner's reasons for judgment that he preferred the Defendant's evidence to that of the Plaintiff because of the discrepancy between the latter's evidence describing the earmarks which the goats bore and the description of those earmarks in the record of the abovementioned criminal proceedings by the presiding judicial officer derived by him from an inspection of the goats at that trial. But the information anent the earmarks of the goats gleaned by the judicial officer in the criminal proceedings from their inspection is inadmissible in the instant case as probative of those earmarks in the absence of an agreement between the parties that this information was to be so admitted, see *Scoble's Law of Evidence,* (Third Edition), at page 185 and the authorities there cited in particular *Hattingh versus Le Roux,* 1939, E.D.L.D. 217, at page 220; also *Masoka versus Mcunu,* 1 N.A.C. (N.E.) 327, at page 330. It should be added that such an agreement is not implied from the mere handing in by consent of the record of the criminal proceedings at the trial of the instant case, see *Godlimpi versus Ncobela,* 1961, (2) P.H., R.37 (S.N.A.C.) and *Fourie versus Morley and Co.,* 1947, (2) S.A. 218 (N.P.D.), at pages 222 and 223.

The Native Commissioner also states in his reasons for judgment that the evidence which the Plaintiff gave in the criminal trial differed materially from his evidence in the civil case, which did, therefore, not serve to establish the identity and his ownership of the goats claimed. Such discrepancies are, however, not apparent from the Plaintiff's evidence in the instant action and if they were arrived at by the Native Commissioner from a comparison of the Plaintiff's evidence in this action with that given by him in the criminal proceedings referred to above, as appears to be the case, it was not competent for him to do so in the absence of an agreement that the evidence in the criminal proceedings was to be regarded as evidence in the instant case, the mere putting in by consent of the record of the criminal case not sufficing to establish such an agreement, see *Godlimpi's* and *Fourie's* cases (*supra.*).

As stressed by Mr. Chisholm in his argument on behalf of the appellant, the Plaintiff was positive in his evidence in identifying the goats by their colour and appearance not being able to do so by their earmarks as these, according to him, had been tampered with; and here it is most significant, as stressed by Mr. Chisholm, that the Defendant admitted in cross-examination that she had interfered with those earmarks after having denied that she had done so. A further unsatisfactory feature in the Defendant's evidence is her admission in cross-examination that she did not know what earmarks the goats bore when she purchased them bearing in mind her testimony that she herself had earmarked them after their purchase.

Here it should be mentioned that there is nothing to indicate that the Plaintiff's evidence is tainted by that of his witness, O'Reilly.

It follows that the Plaintiff discharged the onus of proof resting on him on the pleadings on a preponderance of probability in respect of the claim in convention and was entitled to judgment thereon as prayed, with costs.

Turning to the costs of the counterclaim, the Native Commissioner states in his reasons for judgment that he awarded these to the Defendant as the Plaintiff had instituted the action and caused the Defendant unnecessary expense. But, as submitted by Mr. Chisholm, the criterion here is that the Defendant preferred a counterclaim without being obliged to do so and was unsuccessful therein so that the costs thereof should in accordance with the ordinary rule have followed the event.

In the result the appeal should be allowed, with costs, and the judgment of the Native Commissioner's Court altered to read as follows:—

"For Plaintiff as prayed, i.e., for six goats or their value, R26.00, with costs on the claim in convention. The counter-claim is dismissed, with costs."

Yates and Hastie, Members, concurred.

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

For Respondent: Mr. R. Knopf of Umtata.

SOUTHERN NATIVE APPEAL COURT.

MABOPE AND ANO. vs. MDOLOMBA.

N.A.C. CASE No. 48 OF 1961.

UMTATA: 5th February, 1962. Before Balk, President, Yates and Hastie, Members of the Court.

NATIVE CUSTOM.

Seduction and pregnancy—unacceptible explanation by seduced girl for failure to report her condition to her people—go-between—customary for "go-between" to be employed from inception of love affair.

PRACTICE AND PROCEDURE.

Native Appeal Court Rules—requirements of Rule 2 (1) *peremptory.*

Summary: The Defendants (present appellants) appealed to this Court from the judgment of a Native Commissioner's Court dismissing an appeal from a Chief's Court but altering the Chief's judgment for the Plaintiff from five head of cattle and a *nqutu* beast to five head of cattle or their value, £40.

The action was based on the alleged seduction of the Plaintiff's daughter, Siphokazi, by the second Defendant, followed by pregnancy. The omission of the *nqutu* beast from the altered judgment is covered by the Plaintiff's admission in the course of his evidence in the Native Commissioner's Court that this beast had been taken from the first Defendant's kraal and slaughtered. The second Defendant's defence was that his association with Siphokazi was limited to *ukumetsha.*

In the course of her evidence Siphokazi stated that the reason for her failure to report her seduction and pregnancy to her people until is was noticed and she was questioned by them thereanent, was that she had relied on the second Defendant's assurance that he would advise her in this respect. On the evidence this explanation was found by this Court to be untenable.

According to the evidence for the Plaintiff the second Defendant had, subsequent to the commencement of his association with Siphokazi, utilised the services of a "go-between".

Held: That, as Siphokazi's explanation for her failure to report her pregnancy to her people timeously was unacceptable her evidence fell to be treated as suspect and lent colour to the second Defendant's version that their relations were limited to *ukumetsha.*

Held further: That, it is contrary to custom to employ a "go-between" for the first time after intimacy has already commenced, their employment, in accordance with custom, being from the inception of the affair.

Per curiam: "The inclusion by the Native Commissioner in the altered judgment of an alternative sounding in money was not warranted in the absence of an amendment of the claim to include such an alternative and of any evidence on which it could be based".

The Native Commissioner's inordinate delay in furnishing his reasons for judgment in response to a timeous written request therefor accompanied by the prescribed fee was also commented upon by this Court, it being stressed that Rule 2 (1) of the Rules for Native Cimmissioner's Courts was peremptory and that lengthy delays in furnishing reasons for judgment may well be prejudicial to the parties as the Native Commissioner's recollection of the demeanour of the witnesses and his reasons for his finding become dimmed by the effluxion of time and as the financial position of the unsuccessful party on appeal may well change for the worse in the interim with the result that the successful party may not be able to recover the judgment debt.

Appeal from the judgment of the Native Commissioner, Matatiele.

Balk (President):

This case had its inception in a Chief's Court which awarded five head of cattle and a *nqutu* beast to the Plaintiff (now respondent) as a "fine" for his daughter's seduction and pregnancy in an action brought by him against the two Defendents (present appellants) in this respect. The Plaintiff was also awarded costs.

An appeal by the Defendants from that judgment to the Native Commissioner's Court was dismissed, with costs, but the judgment of the Chief's Court was altered to one for Plaintiff for five head of cattle or their value, £40, with costs.

The Defence in the Chiefs's Court was a denial by the second Defendant who was the alleged tort-feasor that he was responsible for the seduction and pregnancy of the Plaintiff's daughter so that the onus of proof in this respect rested on the Plaintiff. The first Defendant, it should be added, is the second Defendant's father.

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

"1. That the Native Commissioner erred in rejecting evidence of Defendant No. 2 that although a love affair had taken place the intimacy was limited to "Metsha."

2. That the Native Commissioner erred in rejecting the decision in Xalabale versus Ngxazisa and another Southern N.A.C. Case No. 80/1956, that an adverse inference should be drawn from the failure of the girl to report her seduction to her parents.

3. That in any event the Native Commissioner erred in holding that the evidence of the woman Francina constituted sufficient corroboration to place upon the Defendants the onus of proving that Defendant No. 2 was not responsible for the pregnancy."

The President in the course of his judgment pointed out that whilst the Native Commissioner's alteration of the judgment of the Chief's Court by the omission of the *nqutu* beast was covered by the Plaintiff's admission in the course of his evidence in the Native Commissioner's Court that this beast had been taken

from the first Defendant's kraal and slaughtered, the inclusion by the Native Commissioner in the altered judgment of an alternative sounding in money was not warranted in the absence of an amendment of the claim to include such an alternative and of any evidence on which it could be based. After analysing the evidence the President proceeded:—

> "It follows that Siphokazi's explanation for her failure to report her pregnancy to her people is unacceptable so that the Native Commissioner's finding to the contrary is unsound and Siphokazi's evidence falls to be treated as suspect and lends colour to the second Defendant's version that their relations were limited to *nkumetsha,* i.e. external intercourse had by the boy between the girl's thighs. It should be added that the factor relied upon by the Native Commissioner in arriving at the finding that Siphokazi's explanation was acceptable, viz., that she was young at the time and had no mother, does not affect the position for, as pointed out by Mr. Muggleston. she could have reported her pregnancy either to her grandmother or to her sister-in-law, Francina."

The President went on to point out in connection with the evidence for the Plaintiff that it was contrary to custom to employ a "go-between" for the first time after intimacy had taken place, there employment, according to custom, being from the inception of the affair.

The Native Commissioner's inordinate delay in furnishing his reasons for judgment in respence to a timeous written request therefor accompanied by the prescribed fee was commented upon by the President, it being stressed by him that Rule 2 (1) of the Rules for Native Commissioner's Courts was peremptory and that lengthy delays in furnishing reasons for judgment may well be prejudicial to the parties as the Native Commissioner's recollection of the demeanour of the witnesses and his reasons for his finding become dimmed by the effluxion of time and as the financial position of the unsuccessful party on appeal may well change for the worse in the interim with the result that the successful party may not be able to recover the judgment debt.

Yates and Hastie, members, concurred.

For appellant: Mr. K. Muggleston of Umtata.

For respondent: Mr. F. G. Airey of Umtata.

SOUTHERN NATIVE APPEAL COURT.

NDLONDLO vs. DINISO.

N.A.C. CASE No. 40 OF 1961.

KING WILLIAM'S TOWN: 26th February, 1962. Before Balk, President, Yates and Neuper, Members of the Court.

PRACTICE AND PROCEDURE.

Evidence—admissibility of evidence as to descent founded on hearsay.

NATIVE CUSTOM.

Customary union—descendants of collaterals debarred from entering into customary union. Negotiator of marriage for prospective bridegroom aware of latter's pedigree. Relationship dictated by common surname and arrangement for circumcision.

Summary: This was an appeal by the second claimant from a Native Commissioner's finding for the first claimant in an inquiry held in terms of section 3 (3) of the Regulations for the Administration and Distribution of Native Estates, published under Government Notice No. 1664 of 1929, as amended, to determine a dispute between them as regards the devolution of a certain land falling within the purview of sub-section (2) of section *twenty-three* of the Native Administration Act, 1927, the tables of succession foreshadowed in that sub-section having been prescribed by Government Notice No. 2257 of 1928, as amended.

The appeal was confined to fact.

Held: That, the evidence of the first claimant as regards his descent, although founded on hearsay, was admissible in that, as testified to by him, this information was communicated to him by his late brother before the dispute arose and thus constituted a declaration as to pedigree by a deceased blood relative of the family concerned made *ante litem motam* and as such an exception to the hearsay rule.

Held further: That the evidence of certain of the other witnesses as regards the claimant's descent, was inadmissible as it was based on hearsay and its source was not disclosed.

Held further: That custom precludes descendants of collaterals from entering into a customary union or marrying, intercourse between them being regarded as incest.

Held further: That custom dictates that a man negotiating a customary union on behalf of a prospective bridegroom should be aware of the latter's pedigree.

Held further: That the fact that youths bear a common surname and that an elder of same surname has them circumcised indicates that the youths belong to the elder's family.

Cases referred to:

Scoble's Law of Evidence (Third Edition) at pages 289 to 291.

Adams versus Skeyi, 1955, N.A.C. 147 (S), at page 149.

Appeal from the judgment of the Assistant Native Commissioner, Lady Frere.

Balk (President):

This is an appeal by the second claimant from a Native Commissioner's finding for the first claimant in an inquiry held in terms of section 3 (3) of the Regulations for the Administration and Distribution of Native Estates, published under Government Notice No. 1664 of 1929, as amended, to determine a dispute between them as regards the devolution of a certain land situate in the District of Glen Grey and falling within the purview of sub-section (2) of section *twenty-three* of the Native Administration Act, 1927, the tables of succession foreshadowed in that sub-section having been prescribed by Government Notice No. 2257 of 1928, as amended.

The appeal is confined to fact.

The evidence of the first claimant as regard his descent although founded on hearsay is admissible in that, as testified to by him, this information was communicated to him by his late brother, Silingo, before the dispute arose and thus constituted a declaration as to pedigree by a deceased blood relative of the family concerned made *ante litem notum* and as such an exception to the hearsay rule, see *Scoble's Law of Evidence* (Third Edition) at pages 289 to 291.

For the same reason the evidence of Annie Cele as to the first claimant's descent founded, as it is, on what she had been told before the dispute arose by her late father, Diniso, a blood relative of the family, is admissible as is also Qukumfana's testimony as to the descent of both the claimants which is based on what his late father, Tyala, a blood relation of the family, had told him before the dispute took place.

The evidence of the remaining five witnesses, excluding the second claimant, as regards the claimants' descent, however, falls to be regarded as inadmissible as it is based on hearsay and the sources of the witnesses' information are not disclosed. For the same reason the second claimant's evidence in the respect in question is inadmissible except for his allegation that the late Diniso had told him before the dispute arose that he (Diniso) was Marili's son.

In these circumstances the proper course for this Court to adopt is to have regard only to the admissible evidence in deciding the appeal, see *Adams versus Skeyi,* 1955, N.A.C. 147 (S), at page 149.

According to the first claimant's evidence and that of Annie Cele, the late Dlangadlanga, who was the registered holder of the land in question, was the second eldest son of one Arosi by his only wife, Nonkazana, with whom he had contracted a customary union and who was the daughter of one Marili. Arosi's eldest son by his wife, Nonkazana, was one Beleni and his third son by her was Diniso. Arosi and Beleni are dead as also all the latter's male descendants. Dlangadlanga had no male issue and Diniso who is also dead, had two sons, viz., Silingo, the elder, who died leaving no male issue, and the first claimant so that if the foregoing particulars are correct the land would, in accordance with the tables of succession referred to above, devolve upon the first claimant.

Qukumfana's version, according to his evidence, is that Marili had three sons, viz., (1) Dlondlo (2) Dlangadlanga and (3) Diniso, all of whom are dead, that Dlondlo's only son is Gadle, that the second claimant is Gadle's son and that the first claimant is the younger son of Diniso, Silingo being Diniso's elder son. Marili's sister, Nonkazana, according to Qukumfana, married one Peter which, as far as he was aware, was her only marriage, he having no knowledge of a customary union entered into by her with Arosi as deposed to by the first claimant and Annie Cele.

If Qukumfana's version is correct and assuming that Marili and Gadle are dead and that the second claimant is, according to Native law and custom, Gadle's senior male descendant, the second claimant would, in accordance with the above-mentioned tables of succession, be entitled to the land.

There are, however, certain features in Qukumfana's evidence indicating that the truth lies with the first claimant's and Annie Cele's version.

In the first place Qukumfana admitted in cross-examination that Annie was a descendant of Nonkazana which, bearing in mind Annie's uncontroverted evidence that she was Diniso's daughter, postulates that Diniso must have been descended from Nonkazana in the manner alleged by the first claimant and Annie i.e. that the latter's father, Diniso, was Nonkazana's son by Arosi, seeing that the only other way in which Annie could have been a descendant of Nonkazana is barred by custom in that Diniso was by custom precluded from entering into a customary union with or marrying a daughter of Nonkazana who, according to Qukumfana, was Marili's sister, if Diniso was in fact Marili's son as Qukumfana would have the Court believe, in view of their relationship which would result in intercourse between them being regarded as incest. Mr. Kelly's submission in regard

to this aspect in his argument on behalf of the appellant was that the word "descendant" had been used by Qukumfana loosely as Natives were wont to do i.e. in the sense that Nonkazana was Diniso's aunt, but this submission cannot be regarded as sound seeing that Qukumfana was deposing to succession and his mention of other relationships was pricise.

Secondly, Qukumfana stated that he did not know to which family Gwengula belonged and volunteered later in cross-examination that he had negotiated Gwengula's marriage. Thereupon when asked why he had anything to do with Gwengula's marriage, he denied that he had negotiated it and added that Ndabambi's family had done so. The significance of this inconsistency becomes apparent if regard is had to the first claimant's and Annie Cele's evidence that Gwengula was Beleni's son for if Qukumfana negotiated Gwengula's marriage it must, bearing custom in mind, have been known or disclosed to him to which family Gwengula belonged.

In my view the second claimant's evidence that Diniso admitted to him that he (Diniso) was Marili's son in the ordinary course of conversaton whilst the second claimant was still at school is most improbable as it is common cause that Diniso bore the surname of Marili and there was therefore no object in his telling the second claimant in the circumstances mentioned by the latter that he was Marili's son.

There is also this feature in the second claimant's evidence indicating that he cannot be regarded as a reliable witness, viz., his denial that the title deeds to the land had ever been in the first claimant's or Butana's possession in the face of Qukumfana's evidence which was otherwise in his (second claimant's) favour, that the first claimant had left the title deeds in the care of Butana.

Admittedly, the fact that Dlangadlanga and Diniso bore the surname "Marili" and that Marili had them circumcised are, as stressed by Mr. Kelly, probabilities favouring the second claimant's claim. But these factors lose much of their force in the light of Annie Cele's evidence that Nonkazana was pregnant with Diniso and that Dlangadlanga was still a small boy when her husband, Arosi, died and she returned to her people, the Marilis, where Diniso was born and where the latter and Dlangadlanga grew up, and that the Arosi family died out. The last-mentioned fact also disposes of Mr. Kelly's argument that no steps were taken by the Arosi family to have Dlangadlanga and Diniso return to them.

There is also this further factor supporting the first claimant's case, viz., that, as pointed out by the Assistant Native Commissioner in his reasons for judgment, the first claimant and his elder brother, Silingo, before him had the undisturbed use of the land for a number of years and the second claimant's explanation that Silingo was given the land to use by Dlondlo's wife, does not assist him as it is, on his own showing, founded on hearsay. As regards Mr. Kelly's contention that Qukumfana being a male would, bearing custom in mind, be better acqainted with the affairs of Nonkazana's kraal than Annie Cele was, there is Qukumfana's own admission that Annie Cele had a better knowledge of those affairs as she had lived at that kraal.

It follows that there is a decisive preponderance of probability favouring the first claimant's claim so that the Native Commissioner cannot be said to be wrong in having found for him and the appeal should accordingly be dismissed, with costs.

Yates and Neuper, Members, concurred.

For Appellant: Mr. H. J. C. Kelly of Lady Frere.

For Respondent: No appearance.

SOUTHERN NATIVE APPEAL COURT.

JACK vs. ZENANI.

N.A.C. CASE No. 36 OF 1961.

KING WILLIAM'S TOWN: 27th February 1962. Before Balk, President, Yates and Neuper, Members of the Court.

NATIVE CUSTOM.

Damages for adultery claimable until customary union dissolved —such damages not precluded by estrangement between husband and wife—mitigation of such damages. Customary union—how dissolved.

PRACTICE AND PROCEDURE.

Appeal—points not covered by grounds of appeal cannot be relied upon—irregularity in procedure not resulting in prejudice condoned on appeal.

Summary: This was an appeal from the judgment of a Native Commissioner's Court for Plaintiff (now Respondent) as prayed, with costs, against the second Defendant (present Appellant) in an action in which the latter was sued by the Plaintiff for five head of cattle or payment of their value, £50, as damages for adultery alleged to have been committed by him on the 5th June, 1958, with the Plaintiff's wife, Dinah, it being averred in the summons that a customary union subsisted betwen the Plaintiff and Dinah.

In his plea the second Defendant admitted having had intercourse with Dinah on or about the 5th June, 1958, but alleged that at the time Dinah had already been driven away by the Plaintiff after having been ill-treated by him and that the customary union between her and the Plaintiff was, therefore, terminated. Alternatively, the second defendant pleaded that as Dinah and Plaintiff were estranged and had been living apart for some time as life with each other was intolerable and impossible, Plaintiff had suffered no damages whatsoever even if the said Dinah was still his legal wife by Native Custom.

Held: That for the dissolution of a customary union by the parties thereto Native law and custom required either the restoration or proper tender to the husband of the dowry paid by him for the wife less the recognised deductions or a part of such remainder of the dowry or a public repudiation by the husband of the wife before the Chief or Headman without the restoration or tender of any dowry and Native law and custom did not recognise any other form of repudiation of one spouse by another such as that occasioned by the husband driving his wife away or abandoning her or by other ill-treatment or by the demand by him without more of the restoration of the dowry he paid for her or the several forms of repudiation of the husband by the wife, as terminating their customary union, such misconduct on the part of a spouse constituting no more than a ground for the dissolution of the customary union by the means stated.

Held further: That misconduct on the part of the husband of the nature mentioned above mitigates damages for the wife's adultery.

Held further: That the fact that the parties to a customary union are estranged and have been living apart for some time does not preclude the award of damages to the husband, for adultery committed by the wife.

Held further: That it was open to the plaintiff to claim damages for adultery committed with his wife until their customary union was dissolved and that the prior action instituted by him against his wife's father for her return to him or, failing such return, for the restoration of the dowry paid by him for her did not in the absence of the restoration or proper tender of such dowry or a part thereof to the plaintiff result in such dissolution until she had failed to return in compliance with the judgment in the case.

Held further: That certain points not covered by the grounds of appeal could not be relied upon.

Held further: That an irregularity in the proceedings resulting in no prejudice to the party relying on it on appeal falls to be condoned by the Court in terms of the proviso to section *fifteen* of the Native Administration Act, 1927.

Cases referred to:

Gunqashi versus Cune, 2 N.A.C. 93.

Logose versus Yekiwe, 4 N.A.C. 105.

Fuzile versus Ntloko, 1944, N.A.C. (C. & O.) 2, at page 6.

Ncongolo versus Parkies, 1953, N.A.C. 103 (S), at page 106.

Basa versus Basa, 5 N.A.C. 2.

Mnyiki and Ano. versus Mnanamba, 1937, N.A.C. (C. & O.) 219, at pages 220 and 221.

Novungwana versus Zabo, 1957, N.A.C. 114 (S), at page 117.

Mayile versus Makawula, 1953, N.A.C. 262 (S), at page 264.

Kabi versus Punge, 1956, N.A.C. 7 (S), at page 12.

Balk (President):

This is an appeal from the judgment of a Native Commissioner's Court for Plaintiff (now Respondent) as prayed, with costs, against the Second Defendant (present Appellant) in an action in which the latter was sued by the Plaintiff for five head of cattle or payment of their value, £50, as damages for adultery alleged to have been committed by him on the 5th June, 1958, with the Plaintiff's wife, Dinah, it being averred in the summons that a customary union subsisted between the Plaintiff and Dinah.

The Second Defendant pleaded as follows:—

"1. Second Defendant admits having had carnal intercourse with certain Dinah on or about the 5th June, 1958, but states that at the time the said Dinah had been driven away by Plaintiff after having been ill-treated by him; and that her marriage by native custom with Plaintiff was therefore terminated. Plaintiff is therefore not entitled to claim any damage whatsoever.

Alternatively.

2. Second Defendant admits having had carnal intercourse with certain Dinah on or about the 5th June, 1958, but pleads that as the said Dinah was living apart from Plaintiff for some time, and Plaintiff and the said Dinah were estranged, as life with each other was intolerable and impossible,, Plaintiff has suffered no damage whatsoever, even if the said Dinah was still his legal wife by Native Custom.

3. Second Defendant in any event denies that Plaintiff has suffered any damage, and puts him to the proof thereof.

4. Wherefore Second Defendant prays that Plaintiff's claim be dismissed with costs."

The appeal is brought on the following grounds:—

"1. That in the absence of any evidence by the Plaintiff to establish his claim, the Assistant Bantu Affairs Commissioner erred in giving judgment for the Plaintiff because the Defendant's evidence, taken in conjunction with the uncontradicted evidence of his witness, Dinah, to the effect that Plaintiff had driven her away and repudiated the customary union by demanding refund of dowry, is not probative of Plaintiff's claim.

2. That the judgment is not supported by the evidence inasmuch as it is against the weight of evidence and probabilities of the case."

It is implicit in paragraph 1 of the Second Defendant's plea that he admitted the subsistence of the customary union between the Plaintiff and Dinah up to the time that the Plaintiff had chased her away which, according to the Second Defendant's plea and the uncontroverted evidence for him, had already occurred when he had intercourse with her on the 5th June, 1958.

It follows that unless the Plaintiff's misconduct in driving Dinah away dissolved his customary union with her as contended by the Second Defendant in his plea or unless the latter was entitled to succeed on his alternative plea, the Native Commissioner's judgment for the Plaintiff cannot be gainsaid.

There are cases in which it has been held that the driving away of the wife by the husband dissolves the customary union between them, e.g., *Gunqashi versus Cuau* 2 N.A.C. 93 and *Logose versus Yekiwe* 4 N.A.C. 105; and in *Fuzile versus Ntloko* 1944 N.A.C. (C. & O.) 2, at page 6, it is stated that it is the repudiation of the one spouse by the other which terminates their customary union. But, with respect, those dicta are not in keeping with Native law and custom which, for the dissolution of a customary union *inter partes*, i.e., by the parties thereto without recourse to an order of Court, requires either the restoration or proper tender to the husband of the dowry paid by him for the wife less the recognised deductions or a part of such remainder of the dowry or a public repudiation by the husband of the wife before the Chief or Headman without the restoration or tender of any dowry and Native law and custom does not, as was properly conceded by Mr. Hart in the course of his argument on behalf of the Appellant, recognise any other form of repudiation of one spouse by another such as that occasioned by the husband driving his wife away or abandoning her or by other ill-treatment or by the demand by him without more of the restoration of the dowry he paid for her or the several forms of repudiation of the husband by the wife, as terminating their customary union, such misconduct on the part of a spouse consituting no more than a ground for the dissolution of the customary union by the means stated i.e. by restoration or proper tender of the dowry or part thereof or the public repudiation before the Chief or Headman, see *Ncongolo versus Parkies* 1953 N.A.C. 103 (S), at page 106, cited by the Acting Additional Native Commissioner in support of his judgment, *Basa versus Basa* 5 N.A.C. 2, *Muyiki and Auo. versus Mnanamba* 1937 N.A.C. (C. & O.) 219, at pages 220 and 221, and *Novungwana versus Zabo*, 1957 N.A.C. 114 (S), at page 117.

It follows that *Gunqashi's*, *Logose's* and *Fuzile's* cases fall to be regarded as having been overruled in the respect in question and that the first ground of appeal fails.

It is perhaps as well to add that in the restoration of the dowry where the recognised deductions equal or exceed the amount of the dowry paid, one beast is nevertheless returnable to mark the dissolution of the customary union, see *Novungwana's* case (*supra*), at page 117.

It is also perhaps as well to add that misconduct on the part of the husband of the nature mentioned above mitigates damages for the wife's adultery, see *Basa's* case (*supra*), but this aspect was neither pleaded nor put in issue on appeal in the instant case.

There is no substance in the Second Defendant's alternative plea as the averments relied upon therein do not in Native law preclude the award of damages in cases such as the instant one so that the remaining ground of appeal also fails.

Mr. Hart took the point that it was not competent for the Native Commissioner's Court to have given judgment in the instant case seeing that the Court had postponed it *sine die* pending a decision in a prior action instituted by the Plaintiff against one Dinisile Nyaniso for the return of the latter's daughter, Nontamdatu, and, failing such return, the restoration of the dowry paid by the Plaintiff for her, and there was nothing to show that the lastmentioned case had been finalised.

But, apart from the fact that this point is not covered by the grounds of appeal and could, therefore, not be relied upon by the Appellant, the latter did not object to the trial of the instant case proceeding at its resumed hearing following a notice of set down when the judgment therein was given so that he must be presumed to have acquiesced in the trial and to have waived his right to take the point in question at this stage. In any event, even assuming that the resumption of the hearing of the instant case without any evidence that the prior action had been disposed of constitutes an irregularity and that Nontamdatu and Dinah are one and the same person, the irregularity falls to be condoned by this Court in terms of the proviso to section *fifteen* of the Native Administration Act, 1927, as it did not result in any prejudice to the second Defendant. That this is so is manifest from the fact that the decision of the prior action could not have debarred the Plaintiff from claiming damages for the adultery in the instant case in that it was open to him to do so before his customary union with Dinah had been dissolved and the prior action could not in the absence of the restoration or proper tender of the dowry paid for her or part thereof result in such dissolution until she had failed to return to the Plaintiff in compliance with the judgment therein, see *Mayile versus Makawula* 1953 N.A.C. 262 (S), at page 264, and *Kabi versus Punge* 1956 N.A.C. 7 (S), at page 12. It should be added that it is clear from Dinah's evidence for the Defendant in the instant case that there was no tender or restoration of any of the dowry paid for her by the Plaintiff.

Mr. Hart also took the point that it was not competent for the Plaintiff to claim the damages in question as, according to Dinah's uncontroverted evidence in this respect, he had entered into a civil marriage with another woman which had the effect of dissolving his customary union with Dinah. But, apart from the fact that here also the point is not covered by the grounds of appeal and could, therefore, not be relied upon by the Appellant, it is manifest from Dinah's evidence that the civil marriage took place in 1961 which is some three years after the Plaintiff instituted the instant action so that in any event the marriage could afford no bar to his maintaining the action, see *Mayile's* case (*supra*), at page 264.

In the result the appeal should be dismissed, with costs.

Yates and Neuper, Members, concurred.

For Appellant: Mr. L. J. C. Hart of East London.

For Respondent: Mr. H. Cohen of East London.

SOUTHERN NATIVE APPEAL COURT.

SKEY vs. MZAMO.

N.A.C. Case No. 53 of 1961.

King William's Town: 27th February 1962. Before Balk, President, Yates and Neuper, Members of the Court.

APPEALS.

Application for amendment of grounds of appeal granted where points relied upon in opposing application could be taken equally effectively on appeal and no prejudice occasioned by such a course—alteration of judgment of Native Commissioner's Court on appeal so as to cure irregularity.

MUNICIPAL NATIVE LOCATIONS.

Disposal of improvements on trading sites in East London Municipal Native Locations does not require Council's consent but only that of Superintendent—option to purchase trading rights in respect of such sites not affected by prohibition in regulations.

Summary: This was an appeal from the judgment of a Native Commissioner's Court requiring the Defendant (Present Appellant) to pass transfer to the Plaintiff (now Respondent) of the shop and dwelling house on site No. 1596 in Duncan Village, East London, and to sign the necessary documents to give effect to such transfer against the tender by the Plaintiff to the Defendant of £500 less certain deductions, in an action brought by the former against the latter for this relief.

An application for the amendment of the grounds of appeal was opposed by Respondent's counsel, firstly, on the ground that the proposed amendment introduced allegations of fact which now were being raised for the first time and had not been canvassed in the Native Commissioner's Court so that the points of law based thereon could not prevail and, secondly, because the further illegalities alleged in the proposed amendment did not flow from the contract itself and in any event there was no clear proof of such illegalities so that it was not proper for this Court to take cognizance of them. Counsel for Respondent conceded, however, that these points could be taken equally effectively should the amendment be allowed and that he could not advance the contention that such a course would result in prejudice to the Respondent. The application was granted.

The action was based on an option to buy the improvements i.e. the shop and dwelling, on the trading site in question given to the Plaintiff by the Defendant and exercised by the former.

The appeal was brought on several grounds amounting to this that the whole transaction was illegal and unenforceable on the ground that the Council's approval required under the relevant Regulation had not been obtained.

Held: As the points relied upon in opposing the application for the amendment of the grounds of appeal could be taken equally effectively should the amendment be allowed and as such a course would not result in prejudice to the Respondent but lent itself to a better consideration of the points involved in the appeal, that the application should be allowed.

Held further: That under the relevant Regulations the Council's consent was not required for the disposal of the improvements but only that of the Superintendent.

Held further: That an option to purchase trading rights in respect of the site in question was not affected by the prohibition in section *twenty-two* of the Regulations as such a transaction did not fall within the purview of that section.

Held further: That, in keeping with the principle underlying the proviso to section *fifteen* of the Native Administration Act, 1927, it was proper for this Court to cure the irregularity in the Native Commissioner's judgment by eliminating therefrom the order on the Defendant to pass transfer of the improvements to the Plaintiff and by only requiring the Defendant to sign such documents as may be necessary to enable the Plaintiff to apply to the Municipality for their transfer to him as suggested by counsel for Respondent as such a course would not result in prejudice and would best serve the interests of justice seeing that the Native Commissioner's judgment was not only not attacked on the merits but *ex facie* the record appears to do justice between the parties and the adoption of this course would make it unnecessary for this Court to raise *mero motu* the question of the joinder of the Superintendent in the instant action and as a result to hold that the Native Commissioner's Court had no jurisdiction to try it in the light of *Ndonga and Lumko versus Mapoma,* 1960, N.A.C. 71 (S).

Cases referred to:

Ndonga and Lumko versus Mapoma, 1960, N.A.C 71 (S).

Nthaka versus Nthaka, 1959, N.A.C. 79 (C).

Appeal from the judgment of the Assistant Native Commissioner, East London.

Balk (President):

This is an appeal from the judgment of a Native Commissioner's Court requiring the Defendant (present appellant) to pass transfer to the Plaintiff (now respondent) of the shop and dwelling house on site No. 1596 in Duncan Village, East London, and to sign the necessary documents to give effect to such transfer against the tender by the Plaintiff to the Defendant of £500 less certain deductions, in an action brought by the former against the latter for this relief.

The Defendant preferred a counterclaim but the judgment thereon does not call for consideration as there is no appeal therefrom.

The appeal is brought on the following grounds:—

"1. That the judgment is bad in law inasmuch as—

(*a*) the right of option given by Defendant to Plaintiff to purchase the property 1596 Mngqika Street, East Bank Location, East London, in terms of Clause 6 of agreement entered into between Plaintiff and Defendant on the 20th October, 1956, was illegal and unenforceable, and Plaintiff cannot legally rely thereon, having regard to the Trading Regulations obtaining in the East London Municipal Location published on the 22nd August, 1952, under Provincial Notice No. 624/52 as such regulations prohibit the disposal by a trader of trading or business rights in the Location to any person other than a Native approved of by the Concil;

(*b*) that the exercise of such option to purchase by Plaintiff in November, 1959, or in March, 1960, or any other date subsequent to the 4th November, 1959, was also illegal and unenforceable, having regard to the Regu-

lations governing Trading or Business rights and Trading Site Permits, obtaining in the East London Municipal Location as published on 18th April, 1957, under Provincial Notice No. 260/57, which Regulations were then and are still of force and effect, and which prohibit the disposal by a trader of his trading or business rights in the Location, or the transfer of his trading site permit to any person other than a Native approved of by the Council; and such approval has not been obtained;

(*c*) that having regard to the East London Municipal Location Regulations regarding Trading and Business rights and Trading Site Permits, which obtained in 1956, 1959, 1960, and at the time of the judgment, the Assistant Native Commissioner could not legally make the order in terms of judgment given by him, and particularly the order on Appellant to pass transfer to Respondent of the said property 1596 Mngqika Street, as transfer of the Site Permit in respect of the said property could not be legally enforced in view of the fact that the said Respondent had not been approved of by the Council, and its consent had not been obtained to transfer or disposal of the trading site permit in respect of the said property;

(*d*) that having regard to agreement filed of record Exhibit "B" the said right of option and the exercise of such right option to purchase property situate at 1596 Mngqika Street, Duncan Village, East London, was intended for the purpose of conducting Native Trading therein—(and not for demolition of the said property)—which purpose was prohibited by the aforesaid Regulations hereinabove detailed, and such right of option and/or the exercise of such right of option were therefore illegal, void and unenforceable;

(*e*) that in any case transfer of the Site Permit of the said property, even for residential purposes, could not be enforced in view of the fact that the consent of the Location Superintendent or the Council has not been obtained, having regard to Regulations 8 and 10 of the aforesaid East London Municipal Regulations published on 18th April, 1957, under Provincial Notice No. 260/1957."

These grounds embody an amendment allowed by this Court on application by Mr. Kaplan who appeared for the appellant. The application was opposed by counsel for Respondent, firstly, on the ground that the proposed amendment introduced allegations of fact which now were being raised for the first time and had not been canvassed in the Native Commissioner's Court so that the points of law based thereon could not prevail and, secondly, because the further illegalities alleged in the proposed amendment did not flow from the contract itself and in any event there was no clear proof of such illegalities so that it was not proper for this Court to take cognizance of them. Counsel for Respondent conceded, however, that these points could be taken equally effectively should the amendment be allowed and that he could not advance the contention that such a course would result in prejudice to the Respondent. That being so and as this Court considered the elaboration of the grounds of appeal by way of the proposed amendment lent itself to a better consideration of the points involved in the appeal, it granted the application.

Turning to the appeal, the Assistant Native Commissioner's judgment is based on the exercise by the Plaintiff of the option referred to in clause 6 of the written agreement entered into

between the parties on the 20th October, 1956 (Exhibit " B "), the clauses of which insofar as they are material here read as follows:—

" Whereas the said Skey (Defendant) is the registered owner of certain improvements consisting of a shop and dwelling situated at Site No. 1596 Mngqika Street, Duncan Village, East London;

and whereas the said Skey is indebted to the said Mzamo (Plaintiff) in the sum of eight hundred pounds (£800) in respect of money actually lent and advanced to him by the said Mzamo;

and whereas the said Skey has agreed to grant the use of the said shop to the said Mzamo on the terms and conditions set out in this agreement;

and whereas the Parties hereto have furthermore mutually agreed to bind themselves in respect of the aforesaid loan of eight hundred pounds (£800) in the manner set forth hereunder;

Now therefore these presents witness:—

1. That the said Mzamo shall have the use of the said shop together with the fixtures and fittings contained therein for a period of three (3) years commencing on the 1st day of November, 1956 and terminating on the 31st day of October, 1959. The said Mzamo acknowledges that the said Skey shall continue to enjoy the sole and undisturbed use and occupation of the dwelling adjoining the said shop.

6. That on the expiration of this agreement as set out in Paragraph 1 above i.e. on the 31st day of October, 1959, the amount of £800 (eight hundred pounds) owing by the said Skey to the said Mzamo aforesaid together with interest thereon at the rate of five per cent (5%) per annum shall become immediately due and payable. In the event of payment thereof by the said Skey within seven (7) days of due date, the said Mzamo shall nevertheless be entitled to have the use of the said shop for a further period of three (3) years as from the 1st day of November, 1959, to the 31st day of October, 1962, on the same terms and conditions hereinbefore set out. In the event of the said Skey's inability and/or failure to make payment of the said amount within seven (7) days of due date, the said Mzamo shall have the option, which is hereby granted to him by the said Skey, to purchase the property comprising the shop and dwelling situate at Site No. 1596 Mngqika Street, Duncan Village, East London, as aforesaid on payment by him to the said Skey of the additional sum of five hundred pounds (£500) in cash. Should the said Mzamo exercise such option, the aforesaid amount of eight hundred pounds (£800) together with Interest due thereon shall be regarded as forming part of the Purchase Price of the said property and shall be set off against the said Purchase Price.

8. That in the event of the said Mzamo acquiring ownership of the said property in the manner set forth in Paragraph 6 and 7 above, the said Skey undertakes to sign all such documents and to do all such other acts as may be necessary to effect transfer thereof into the name of the said Mzamo or his Nominee."

The Defendant alleged in his plea that clause 6 of the agreement (Exhibit " B ") was illegal but he did not specify in which respect or on what ground and in any event this aspect was

not pursued at the trial in the Native Commissioner's Court nor were the allegations of fact on which the points of law raised on appeal are based, canvassed in that Court.

In support of his argument in pursuance of ground of appeal 1 (*a*), Mr. Kaplan relied on sections 2, 3, 14 and 22 of the trading regulations published under Provincial Notice No. 624 of 1952 which were handed in by him at the inception of that argument with the leave of this Court and which, at the time the agreement (Exhibit " B ") was entered into by the parties, obtained in that Duncan Village was a Municipal Native Village in the urban area of East London, as conceded by counsel for Respondent, and these regulations applied to such Native Villages by virtue of the opening paragraph thereof. These regulations were superseded by chapter 4 of the regulations published under Provincial Notice No. 260 of 1957, which were also handed in by Mr. Kaplan and are relied upon in the remaining grounds of appeal.

Sections 2, 3, 14 and 22 of the 1952 and 1957 regulations are much the same. In both cases section 2 provides for the allotment of trading sites and the continuation of existing businesses subject to permission by the East London City Council and to the regulations, section 3 prohibits trading by any person otherwise than on the site alloted to him by the Council for that purpose and section 14 requires the allottee personally to carry on and supervise the business. Section 22 of both sets of regulations prohibits the disposal by the allottee of his trading rights to any person other than a Native approved of by the Council and in addition in that section of the 1957 regulations there is a similar prohibition in respect of the transfer of a trading site permit.

Mr. Kaplan's contention that the option referred to in clause 6 of the agreement (Exhibit " B ") fell within the ambit of the prohibition contained in section 22 of the 1952 regulations as it constituted a diminution of the Defendant's rights appears to me to be unsound for, even if, as may well be the case, the Plaintiff's intention was to acquire the shop for trading purposes and the Defendant was aware thereof, this in itself did not, as submitted by counsel for Respondent, constitute a disposal by the Defendant of his trading rights as in the absence of any stipulation in the agreement (Exhibit " B ") to the effect that the purchase of the shop and dwelling house by the Plaintiff which was all that was agreed upon therein, was to include the acquisition by him of the trading rights and that such rights were to be transferred to him by the Defendant in pursuance of the sale, the Defendant was not obliged to pass such rights to the Plaintiff or even to assist him in any way in obtaining them on his exercising the option. On the contrary it was open to the Defendant to have his trading site permit cancelled and so also his trading rights in terms of section 24 of the 1957 regulations and to transfer the shop and dwelling house to the Plaintiff without the Council's consent in the manner provided by section 26 of those regulations leaving it to the Plaintiff to apply to the Council for the trading rights anew if he so desired. It is true that the Superintendent's consent to the disposal of the shop and dwelling is then required but this aspect was not raised in the grounds of appeal so that the appeal cannot succeed thereon. This disposes not only of Mr. Kaplan's contention in regard to ground of appeal 1 (*a*) but also of his argument in respect of the remaining grounds based, as it was, on the transfer of the trading rights and the trading site permit without the necessary approval, neither of which is, for the reason given above, involved. It is as well to add that there is this further consideration for holding that the first ground of appeal is without substance, viz., that, even if the option had included the trading rights, it would still not fall within the purview of section 22 of the 1952 regulations as it amounted to no more than a contemplated sale of such rights

at a future date which may or may not eventuate whereas, as is manifest from the language of the section, it envisages an actual and not a contemplated disposal of the trading rights.

In the circumstances the appeal fails and it is unnecessary to consider the submission by counsel for Respondent that it would not be proper for this Court to allow the points of law taken on appeal to prevail, firstly, as the allegations of fact on which they were based were now being raised for the first time and had not been canvassed in the Native Commissioner's Court and, secondly, because the alleged illegalities did not flow from the agreement itself and in any event there was no clear proof of any illegality; nor in the circumstances is it necessary to consider Mr. Kaplan's counter-submission that the case should be remitted to the Native Commissioner's Court for further evidence to determine whether or not the Council's consent had been obtained.

Mr. Kaplan on the authority of *Nthaka versus Nthaka* 1959 N.A.C. 79 (C) invited this Court to raise *mero motu* the question of the joiner of the Council and the Superintendent in the instant action and to hold in the light of that judgment that the Native Commissioner's Court had no jurisdiction to try it. A similar course was pursued in *Ndonga and Lumko versus Mapoma* 1960 N.A.C. 71 (S).

But to my mind the interests of justice in the instant case would best be served by adopting the suggestion made by counsel for Respondent that the judgment of the Native Commissioner's Court be altered by eliminating therefrom the order on the Defendant to pass transfer of the shop and dwelling house to the Plaintiff and by only requiring the Defendant to sign such documents as may be necessary to enable the Plaintiff to apply through the Municipal Native Administration Department at Duncan Village for the transfer to him of the rights to the shop and dwelling which was all that he desired. That such a course would best serve the interests of justice is apparent from the fact that the judgment of the Native Commissioner's Court was not only not attacked on appeal on the merits but that *ex facie* the record appears to do justice between the parties and counsel's suggestion would give effect thereto as far as possible without resulting in any prejudice to the Defendant whilst at the same time serving to remove the ground for the intervention by this Court *mero motu* suggested by Mr. Kaplan in that it would eliminate any "direct and substantial interest" by the Council or the Superintendent in the order of the Native Commissioner's Court. Accordingly it is proper for this Court to cure the irregularity in the Native Commissioner's judgment in this manner in keeping with the principle underlying the proviso to section *fifteen* of the Native Administration Act, 1927. It does not appear to me to be proper for this Court to give effect to counsel's suggestion that it should be stipulated in the judgment that the Plaintiff may in addition to applying for transfer of the rights to the shop and dwelling house to himself alternatively apply for the transfer thereof to his nominee as this aspect, although covered by clause 8 of the agreement (Exhibit "B"), is not embodied in the Plaintiff's claim. It seems to me, however, that to facilitate enforcement of the judgment provisions should be made therein for the Messenger of the Court at East London to sign the necessary documents if the Defendant fails to do so within a fixed period.

In the result the appeal should be dismissed, with costs, but the judgment of the Native Commissioner's Court on the claim in convention should be altered by substituting for the words "For Plaintiff as prayed i.e. Defendant to pass transfer to Plaintiff of the said property and to sign all such documents as may

be necessary in order to effect such transfer. Plaintiff to tender sum of £500 against such transfer less the following amounts" the following words:—

"The Defendant is hereby ordered to attend at the offices of the Municipal Native Administration Department at Duncan Village, East London, not later than the 2nd day of April, 1962, and there and then to sign all such documents as may be necessary to enable the Plaintiff to apply for transfer to him of the rights to the shop and dwelling house situate on site No. 1596, Mngqika Street, Duncan Village, East London, against payment by the Plaintiff to the Defendant of the sum of one thousand rand (R1,000) less the amounts specified below; and failing compliance by the Defendant with this order the Messenger of the Native Commissioner's Court at East London is hereby authorised to sign all such documents against payment by the Plaintiff to him of the sum of one thousand rand (R1,000) less the said deductions for transmission to the Defendant."

Yates and Neuper, Members, concurred.

For Appellant: Mr. T. H. Kaplan of East London.

For Respondent: Adv. T. Mullins of Grahamstown.

SOUTHERN NATIVE APPEAL COURT.

MAGABA vs. NOGANTSHI.

N.A.C. CASE No. 56 OF 1961.

KING WILLIAM'S TOWN: 28th February, 1962. Before Balk, President, Yates and Neuper, Members of the Court.

OWNERSHIP AND POSSESSION.

Vindicatory action distinguished from spoliatory proceedings.

EVIDENCE.

Onus of proof in vindicatory action where Plaintiff despoiled of property in dispute.

Summary: This was an appeal from the judgment of a Native Commissioner's Court for Plaintiff (now Respondent) as prayed, with costs, in an action in which his claim against the Defendant (present Appellant), as amended with the leave of that Court, was for fourteen head of cattle and one calf or payment of their value, £143 0s. 0d.

The Plaintiff averred, *inter alia,* in the particulars of claim in his summons that he was the owner of this stock and that the Defendant had unlawfully taken it from his possession without his consent.

Ground two of the notice of appeal reads as follows:—

"The action was in the nature of a spoliation action, and the two main essentials (*a*) that Plaintiff was in peaceful and undisturbed possession of the livestock and (*b*) that the Defendant deprived him of that possession forcibly or wrongfully against his consent, were not clearly proved".

Held: That the action was a vindicatory and not a spoliatory one in that the Plaintiff as an alternative to the return of the cattle claimed their value.

Held further: That, as the Plaintiff established the alleged spoliation the onus of proving the ownership of the cattle rested on the Defendant.

Cases referred to:

Sibanyoni versus Molise, 1929, T.P.D. 342.

Ntlantsana versus Ntlantsana, 1957, N.A.C. 80 (S), at page 84.

Balooi versus Balooi, 1952, N.A.C. 154 (N.E.), at page 156.

Arter versus Burt, 1922, A.D. 303, at page 306.

Appeal from the judgment of the Native Commissioner, Fort Beaufort.

Balk (President):

This is an appeal from the judgment of a Native Commissioner's Court for Plaintiff (now Respondent) as prayed, with costs, in an action in which his claim against the Defendant (present Appellant), as amended with the leave of the Court, was for fourteen head of cattle and one calf or payment of their value, £143 0s. 0d.

The Plaintiff averred, *inter alia,* in the particulars of claim in his summons that he was the owner of this stock and that the Defendant had unlawfully taken it from his possession without his consent.

In her plea the Defendant denied the alleged spoliation and that the Plaintiff was the owner of the stock and stated that it had been given to her legally at a family meeting concerning the affairs of the kraal at which it was decided that the Plaintiff had no right, claim or title thereto or interest therein.

The appeal is brought on the following grounds:—

" 1. That there was evidence of permission given to the Defendant to remove the cattle, supported by the Mother of the Defendant but the Court stated this evidence did not impress the Court.

2. The action was in the nature of a spoliation action, and the two main essentials (*a*) that Plaintiff was in peaceful and undisturbed possession of the livestock, and (*b*) that the Defendant deprived him of that possession forcibly or wrongfully against his consent were not clearly proved.

3. That the evidence of the Plaintiff was extremely conflicting, and the judgment was therefore wrong in law.

4. This was not a vindicatory action, but a spoliation case, and the evidence adduced was in favour of the Defendant.

5. The evidence of the Mother of the Defendant was of a very solid and important nature, and corroborated the story of the within Defendant, that she had permission to take the cattle.

6. The judgment should have been in favour of the *Defendant* with costs."

The action is a vindicatory and not a spoliatory one in that the Plaintiff as an alternative to the return of the cattle claimed their value, see *Balooi versus Balooi,* 1952, N.A.C. 154 (N.E.), at page 156.

It is common cause that the cattle were removed by the Defendant whilst they were in the Plaintiff's possession and the Plaintiff's evidence that the Defendant did so illicitly, i.e., without his consent, is to be preferred to the Defendant's testimony that the Plaintiff consented thereto in view of the blatant discrepancy between it and her mother's evidence for her in regard to this aspect, the Defendant stating that the Plaintiff gave his consent to her taking the stock at a family meeting whereas her mother

stated that all that was discussed at that meeting was money and that the Plaintiff had told the Defendant to take her cattle when he drove her away after the meeting. The Native Commissioner, it should be added, stated in his reasons for judgment that the Defendant and her mother did not impress him as honest witnesses.

It follows that the Plaintiff established the alleged spoliation so that the onus of proving the ownership of the cattle rested on the Defendant, see *Sibanyoni versus Molise,* 1929, T.P.D. 342, cited in *Ntlantsana versus Ntlantsana,* 1957, N.A.C. 80 (S), at page 84.

In her evidence the Defendant claimed to be the owner of the cattle which it is not disputed are the increase of a cow paid as dowry for her to the Plaintiff, on the ground that it was customary for the dowry cattle paid for a bride to be given to her. But, apart from the fact that this is not the custom, there is nothing to indicate that the cattle actually paid as dowry for her were given to her but on the contrary it is manifest from the evidence of her own witness, i.e., her mother, that this was not the case as the latter stated that the Defendant's brother was the owner of the cattle. The only other evidence relative to the Defendant's ownership of the cattle is her statement and that of her mother that the Plaintiff had told her (Defendant) to take the cattle presently in dispute which are the increase of one of the dowry cattle, but as pointed out above their evidence in this respect is unacceptable.

The Defendant, therefore, failed to prove that she was the owner of the cattle so that the Plaintiff was entitled to judgment as prayed, with costs, there being no room for absolution from the instance as the onus of proof rested on the Defendant, see *Arter versus Burt,* 1922, A.D. 303, at page 306; and the fact that the Plaintiff also does not, on the evidence, appear to be the owner of the cattle as they are the increase of a cow paid to him as dowry for the Defendant when he negotiated her customary union whilst she lived at his kraal and as the Defendant's brother appears to be her senior surviving male relative on the paternal side and as such the "eater" of this dowry, does not affect the position that the Plaintiff was entitled to judgment seeing that the criterion is the Defendant's failure to discharge the onus of proof of ownership resting on her.

The appeal should accordingly be dismissed, with costs.

Yates and Neuper, Members, concurred.

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

For Respondent: Mr. M. Anderson of King William's Town.

SOUTHERN NATIVE APPEAL COURT.

NOKOYO vs. GIDA.

N.A.C. CASE No. 39 OF 1961.

KING WILLIAM'S TOWN: 1st March, 1962. Before Balk, President, Yates and Neuper, Members of the Court.

EVIDENCE.

Where nature of defence evidence not disclosed by putting it to Plaintiff's witnesses in cross-examination, open to Plaintiff to apply to the Court for leave to call evidence in rebuttal. Evidencial value of documents comprising a record of payments and receipts for money issued by third persons to one of parties.

Summary: The facts of the case are not material to this report.

Held: That, where the nature of the defence evidence is not disclosed by putting it to the Plaintiff's witnesses in cross-examination, it is open to him to apply to the Court for leave to recall them in rebuttal of such evidence.

Held further: That, documents comprising a record of payments and a receipt for money issued by third persons to one of the parties are not probative of the truth of their contents as they are hearsay in this respect.

Cases referred to:

Holland versus Piccione, 1937, (1) P.H., F. 21 (N.P.D.).

Middleton versus Carr, 1949, (2) S.A. 374 (A.D.), at pages 385 and 386.

SOUTHERN NATIVE APPEAL COURT.

MCWEBENI TRIBAL AUTHORITY vs. NDAMASE.

N.A.C. CASE No. 59 OF 1961.

UMTATA: 16th May, 1962. Before Yates, Acting President, Collen and Warner, Members of the Court.

JURISDICTION.

Native Commissioners' Courts no jurisdiction in civil actions involving Bantu Authorities.

Summary: This was an appeal from the judgment of a Native Commissioner's Court for Defendant (now Respondent) as prayed, with costs, in an action in which Plaintiff (present Appellant), the Mcwebeni Tribal Authority, sued Defendant who at the relevant time was Secretary/Treasurer of the Tribal Authority for the amount of £25 12s. 6d., which had been paid to him in his capacity as Treasurer and which he had failed to account for.

This Court, *mero motu,* raised the question as to whether the Native Commissioner's Court had jurisdiction to try the action.

Held: That a Tribal Authority is a corporate body established by proclamation and is therefore a legal *persona,* distinct from the members who compose it and can not possess characteristics which belong to a race of people. The Mcwebeni Tribal Authority did not, therefore, fall within the terms of the definition of "Native" so that the Native Commissioner's Court had no jurisdiction to hear the case.

Cases referred to:

Tsautsi versus Nene and Ano., 1952, N.A.C. 73 (S), at page 75.

Gumede versus Bandhla Vukani Bakithi Ltd., 1950, (4) S.A. 560 (N).

Korsten African Ratepayers Association versus Petani, 1955, N.A.C. 136 (S), at page 140.

Ndebele versus Bantu Christian Catholic Church in Zion, 1956, N.A.C. 184, at page 188.

Appeal from the Court of the Native Commissioner, Ngqeleni.

Yates (Acting President):

This is an appeal from a judgment of a Native Commissioner's Court for Defendant (now Respondent) as prayed, with costs, in an action in which Plaintiff (present Appellant), the Mcwebeni Tribal Authority, sued Defendant who at the relevant time was Secretary/Treasurer of the Tribal Authority for the amount of £25 12s. 6d., which had been paid to him in his capacity as Treasurer and which he had failed to account for. The summons as amended with the leave of the Court went on to allege that the Defendant by failing to bank in accordance with the instructions, had been negligent and thereby caused the loss.

Defendant denied that he had been negligent in not banking the amount and alleged that his kraal had been raided and the money stolen. Alternatively he pleaded that the Plaintiff was fully aware of the procedure he adopted in regard to banking and thereby assumed the risk and condoned the Defendant's conduct and method of control over the money.

The appeal is brought on the grounds:—

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

2. That the Assistant Native Commissioner erred in preferring the evidence of the Defendant to that of the Plaintiff."

This Court has, *mero motu*, raised the question as to whether the Native Commissioner's Court had jurisdiction to try this action.

It is not alleged in the summons that the Plaintiff is a Native although it is stated that the parties to the case are subject to the jurisdiction of the Court. This allegation is admitted in Defendant's plea. The parties however, cannot, by agreement, confer jurisdiction on the Court. If a court finds the matter before it to be beyond its jurisdiction it must refuse to proceed even though neither party takes the objection; see *Tsautsi versus Nene and another*, 1952, N.A.C. 73 (S), at page 75. The jurisdiction of a Native Commissioner's Court is limited to actions between Native and Native and the question to be decided is whether the Mcwebeni Tribal Authority which, according to its own admission, is a corporate body established in terms of Proclamation 180 of 1956, falls within the terms of the definition of a Native. Native is defined in Section 35 of the Native Administration Act No. 38 of 1927, as follows:—

> "Native" shall include any person who is a member of any aboriginal race or tribe of Africa . . . , and
>
> "Person" is defined in section *two* (*x*) of the Interpretation Act No. 33 of 1957, as including "any Divisional Council, Municipal Council, Village Management Board or like authority",

so that obviously it also includes a Tribal Authority. The Tribal Authority however, is a corporate body established by Proclamation and therefore it is a legal *persona*, distinct from the members who compose it and cannot possess characteristics which belong to a race of people. In other words the Tribal Authority as a legal *persona* cannot be classed as a Native even if membership is restricted to Natives; see *Gumede versus Bandhla Vukani Bakithi Ltd.*, 1950, (4) S.A. 560 (N), quoted with approval in *Korsten African Ratepayers Association versus Petane*, 1955, N.A.C. 136 (S), at page 140.

It follows therefore that the Tribal Authority does not fall within the terms of the definition of "Native", so that the Native Commissioner's Court had no jurisdiction to hear the case.

The appeal should therefore be allowed and the judgment of the Native Commissioner altered to one dismissing the summons with costs.

As the appeal is allowed on a ground not raised in the Notice of Appeal but by the Court *mero motu*, there will be no order as to costs: see *Ndebele versus Bantu Christian Catholic Church in Zion*, 1956, N.A.C. 184, at page 188 which is also instructive in regard to other aspects of the instant case.

Warner and Collen, Members, concurred.

For Appellant: Mr. K. Muggleston of Umtata.

For Respondent: Mr. J. Beer of Umtata.

SOUTHERN NATIVE APPEAL COURT.

NOGAGA vs. MADIKIZELA.

N.A.C. CASE No. 61 OF 1961.

UMTATA: 16th May, 1962. Before Yates, Acting President, Blakeway and Warner, Members of the Court.

NATIVE CUSTOM.

"Peka" *Wife unkown to Pondo custom.*

Summary: In the Court *a quo* evidence was given that according to Pondo custom when a wife dies a husband may marry another woman to replace the deceased wife for the purpose of looking after the children born of the deceased; that the second wife is known as a "Peka" wife and that if there is no son born to the "Peka" wife the dowry of her daughters goes to the eldest son of the deceased woman.

On the strength of this evidence the Court *a quo* gave judgment in favour of the Plaintiff for the delivery of 13 head of cattle.

An appeal to this Court was brought by the Defendant on the ground, *inter alia,* that the "Peka" custom relied upon by the Plaintiff was unknown to Pondo custom. The Pondo Native assessors were consulted.

Held: That, as the Native assessors were unanimous in their statements that a "Peka" wife was unknown in Pondo custom and as the Court could find no reference to such a custom in cases extending over a period of 60 years, it was not accepted Pondo custom to institute a "Peka" wife in an existing house.

Appeal from the Court of the Native Commissioner, Ngqeleni. *A. M. Blakeway*, (Member):

The Plaintiff in the Court below (now Respondent) claimed from Defendant (now Appellant) the delivery of certain thirteen head of cattle. After the filing of some sixteen pages of pleadings extending over a period of 12 months, the issue resolved itself into the simple question of whether or not the Plaintiff is the heir to the late Nogaga.

Plaintiff's case is that the late Madikizela's fourth wife Magwadiso died leaving small children, including a male heir, Dilika, and that Madikizela then married a woman Mangewu as a "Peka" wife to take Magwadiso's place. The "Peka" wife gave birth to a male, Nogaga, and two females. Nogaga in turn had three female children by Defendant and left no male issue. Nogaga then died and Plaintiff as heir to the late Dilika claims that he is entitled to the dowries of all the female descendants of the "Peka" wife Magewu. The issue then narrowed to the matter of the "Peka" wife. To succeed it

was necessary for Plaintiff to prove that under Pondo custom a man could marry another woman into a house in which there was already an heir and that the woman Mangewu was so married.

Mr. Muggleston, who appeared for the Appellant, requested that, before dealing with the merits of the case, the Native assessors be called to ascertain whether in fact there is a Pondo custom under which a man may enter into a customary union with a woman known as a "Peka" wife. Mr. Airey, who appeared for the respondent, agreed that the assessors should be called at that stage and conceded that if it was found that there is no such custom he would have no case to put before the Court.

On the matter being put to the assessors, they were unanimous in their statements that a "Peka" wife is unknown in Pondo custom, and as this Court can find no reference to such a custom in cases extending over a period of 60 years, it comes to the conclusion that it is not accepted Pondo custom to institute a "Peka" wife in an existing house.

This being so it is unnecessary to consider the other aspects of the case, and the appeal is accordingly upheld with costs. The judgment of the Court below is therefore altered to judgment for Defendant with costs.

The assessors consulted were:—

1. Chief Mdabuka Mqikela of Qaukeni, East Pondoland.
2. George Ntanta of Qoqo Location, Flagstaff, East Pondoland.
3. Madlanya Tantsi of Caba Location, Tabankulu, East Pondoland.
4. Tolikana Mangala of Maqingeni Location, Libode, West Pondoland.

Yates, Acting President, and Warner, Member, concurred.

For Appellant: Mr. K. Muggleston, Umtata.

For Respondent: Mr. F. G. Airey, Umtata.

SOUTHERN NATIVE APPEAL COURT.

SIQWELO vs. MANDONDO.

N.A.C. CASE No. 2 OF 1962.

KING WILLIAM'S TOWN: 19th June, 1962. Before Yates, Acting President, Leppan and Moll, Members of the Court.

APPEALS.

Appeal from Native Commissioner's Court—necessity for service of copy of Notice of Appeal on opposite party.

Summary: The Respondent filed an objection, in terms of Rule 14 of the Rules for Native Appeal Courts, to the set down of the appeal or, alternatively, in the event of the appeal nevertheless being set down for hearing, he applied that it be struck off the roll, on the ground, *inter alia,* that the Appellant had not complied with the requirements of Rule 6 of the said Rules.

There was no indication that the Notice of Appeal had been served either personally or by the Messenger of the Court on the Respondent nor that the Clerk of the Court had been notified of any such service.

Held: That as there was no indication whatsoever that the Notice of Appeal had been served either personally or by the Messenger of the Court on the Respondent as required by Rule 6 (1) of the Rules for Native Appeal Courts nor that the Clerk of the Court had been notified of any such service as is required by Rule 6 (3) of the said Rules, the matter was not properly before the Court.

Statutes etc. referred to:

Rules 5 (1), 6 (1), 6 (3) and 31 (1) of the Rules for Native Appeal Courts.

Appeal from the Court of the Native Commissioner, Observatory, Cape.

Yates (Acting President):

This is an appeal from a Native Commissioner's Court in a case in which Plaintiff (present Respondent) made application to the Court on affidavit for an order requiring Defendant (present Appellant) forthwith to quit and restore to Plaintiff occupation and possession of the premises and contents at 235 Caledon Street, Cape Town. Defendant opposed the application and the Native Commissioner ordered that the issue should be tried by way of action in terms of Rule 56 (2) of the Rules for Native Commissioners' Courts contained in Government Notice No. 2886 of 1951. At the conclusion of the hearing he gave judgment for Plaintiff, as prayed, in respect of the room in question, with costs.

Against this judgment an appeal is brought on the grounds that it is against the weight of evidence.

Respondent then filed an objection in terms of Rule 14 of the Native Appeal Court Rules contained in Government Notice No. 2887 of 1951 to the set-down of the appeal on the grounds that—

"1. The 'Notice of Appeal' does not comply with the requirements of Rule 7 in regard to its contents, and there has accordingly been no proper noting of the Appeal in terms of Rule 5 (1);

2. No copy of the 'Notice of Appeal' was, in terms of Rule 6, served on Respondent in any manner provided therein or otherwise, either near the time of 'noting' or since;

3. In consequence, Respondent has had no opportunity of noting a cross-appeal in terms of Rule 5 (2) if he were so disposed; and

4. As a further consequence, there has been no delivery (as defined) of the Notice of Appeal in terms of Rule 9, and therefore the Commissioner was not required to deliver a written statement to the Clerk of the Court or to certify the incomplete record for the purpose of Rule 10."

Mr. Hart, who appeared for appellant, informed the Court that, in accordance with his instructions, he was applying for a postponement of the case *sine die* but he could advance no valid reasons for the request. Mr. Barnes, who appeared for Respondent, objected to the postponement and applied for the appeal to be struck off the roll, with costs, in terms of the objection and affidavit filed in support thereof as the appeal had not been properly noted and was therefore not properly before the Court. He pointed out that Rule 5 (1) of the Native Appeal Court Rules is peremptory in its terms and that the appeal had not been properly noted as it had not been delivered in terms of Rule 31 (1) in that no copy had been served on the Respondent.

He also pointed out that Rule 6 (1) which requires a copy of the Notice of Appeal to be served on the opposite party forthwith after noting is likewise peremptory and had not been complied with.

There is no indication whatever that the Notice of Appeal was served either personally or by the Messenger of the Court on the Respondent nor was the Clerk of the Court notified of any such service as is required by sub-rule 6 (3).

The matter, therefore, was not properly before the Court and the case is struck off the roll, with costs.

Mr. Barnes also submitted a request that in terms of the final paragraph of Table "B" the fees in connection with items 4 and 5 should be increased. As, however, he was unable to advance any substantial reasons for his request, it was refused.

Moll and Leppan, Members, concurred.

For Appellant: Mr. B. Hart of King William's Town.

For Respondent: Mr. B. Barnes of King William's Town.

SOUTHERN NATIVE DIVORCE COURT.

MATROSE vs. MATROSE.

N.D.C. CASE No. 525 OF 1961.

CAPE TOWN: 13th and 16th March, 1962. Before Balk, President.

HUSBAND AND WIFE.

Uncontested divorce action based on adultery—evidence required.

Summary: This was an uncontested divorce action based on the Defendant's adultery. The Court intimated after the Plaintiff had given evidence that further evidence was required to oust collusion and the hearing was postponed for that purpose. At the resumed hearing Plaintiff's counsel handed in an affidavit by the defendant containing a bare admission by her of the alleged adultery at the same time intimating that the Defendant refused to come to Court and thereupon closed the Plaintiff's case.

Held: That in an uncontested divorce action based on adultery, the Court should be satisfied that the Plaintiff's evidence of the alleged adultery and/or the Defendant's confession thereof is true and that there is no collusion before granting a divorce on such evidence or confession alone.

Held further: That there was nothing in the Plaintiff's demeanour or evidence or in the Defendant's confession giving the impress of truth but on the contrary the improbability in the Plaintiff's evidence indicated that it could not be accepted with confidence and the Defendant's bald confession did not show that the Plaintiff's version was true nor did it serve to oust collusion suggested by the improbability.

The President in the course of his reasons for judgment stated:—

"The Plaintiff's version regarding the alleged adultery is, briefly, that he found the Defendant in their bed in their common home with another man at about 1 a.m. on the 4th March, 1961, on his return from Police duty after he had told the Defendant on leaving home for duty on the previous afternoon that he would be back late the same night at about midnight. That the Defendant should have committed adultery knowing full well that the Plaintiff was expected back at the time and that there was every prospect of her being caught by him is most improbable and suggests collusion between the parties.

The Court drew the attention of Plaintiff's counsel to the necessity for further evidence to oust collusion, a ruling which he accepted, and accorded him an opportunity of adducing evidence *aliunde,* postponing the hearing on his application from the 13th instant to the 16th idem for that purpose.

At the resumed hearing on the lastmentioned date counsel handed in an affidavit by the Defendant containing a bare admission by her of the alleged adultery at the same time intimating that she refused to come to Court, and thereupon closed the Plaintiff's case . . .

The Court should in an uncontested divorce action based on adultery be satisfied that the Plaintiff's evidence of the alleged adultery and/or the Defendant's confession thereof is true and that there is no collusion before granting a divorce on such evidence and/or confession alone, see *Miles versus Miles* 1949 (2) S.A. 360 (D. & C. L.D.), at page 362, cited by Plaintiff's counsel, and *Jonker versus Jonker* 1942 (E.D.L.D.) 134, at page 148.

In the instant case, not only was there nothing in the Plaintiff's demeanour or evidence or in the Defendant's confession giving the impress of truth but, on the contrary, the improbability in the Plaintiff's evidence referred to above indicated that the plaintiff's evidence could not be accepted with confidence as being the truth and suggested collusion between the parties. The Defendant's bald confession of adultery did not advance the Plaintiff's case as it did not show that the Plaintiff's version was true nor did it serve to oust collusion suggested by the improbability. It follows that the Court was not satisfied that the Plaintiff's evidence was true or that the Defendant's confession was genuine and that there was no collusion between the parties.

That being so, absolution from the instance was decreed.

Cases referred to:

Miles versus Miles 1949 (2) S.A. 360 (D. & C.L.D.), at page 362.

Jonker versus Jonker 1942 (E.D.L.D.) 134, at page 148.

SOUTHERN BANTU APPEAL COURT.

SEMANE vs. SEMANE.

N.A.C. CASE No. 31 OF 1962.

UMTATA: 18th September, 1962. Before Balk, President, Yates and Fourie, Members of the Court.

PRACTICE AND PROCEDURE.

Judgment—application for rescission in terms of Bantu Affairs Commissioners' Courts sub-rule 74 (10)*—where question of whether applicant affected thereby in dispute issue to be resolved by trial—necessity for applicant to cite both parties to action in which relevant judgment given—not possible in application under this sub-rule for applicant to be in "wilful default." Default judgment—onus of proving "wilful default." Judgment ineffective in so far as award of progeny of cattle claimed where such progeny not specified in claim or judgment.*

Summary: This was an appeal from the judgment of a Bantu Affair Commissioner's Court refusing, with costs, an application, made in terms of sub-rule 74 (10) of the rules pertaining to that Court, for rescission of a default judgment under which livestock belonging to the late Ben Semane was awarded to the respondent, then plaintiff, as the deceased's heir.

The applicant alleged in his application that *he* was the heir relying solely on this allegation to show that he was affected by the default judgment, and at the instance of the presiding judicial officer evidence was adduced to resolve this dispute. On the evidence the presiding judicial officer found that the applicant had failed to establish that he was the deceased's heir and, therefore, that he (applicant) was affected by the default judgment.

The presiding judicial officer also found that the applicant had been in wilful default at the hearing of the action when the default judgment was given placing the onus of proof on the applicant in this respect.

Although the claim was merely for certain specific head of livestock or their value the presiding judicial officer who granted the default judgment awarded the livestock claimed as also their progeny to the plaintiff without specifying such progeny in his judgment.

Held: That in an application for rescission of a default judgment brought by a person alleging to be affected thereby who was not a party to the action in which such judgment was given where the allegations relied upon by applicant as showing that he was affected by the judgment are disputed the issue must be resolved by trial, regard being had to the wording of Bantu Affairs Commissioners' Courts sub-rule 74 (10).

Held further: In such an application both plaintiff and defendant in the action in which the default judgment was given must be cited.

Held further: That it was not possible in such an application for applicant to be in "wilful default".

Held further: Onus of proving "wilful default" in applications in which such default was in issue was on respondent.

Held further: That the default judgment was ineffective insofar as the award of the progeny of the stock was concerned in that such progeny had not been specified in the claim or judgment.

Cases referred to:

Thorne N.O. versus Kajee (Pty.), Ltd., 1962, (2) S.A. 99 (N.P.D.), at page 102.

Naidoo versus Harper's Stores and Ano., 1935, N.P.D. 94, at page 97.

Jackson Bros. versus Stewart, 1927, E.D.L. 82.

Gluckman versus Wylde, 1933, E.D.L. 322.

Johnston versus Aaronson and Ano., 1913, T.P.D. 802.

Silber versus Ozen Wholesalers (Pty.), Ltd., 1954, (2) S.A. 345 (A.D.), at page 352.

Appeal from judgment of Bantu Affairs Commissioner's Court, Mqanduli.

Balk (President):

This is an appeal from the judgment of a Bantu Affairs Commissioner's Court refusing, with costs, an application, made in terms of sub-rule 74 (10) of the rules pertaining to that Court, for rescission of a default judgment under which the livestock belonging to the late Ben Semane (hereinafter referred to as "the deceased") was awarded to the respondent, then plaintiff, as the deceased's heir.

Sub-rule 74 (10) provides that "Any judgment of the Court may, on the application of any person affected thereby who was not a party to the action or matter, made within one month after he has knowledge thereof, be so rescinded or varied by the Court to the extent only to which such applicant is affected thereby."

The appeal is brought by the applicant on the following grounds:—

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

2. That the judgment is bad in law in that:—

(*a*) The Court having recognised Applicant's right to make an Application for rescission of its judgment in a matter to which the said Applicant was not a party, it could not hold that he was in wilful default nor did it seek to prove this;

(*b*) the Applicant did in fact show that he was affected by the judgment of the Court which he sought to rescind;

(*c*) that the Court having called for oral evidence on the question of the illegitimacy of the Applicant's father only, it rejected the evidence of both parties as 'merely secondary evidence'. As this was apparently the only point on which the Court was in doubt, it should have allowed the application for rescission since the illegitimacy of Applicant's father could not be proved."

The applicant alleged in his affidavit embodying the application that he was the heir of the deceased relying solely on this allegation to show that he was affected by the default judgment. The respondent in his opposing affidavit denied that the applicant was the deceased's heir and, at the instance of the Assistant Bantu Affairs Commissioner, evidence was adduced to resolve this dispute.

The Commissioner found that the applicant had, on the evidence, failed to establish that he was the deseased's heir and, properly so, as the applicant's evidence which was the only evidence adduced by him in support of his pedigree is inadmissible being, as it is, based on hearsay without the source of the applicant's information being disclosed so that it is not receivable as a declaration as to pedigree which forms an exception to the hearsay rule, see *Scobles' Law of evidence* (Third Edition) at pages 289 to 291. Moreover, the respondent's evidence that the applicant had admitted that he (respondent) was the deceased's heir was not controverted.

In my judgment the course adopted by the Commissioner in calling for evidence to resolve the heirship issue was correct as the applicant's being affected by the default judgment within the meaning of sub-rule 74 (10) was contingent on the heirship issue, as submitted by Mr. Muggleston in his argument on behalf of the respondent.

Apropos this aspect, the following passage occurs in *Thorne N.O. versus Kajee (Pty.) Ltd.*, 1962, (2) S.A. 99 (N.P.D.), at page 102, in relation to Magistrates' Courts sub-rule 46 (10), the wording of which insofar as it is relevant here corresponds to that of Bantu Affairs Commissioners' Courts sub-rule 74 (10):—

> "It has been decided that the phrase 'any person affected' is a very wide one (*Naidoo versus Harper's Stores and Another*, 1935, N.P.D. 94, at page 97), and includes the guardian of a minor against whom the judgement was taken (*Jackson Bros. versus Stewart*, 1927, E.D.L. 82), a third person who claims to be the owner of property attached under a writ issued in pursuance of the judgment (*Gluckman versus Wylde*, 1933, E.D.L. 322), and a garnishee from whom satisfaction or part satisfaction of the judgment is sought (*Naidoo's case supra*.)."

To my mind, the foregoing passage appears to go no further than to indicate insofar as procedure in applications under the sub-rule is concerned that it is necessary for the applicant to set down in his supporting affidavit facts showing that he is affected by the default judgment and that such facts fall to be accepted by the Court as a *prima facie* indication that the applicant is so affected where they are not challenged by the respondents. I come to this conclusion as in none of the cases cited in the passage do the allegations indicating that the applicants were affected by the judgments appear to have been called into question by the respondents.

It is true that the applicant also stated in his affidavit embodying the application that he had taken over the deceased's livestock on the death of the latter's widow and that the respondent admitted in his opposing affidavit that some of the deceased's livestock were in the applicant's possession adding that they had been taken by the latter after the issue of summons in the action in which the default judgment was given. But the question whether such possession shows that the applicant was affected by the default judgment does not call for consideration as it is clear from the applicant's affidavit that he did not rely thereon and this question does not appear to have been canvassed in the Commissioner's Court.

In any event, as pointed out by Mr. Muggleston, the applicant did not in the application cite as a respondent the defendant in the action by giving notice to him of the application as he ought to have done in terms of Bantu Affairs Commissioners' Courts sub-rule 56 (1) but only cited the plaintiff so that the application was bound to fail on that ground alone, see *Johnston versus Aaronson and Another*, 1913, T.P.D. 802.

As regards the Commissioner's finding that the applicant had been in wilful default at the hearing of the action when the default judgment was given, it is perhaps as well to point out that it does not appear to be possible for the applicant to have been in "wilful default" as this expression postulates that the person concerned was cited to appear by process of the Court and that he deliberately refrained from doing so which is not the position here in that the applicant not having been a party to the action was not cited therein. In any event, the Commissioner was not justified in holding that the applicant was at fault in this respect as the allegation in his affidavit that he had only learnt of the default judgment from the Commissioner on which the latter's finding that the applicant was in wilful default is based, did not without more warrant the inference drawn therefrom by the Commissioner that, before the default judgment was given, the

applicant had know of the action and that it affected him but had not applied to the Court for leave to intervene; for the applicant may have heard from other sources of the default judgment after it had been given and thereupon have sought confirmation thereof from the Commissioner.

It is perhaps also as well to point out that the Commissioner erred in holding that it was for the applicant to show that he had not been in wilful default as in applications in which such default is an issue the onus of proving it is on the respondent, see *Silber versus Ozen Wholesalers (Pty.), Ltd.*, 1954, (2) S.A. 345 (A.D.), at page 352.

The Commissioner's attention is also invited to the fact that the default judgment is ineffective insofar as the award of the progeny of the stock is concerned as such progeny has not been specified in the claim or judgment.

The appeal should be dismissed, with costs.

Yates and Fourie, Members, concurred.

For Appellant: Mr. F. G. Airey of Umtata.

For Respondent: Mr. K. W. A. Muggleston of Umtata.

SOUTHERN BANTU APPEAL COURT.

MWANDA vs. KUSE.

N.A.C. CASE No. 27 OF 1962.

UMTATA: 18th September, 1962. Before Balk, President, Yates and Fourie, Members of the Court.

LAW OF DELICT.

Adultery—assessment of damages claimed by husband for adultery with wife of civil marriage—considerations.

Summary: Plaintiff (present appellant), claimed from the defendant (now respondent) the sum of R100 as damages for adultery with his wife by civil rites resulting in her pregnancy. The Court *a quo* awarded plaintiff R40 and the latter appealed on the ground that this amount was inadequate.

The only relevant factor mentioned by the presiding judicial officer in his reasons for judgment was that the plaintiff continued to live with his wife after the adultery. The attorney for the appellant contended that the plaintiff was entitled to the equivalent of the Native customary damages for adultery followed by pregnancy viz., the value of five head of cattle which number was the standard in the district from which the instant case emanated.

The attorney for the respondent contended that the fact that the plaintiff had been away at work leaving his wife at home for a continuous period of three years fell to be regarded as a mitigating feature in the assessment of damages.

Held: That the plaintiff was entitled to the equivalent of Native customary damages in the circumstances of the instant case.

Held further: That an inference of blameworthiness was not properly inferable from the lengthy absence of the plaintiff as this absence may well have been unavoidable. On the contrary, these were aggravating circumstances, viz., that the defendant took advantage of the plaintiff's absence to seduce the latter's wife and to commit adultery with her on a number of occasions at the plaintiff's kraal.

Cases referred to:
Viviers versus Kilian, 1927 (A.D.) 449.
Nodada versus Mokoena, 1942, N.A.C. (C. & O.) 80.
Nazo versus Lubisi, 1946, N.A.C. (C. & O.) 18.
Bukulu versus Cebisa, 1946, N.A.C. (C. & O.) 45.
Zibaya versus Maguga, 1947, N.A.C. (S.D.) (C. & O.) 7.
Mdinge versus Kotshini, 1 N.A.C. (S.D.) 270. at page 272.
Matolengwe versus Pateni, 1 N.A.C. (S.D.) 106.

Appeal from judgment of Bantu Affairs Commissioner's Court, Cofinvaba.

Balk (President):

This is an appeal from the judgment of a Bantu Affairs Commissioner's Court awarding to the plaintiff (present appellant) the sum of R40 and costs in an action in which he sued the defendant (now respondent) for R100 as damages for adultery. The plaintiff averred, *inter alia,* in the particulars of claim in his summons that the adultery had been committed with his wife to whom he was married according to Christian rites and that the adultery resulted in her pregnancy.

The appeal is brought on the ground that the damages awarded are inadequate.

The Assistant Bantu Affairs Commissioner's reasons for judgment are of little assistance. The only relevant factor mentioned by him is that the plaintiff continued to live with his wife after the adultery. He also referred to certain Bantu Appeal Court decisions but did not state in what respects he relied on them. Why in connection with the damages awarded by him in the instant case he should have referred to *Mwanda versus Simayile* 5 N.A.C. 7 is not understood seeing it was laid down there that the plaintiff was not entitled to recover any damages in respect of adultery committed with his wife married according to Christian rites as he had condoned the adultery and continued to live with her as is the case here. However that may be, *Mwanda's* case falls to be regarded as overruled by the dictum in *Viviers versus Kilian,* 1927 (A.D.) 449, followed in *Nodada versus Mokoena,* 1942, N.A.C. (C. & O.) 80, that damages are recoverable in such a case seeing that they arise from two entirely separate and distinct grounds, viz. (1) from the injury or contumelia inflicted upon the husband by the adulterer and (2) from his loss of *consortium* i.e. of the comfort, society and services of his wife, so that where there is no loss of *consortium* the claim for damages is still maintainable on the ground of the injury or *contumelia.*

In the instant case there was no loss of *consortium* and the damages accordingly fall to be assessed solely on the ground of injury or *contumelia.* The only point taken by Mr. Airey in his argument on behalf of the appellant as regards the inadequacy of the damages awarded by the Commissioner is that those damages should have borne some relation to Native customary damages awarded for adultery followed by pregnancy in the light of the judgment in *Nodada's* case (*supra*) and other decisions of this Court to the same effect, see *Nazo versus Lubisi,* 1946, N.A.C. (C. & O.) 18, *Bukulu versus Cebisa,* 1946, N.A.C. (C. & O.) 45 and *Zibaya versus Maguga,* 1947, N.A.C. (C. & O.) 7. In this connection Mr. Airey submitted that as the customary damages for adultery followed by pregnancy were five head of cattle the Commissioner ought in the circumstances of this case to have awarded the plaintiff the R100 claimed by him as this was the present value of the cattle. He intimated that it was not his contention that the plaintiff was entitled to damages higher than the customary ones. That the customary damages for adultery followed by pregnancy in the district from which the instant case emanates, viz. St. Marks, is five head of cattle emerges from the judgment in *Zibaya's* case (*supra.*).

As pointed out, however, by Mr. Muggleston in his argument for respondent, there is nothing in the pleadings nor in the evidence indicating the value of the cattle paid in respect of Native customary damages so that there is no basis for this Court to increase the award beyond an additional R10 as in such a case the standard value of R10 per beast applies, see *Mdinge versus Kotshini,* 1 N.A.C. (S.D.) 270, at page 272 and *Matolengwe versus Pateni,* 1 N.A.C. (S.D.) 106 cited by Mr. Muggleston.

Mr. Muggleston further contended that the fact that the plaintiff had been away at work leaving his wife at home for a continuous period of three years fell to be regarded as a mitigating feature in the assessment of the damages. But, it seems to me that an inference of blameworthiness is not properly inferable from this absence as it may well have been unavoidable. On the contrary, as submitted by Mr. Airey, there are aggravating circumstances, viz., that the defendant took advantage of the plaintiff's absence to seduce the latter's wife and to commit adultery with her on a number of occasions at the plaintiff's kraal.

In the circumstances the appellant is entitled to the increased damages within the limit mentioned above.

The appeal should accordingly be allowed, with costs, and the judgment of the Bantu Affairs Commissioner's Court altered to one for plaintiff for R50 and costs.

Yates and Fourie, Members, concurred.

For Appellant: Mr. F. G. Airey of Umtata.

For Respondent: Mr. K. W. A. Muggleston of Umtata.

SOUTHERN BANTU APPEAL COURT.

SELANE vs. NDZIBA.

N.A.C. CASE No. 18 OF 1962.

UMTATA: 24th September, 1962. Before Balk, President, Yates and Maytham, Members of the Court.

PRACTICE AND PROCEDURE.

Notice of appeal—ground of appeal that judgment against weight of evidence suffices.

NATIVE CUSTOM.

Adultery—claim for damages—recognised custom for witnesses sent with wife to alleged adulterers kraal to be questioned there where claim disputed.

Summary: Plaintiff (now respondent) successfully appealed to a Bantu Affairs Commissioner's Court from the judgment of a Chief's Court for defendant (present appellant) in a claim for damages for adultery by the latter with his (Plaintiff's) wife.

A witness to the adultery who accompanied plaintiff's wife to the defendant's kraal in connection with the claim for damages, admitted, under cross-examination, in her evidence for the plaintiff, that she (the witness) had not been questioned there.

The defendant appealed to this Court on the ground that the judgment was against the weight of evidence.

Held: That the Bantu Affairs Commissioner in remarking in his reason for judgment on the lack of particulars contained in the ground of appeal lost sight of the fact that in an appeal of this nature from the judgment of a Bantu Affairs Commissioner's Court it was competent to word the ground of appeal as was done in the instant case, viz., that the judgment was against the weight of the evidence.

Held further: That the recognised customary procedure is where witnesses are sent by the husband to the alleged adulterer's kraal in connection with a claim for damages for adultery with the wife, such witnesses are questioned there as to their knowledge of the alleged adultery if the claim is disputed.

Cases referred to: Ponya versus Sitate, 1944, N.A.C. (C. & O.) 13, page 14.

Appeal from judgment of Bantu Affairs Commissioner's Court, Port St. Johns.

Balk (President):

This case had its inception in a Chief's Court in which the plaintiff sued the defendant for five head of cattle as damages for adultery with his wife, Mavanya. That Court found for defendant for five head of cattle or their value, R100, with costs, meaning no doubt no more than that it was finding for defendant on his plea denying the adultery. The appeal from that judgment to the Bantu Affairs Commissioner's Court was allowed, with costs, and the judgment altered to one for plaintiff for five head of cattle and costs.

The appeal to this Court is confined to fact.

The Bantu Affairs Commissioner in his reasons for judgment remarked on the lack of particulars contained in the ground of appeal losing sight of the fact that in an appeal of this nature from the judgment of a Bantu Affairs Commissioner's Court, it is competent to word the ground of appeal as was done in the instant case viz., that the judgment is against the weight of the evidence, see *Ponya versus Sitata,* 1944, N.A.C. (C. & O.), 13 at page 14.

As the defendant's denial of the alleged adultery in the Chief s Court stood as his plea in the Bantu Affairs Commissioner's Court, the onus of proof rested on the plaintiff.

As stressed by Mr. Muggleston in his argument on behalf of the appellant, there is a vital discrepancy between the evidence of the plaintiff's witnesses, Mavanya and Mandilavu, which renders suspect their testimony on which the Commissioner relied to found his judgment for the plaintiff, viz., that Mandilavu had recognised the person in bed in the plaintiff's hut as the defendant on the evening she called there for a pot and found Mavanya in the same hut in her petticoat. The discrepancy arises from Mavanya's statement that Mandilavu had asked her who the man lying on the bed was whereas Mandilavu denied that she asked Mavanya this question.

The discrepancy appears to have been overlooked by the Bantu Affairs Commissioner for he states in his reasons for judgment that there were no discrepancies between the evidence of these witnesses.

As also stressed by Mr. Muggleston, the discrepancy referred to above is heightened by Mandilavu's admission in cross-examination that when she accompanied Mavanya to the defendant's kraal in connection with the instant claim, she was not questioned there notwithstanding that the defendant was told that she was a witness to the alleged adultery and that the defendant had denied this adultery and had called two men to be present on his side

at the meeting; for it is inconceivable that she should not have been questioned anent what she knew of the alleged adultery if it had been stated that she was a witness thereto as this is the recognised customary procedure when the claim is disputed by the defendant; and this improbability in Mandilavu's evidence lends colour to the evidence of Sibaka for the defendant that it was not mentioned that Mandilavu was a witness when she came to the defendant's kraal with Mavanya in connection with the claim. Admittedly as stressed by Mr. Airey in his argument for respondent, Sibaka stated in his evidence in chief that he had seen Mandilavu for the first time at the church enquiry which took place after Mavanya had been at the defendant's kraal in connection with the claim. But as submitted by Mr. Muggleston, it is manifest from Sibaka's replies under cross-examination that what he had intended to convey in his evidence in chief was that at the church enquiry Mandilavu was produced for the first time as a witness, she having been at the defendant's kraal when the claim was made there but she was not questioned then as there was nothing to associate her with the matter.

In addition, as submitted by Mr. Muggleston, the discrepancy is further heightened by the defendant's and Botha's testimony for the defendant that at the church enquiry which preceded the trial in the Bantu Affairs Commissioner's Court, Mandilavu had stated that she had seen a man covered with a blanket lying on the bed in the plaintiff's hut when she called there on the evening in question but that she had not recognised the man. It is true that, as stressed by Mr. Airey, the evidence of the defence witnesses, Botha and Sibaka, indicates that the defendant's evidence that Mandilavu had been questioned at his kraal and had stated that she knew nothing about the alleged adultery is false. But Botha's and Sibaka's evidence here shows that they were reliable witnesses as they did not hesitate to state under cross-examination that the defendant's evidence was not correct in the respect in question so that Mr. Muggleston's submission anent the discrepancy being further heightened is sound.

Mr. Airey's contention that the defendant's false evidence served to establish the plaintiff's case is not well-founded as it goes no further than that the defendant did not establish his case as the discrepancy in the evidence for the plaintiff and the features heightening it referred to above indicate that it is unreliable; and there is no other evidence establishing the plaintiff's case.

It follows that the judgment of the Chief's Court should on appeal to the Bantu Affairs Commissioner's Court have been altered to one of absolution from the instance, with costs. As this alteration is not, however, a matter of substance but one of form in that there is nothing to indicate that the plaintiff has furher witnesses available, the Bantu Affairs Commissioner's Court should have dismissed the appeal from the judgment of the Chief's Court, with costs, but altered that judgment to one of absolution from the instance, with costs.

In the result the appeal to this Court should be allowed, with costs, and the judgment of the Bantu Affairs Commissioner's Court altered to read as follows:—

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

Yates and Maytham, Members, concurred.

For Appellant: Mr. K. W. A. Muggleston of Umtata.

For Respondent: Mr. F. G. Airey of Umtata.

SOUTHERN BANTU APPEAL COURT.

GUYANA and ANO. vs. MAROYANA and ANO.

N.A.C. CASE No. 5 OF 1962.

UMTATA: 24th September, 1962. Before Balk, President, Yates and Maytham, Members of the Court.

CONFLICT OF LAWS.

Incompetent for judicial officer to make final decision on system of law to be applied prior to hearing evidence and argument.

PRACTICE AND PROCEDURE.

Exception to summons to be embodied in plea—sub-rule 44 (1) *of Bantu Affairs Commissioners' Courts Rules.*

Summary: At the trail of this action in the Bantu Affairs Commissioner's Court the defendants' attorney *in limine* contended that the plaintiffs had no *locus standi in judicio* under Native law. The presiding judicial officer accepted this contention and dismissed the summons, with costs. The appeal was brought on the ground *inter alia* that the presiding judicial officer erred in dismissing the summons without hearing evidence.

Held: That the capacity of parties is dictated by the system of law finally applied by the presiding judicial officer after considering all the evidence and argument as part of his eventual decision on the case so that it was incompetent for him to have determined the *locus standi in judicio* of the plaintiffs without hearing any evidence and without the parties having closed their cases; the exceptions mentioned in the case of *Nhlanhla versus Mokweno,* 1952 N.A.C. 286 (N.E.) not being applicable.

Held further: That the point taken by the defendants' attorneys that the plaintiffs had no *locus standi in judicio* should have been embodied in the defendants' plea as required by Bantu Affairs Commissioners' Courts sub-rule 44 (1).

Cases referred to:

Nhlanhla versus Mokweno, 1952, N.A.C. 286 (N.E.), at page 290.

Mahashe versus Mahashe, 1955, N.A.C. 149 (S), at page 152.

Appeal from judgment of Bantu Affairs Commissioner's Court, Ngqeleni.

Balk (President):

This is an appeal from the judgment of a Bantu Affairs Com-Missioner's Court dismissing the summons, with costs, in an action in which the two plaintiffs (present appellants), in their capacities as natural guardians of their minor children, sued the two defendants (now respondents), jointly and severally, for R1,000 as damages for the unlawful killing of one Guyana Poswa who, they averred, was under a legal duty to support these children.

At the trail of the action in the Bantu Affairs Commissioner's Court the defendants' attorney *in limine* contended that the plaintiffs, who described themselves as Native widows in the summons, could not be cited as natural guardians of the children under Native law.

The Assistant Bantu Affairs Commissioner accepted this contention and dismissed the summons, with costs.

The appeal is brought on the ground, *inter alia,* that the Commissioner erred in dismissing the summons without hearing evidence.

As submitted by Mr. Airey in his argument on behalf of the appellants, the capacity of the plaintiffs to bring the instant action is dictated by the system of law, i.e. the common law or Native law and custom, finally applied by the Commissioner after considering all the evidence and argument as part of his eventual decision on the case so that it was not competent for him to have determined their *locus standi in judicio* without hearing any evidence and without the parties having closed their cases at he did, see *Nhlanhla versus Mokweno,* 1952, N.A.C. 286 (N.E.), at page 290, and *Mahashe versus Mahashe,* 1955, N.A.C. 149 (S), at page 152.

It should be added that the exceptions to this rule mentioned in *Nhlanhla's* case also have no application here and that the defendants' attorney before taking the point referred to above should have applied for an amendment to the defendants' plea to embody that point as required by Bantu Affairs Commissioners' Courts sub-rule 44 (1).

The appeal should accordingly be allowed, with costs, and the judgment of the Bantu Affairs Commissioner's Court should be set aside and the case remitted to that Court for trial to a conclusion on the evidence adduced by the parties and for a judgment thereon.

Yates and Maytham, Members, concurred.

For Appellant: Mr. F. G. Airey of Umtata.

For Respondent: Mr. K. W. A. Muggleston of Umtata.

SOUTHERN BANTU APPEAL COURT.

MOKHESI vs. NKENJANE.

N.A.C. CASE No. 15 OF 1962.

UMTATA: 27th September, 1962. Before Balk, President, Yates and Slier, Members of the Court.

CONFLICT OF LAWS.

Principles to be applied in determining which legal system to envoke.

Summary: This case had its inception in a Chief's Court in which the plaintiff sued the defendant and obtained judgment against him by default for six head of cattle and costs for abduction. An appeal from that judgment to the Bantu Affairs Commissioner's Court was dismissed, with costs.

It was manifest from the plaintiff's evidence in the Commissioner's Court that his claim was for the customary damages in respect of the abduction of his daughter, Susannah, by one Petros and that he had sued the defendant therefor as the latter had negotiated with him (plaintiff) through a messenger for the marriage of Susannah to his (defendant's) son to which he (plaintiff) had agreed provided dowry was paid for her, but Petros had, without paying dowry for her, abducted her and married her according to civil rites.

Held: That the allegations relied upon by the plaintiff as founding the alleged abduction did not at common law constitute this tort; for Petros' conduct in persuading the plaintiff's daughter, Susannah, who, according to the plaintiff, was then over 21 years of age, to leave the plaintiff's home against the latter's consent for the purpose of entering into a civil marriage with her is a course sanctioned by the common law; and to apply Native law and custom and hold that this conduct on Petros' part amounted to abduction was repugnant to the principles of public policy and, therefore, incompetent in terms of the first proviso to sub-section (1) of section *eleven* of the Native Administration Act, 1927, in that it would result in subjecting conduct sanctioned by the common law to a penalty. It followed that the Commissioner erred in applying Native law and should have applied common law with the result that the plaintiff was not entitled to succeed in his claim.

Cases referred to:

Sgatya versus Madleba, 1958, N.A.C. 53 (S).
Mbonjiwa versus Scellam, 1957, N.A.C. 41 (S).

Appeal from judgment of Bantu Affairs Commissioner's Court, Matatiele.

Balk (President):

This case had its inception in a Chief's Court in which the plaintiff sued the defendant and obtained judgment against him by default for six head of cattle and costs for abduction.

An appeal from that judgment to the Bantu Affairs Commissioner's Court was dismissed, with costs.

The appeal to this Court from the judgment of the Bantu Affairs Commissioner's Court is brought by the defendant on various grounds of which it is only necessary to consider the following:—

1. "That the judgment is against the weight of the evidence."
2. "The judgment of the Chief and of the Native Commissioner's Court on appeal are bad in law, *contra bonos mores* and contrary to public policy, in that they purport to place an unlawful, immoral and unwarrantable obstacle or bar in the way of lawful and honourable civil marriages between persons who are competent in law to contract such marriages and wish to do so."

The plaintiff's claim as recorded in the Chiefs' Court is that it is for abduction without any particulars thereof being given. This claim was not amplified in the Bantu Affairs Commissioner's Court as it was competent to do in terms of section 12 of the regulations for Chiefs' and Headmen's Civil Courts. It is manifest from the plaintiff's evidence in the Commissioner's Court, however, that his claim is for the customary damages in respect of the abduction of his daughter, Susannah, by one Petros Motsabi and that he had sued the defendant therefor as the latter had negotiated with him (plaintiff) through a messenger, viz., Mabusetsa, for the marriage of Susannah to his (defendant's) son to which he (plaintiff) had agreed provided dowry was paid for her, but Petros had without paying dowry for her abducted her and married her according to civil rites so that if the defendant was not the principal in the marriage negotiations he should have indicated who the principal was to permit of the latter being sued.

The plaintiff further stated in his evidence that he did not know whether Petros was the person referred to by the defendant as his son in the marriage negotiations, that the defendant had told him before he (plaintiff) became aware of the abduction that Susannah was at his (defendant's) kraal and that Petros had grown up there but had his own people. The defendant had, however,

refused to disclose their identity. The plaintiff also mentioned that the defendant had personally paid to him the sum of R20 as representing a horse in connection with the abduction and that thereafter he had received R16 from the Chief's Court which was said to have been paid by Petros who had stated he had been sent by the defendant who was ill.

The plaintiff's testimony as to the source of the payment of the R16, being hearsay is, as submitted by Mr. Airey in his argument on behalf of the appellant, inadmissible.

Mabusetsa in the course of his evidence for the defendant stated that the latter had sent him to the plaintiff to ask for his daughter's hand in marriage to Petros.

The Bantu Affairs Commissioner found, *inter alia* that the abduction had been admitted, that Petros was an inmate of the defendant's kraal so that the latter was liable for the former's delicts, that the defendant had ample opportunity to show that someone other than himself was liable and should be sued rather than himself but had failed to indicate any other person and that liability was seemingly admitted by the defendant by his payment of the R20 to the plaintiff when the defendant had reported the abduction of Susannah to him and by the payment to the Chief of the R16 on account of the judgment debt. The Commissioner applied Native law in deciding the case.

The allegations relied upon by the plaintiff as founding the alleged abduction do not at common law constitute this tort; for Petros' conduct in persuading the plaintiff's daughter, Susannah, who, according to the plaintiff, was then over 21 years of age, to leave the plaintiff's home against the latter's consent for the purpose of entering into a civil marriage with her is a course sanctioned by the common law; and to apply Native law and custom and hold that this conduct on Petros' part amounted to abduction is, as contended by Mr Airey, repugnant to the principles of public policy and, therefore, incompetent in terms of the first proviso to sub-section (1) of section *eleven* of the Native Administration Act, 1927 in that it would result in subjecting conduct sanctioned by the common law to a penalty, see *Sgatya versus Madleba,* 1958, N.A.C. 53 (S), and the authority cited in the first paragraph at page 56, i.e. *Mbonjiwa versus Scellam,* 1957, N.A.C. 41 (S).

It follows that the Commissioner erred in applying Native law and should have applied common law with the result that the plaintiff was not entitled to succeed in his claim.

It is perhaps as well to point out that the Bantu Affairs Commissioner's finding that the defendant was liable for Petros' delict was not warranted as neither the factors relied upon by the Commissioner nor any of the other evidence established that Petros was resident at the defendant's kraal when the alleged delict was committed; for the defendant's admission to the plaintiff that Petros had grown up at his kraal did not serve to prove that Petros was resident there at the time of the commission of the alleged abduction nor did the fact that Petros took his bride to the defendant's kraal and stayed there for a time do so as, on the evidence, it may well have been a visit, see *Mgoma versus Kulati and Another,* 1956, N.A.C. 198 (S), at page 202; and Mabusetsa's message to the plaintiff that the defendant had asked for Susannah in marriage to his (defendant's) son is hearsay and inadmissible against the defendant and there appear to be no other factors disclosed by the evidence which are relevant to this issue.

A further matter calling for comment is that it is not disclosed in the record whether application was made by the defendant, in terms of sub-section (3) of section 2 of the regulations for Chiefs'

and Headmen's Civil Courts, to the Chief's Court for rescission of its judgment which, as indicated above, was given by default. However that may be, the question whether an appeal lay from that judgment to the Bantu Affairs Commissioner's Court regard being had to the proviso to sub-section (1) of section 9 of the regulations was neither raised nor canvassed in that Court nor raised in this Court so that the matter does not call for consideration, see *Ntsabalala versus Piti,* 1956, N.A.C. 111 (S), at page 112. That proviso, it should be added, reads as follows:—

> "Provided that no appeal shall lie from a default judgment given by a Chief under sub-section (1) of section 2 unless and until an application for the rescission of such judgment has been refused."

In the result the appeal to this Court should be allowed, with costs, and the judgment of the Bantu Affairs Commissioner's Court altered to read as follows:—

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

Yates and Slier, Members, concurred.

For Appellant: Mr. F. G. Airey of Umtata.

For Respondent: In default.

SOUTHERN BANTU APPEAL COURT.

GEBASHE vs. CELE.

N.A.C. CASE No. 26 OF 1962.

UMTATA: 27th September, 1962. Before Balk, President, Yates and Slier, Members of the Court.

PRACTICE AND PROCEDURE.

Interpleader summons—necessity for service on both claimant and respondent.

Summary: In an application, in terms of Rule 22 of the Rules for Bantu Appeal Courts, for review of proceedings in a Bantu Affairs Commissioner's Court in an interpleader action, it was not disputed that the interpleader summons had not been served on the claimant.

Held: That as an interpleader summons is in terms of Bantu Affairs Commissioners' Court sub-rule 70 (2) sued out by the messenger of the court both the claimant and the respondent are "affected thereby" within the meaning of sub-rule 31 (3) so that the summons must be served on both.

Cases referred to:

Mandembu and Another versus Cetywa, 1956, N.A.C. 168 (S), at page 169.

Appeal from judgment of Bantu Affairs Commissioner's Court, Umzimkulu.

Balk (President):

This is an application in terms of rule 22 of this Court for review of the proceedings in a Bantu Affairs Commissioner's Court in an interpleader action in which the applicant was the claimant and the respondent the execution creditor and in which the two head of cattle claimed were declared to be executable by the Commissioner's Court.

According to the applicant's affidavit filed in support of his application he bases it on the ground of grave irregularity in that the interpleader summons was not served on him as a result of which he suffered prejudice.

The applicant also averred in his affidavit that—

(1) on the 25th March, 1960, on which he claimed the cattle, the messenger of the court informed him that he should return to Umzimkulu on the 14th June, 1961, and that he would then be taken to the Court by the messenger in order that he should confirm his statement that the two head of cattle claimed by him were his property and the messenger thereupon handed him a piece of paper with the date, the 14th June, 1961, recorded thereon;

(2) when the messenger informed him that he should be at Umzimkulu on the 14th June 1961, to confirm his statement that the two head of cattle were his property he did not understand that there would be a court case about the cattle and that he would be required to establish in court his claim to these cattle and required and entitled to call witnesses for that purpose; and

(3) on the 25th June, 1961, he was asked by the presiding judicial officer if he wanted to call witnesses and he replied in the negative because his witnesses were not present and he did not then appreciate the nature of the proceedings.

It is manifest from the record of the interpleader proceedings and the Assistant Bantu Affairs Commissioner's replying affidavit that the date "25th June, 1961," in sub-paragraph (3) above should read "14th June, 1962".

It is not disputed that the interpleader summons wat not served on the claimant as required by Bantu Affairs Commissioners' Courts sub-rule 70 (2) read with form No. 39 (2) referred to therein and sub-rules 31 (3) and (12) (*b*), the position being that as the interpleader summons is in terms of sub-rule 70 (2) sued out by the messenger of the court, both the claimant and the respondent are "affected thereby" within the meaning of sub-rule 31 (3) so that the summons must be served on both.

It is also manifest from the Commissioner's affidavit which was not disputed in these respects, that the claimant appeared at the hearing of the interpleader action on the 14th June, 1961, and did not then raise any objection or intimate to the Court that he did not understand the proceedings and that the Court asked him at the hearing whether he did not wish to call any witnesses, in particular the execution debtor to whom he alleged in his evidence he had *nqomaed* the cattle claimed by him, and that his reply was in the negative.

Mr. Muggleston in his argument on behalf of the applicant submitted that as the applicant had not appreciated the proceedings at the hearing of the interpleader action the applicant could not be held to have waived his right of objection arising from the fact that the interpleader summons had not been served on him and that such non-service resulted in substantial prejudice to the applicant in that it precluded him from preparing for the trial and having his witnesses present thereat.

But, as is manifest from the applicant's own affidavit he was aware of the fact that he was in a Court when the interpleader action was heard and it is inconceivable that he should not have realised the nature of the proceedings, i.e. that the interpleader action was being tried, when the presiding judicial officer asked him whether he wanted to call witnesses in particular the execution debtor to whom he alleged in the course of his evidence he had *nqomaed* the cattle claimed by him especially in the light of his reply in the negative for, had he not appreciated that the, hearing was a trial, he would surely have replied that he would bring his witnesses at the trial and not that he did not want them called at all. Moreover, it is apparent from the record of the interpleader action that the claimant was cross-examined anent his allegation that he had *nqomaed* the cattle to the execution debtor which together with the fact that the execution creditor

adduced evidence disputing the claimant's case, as is also apparent from the record, must have conveyed to him (claimant) that the interpleader action was then being tried particularly in view of the similarity in procedure in these respects in Native Courts.

In the circumstances it is difficult to escape the conclusion that the claimant well knew that the interpleader action was being tried at the hearing on the 14th June, 1961, so that Mr. Muggleston's submission to the contrary is untenable.

That being so and as the claimant allowed the hearing to proceed without objecting, it must be assumed that he waived his right to do so and the irregularity should, therefore, be regarded as cured, see *Mandembu and Another versus Cetywa,* 1956, N.A.C. 168 (S), at page 169. Moreover, as is evident from what has been said above, the claimant was accorded a full opportunity by the presiding judicial officer at the trial of the interpleader action of calling witnesses in support of his evidence but he declined to avail himself thereof so that it is apparent that the non-service on him of the interpleader summons did not result in any substantial prejudice to him and this irregularity becomes a mere technicality at this, the appeal stage and ought, therefore, to be condoned in terms of the proviso to section *fifteen* of the Native Administration Act, 1927, see *Jeni versus Xibantu,* 1961, N.A.C. 62 (S), at page 64.

As regards the applicant's allegation that he was told by the messenger of the court that he should appear on the 14th June, 1961, merely to confirm his statement that the two head of cattle were his property, the messenger in his replying affidavit states that on the 25th March, 1961, when he obtained the date for the trial, viz., the 14th June, 1961, from the clerk of the court, he carefully and clearly explained to the claimant that the interpleader action would be heard on that date and that he must attend court with his witnesses in order to prove that the cattle claimed by him were his property.

It is, however, unnecessary to refer this disputed issue to the Bantu Affairs Commissioner's Court for the taking of evidence and a finding thereon in terms of sub-rules 22 (5) and (6) of this Court as the application lends itself to decision on the documents presently before this Court as is apparent from what has been said above.

In the result the application should be refused, with costs.

Yates and Slier, Members, concurred.

For Applicant: Mr. K. W. A. Muggleston of Umtata.

For Respondent: Mr. F. G. Airey of Umtata.

SOUTHERN BANTU APPEAL COURT.

MSENGE vs. NDZUNGU.

N.A.C. CASE No. 19 OF 1962.

UMTATA: 19th September, 1962. Before Balk, President, Yates and Collen Members of Court.

NATIVE CUSTOM.

Kraalhead responsibility for torts of another falls to be fixed on basis of residence of tort-feasor at time tort committed—"residence" how determined.

Summary: This appeal was from the judgment of a Bantu Affairs Commissioner's Court for plaintiff as prayed with costs, in an action in which he sued the two defendants, jointly and severally, for five head of cattle or payment of their value, R200, as damages for the seduction of his daughter followed by her pregnancy. The first defendant

was cited as the tort-feasor and the second defendant as being liable on the ground that the first defendant was an inmate of his kraal when the seduction took place.

In his plea the second defendant (present appellant) denied that the first defendant was an inmate of his kraal at the time of the seduction although in his evidence, he admitted that the first defendant had no kraal of his own, that he was the first defendant's kraalhead and that at the time of the seduction he had control over him. It was, however, manifest from the evidence as a whole that the first defendant lived away from the second defendant's kraal in huts near the school where he taught, for some years prior to the seduction; that he was still living there when the seduction took place and that during this period he used to visit the second defendant's kraal at very irregular intervals over week-ends at one time the interval extended to over six months.

Held: That kraalhead liability for the torts of another fell to be fixed on the basis of the residence of the tort-feasor at the time of the commission of the tort with the question as to where he was then residing to be determined in accordance with the principles laid down in *Ex Parte* Minister of Native Affairs, 1941, A.D., 53, at page 58 to 60, so that in the absence of any special custom to the contrary a kraalhead is liable for another's tort if the latter was at the time of its commission residing at the kraalhead's kraal, otherwise not.

Cases referred to:

Mgoma versus Kulati and Ano., 1956, N.A.C. 198 (S), at page 202.
Ex Parte Minister of Native Affairs, 1941 (A.D.), 53.
Genge versus Funani, 1961, N.A.C. 33 (S) at page 34.
Motseoa versus Qungane, 1 N.A.C. (S.D.) 16, at page 17.
Penxa and Ano versus Fani, 1947, N.A.C. (C. & O.), 120

Appeal from judgment of Bantu Affairs Commissioner's Court, Umtata.

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 Bantu Affairs Commissioner's Court for plaintiff as prayed, with costs, in an action in which he sued the two defendants, jointly and severally, for five head of cattle or payment of their value, R200, as damages for the seduction of his daughter followed by her pregnancy. The first defendant was cited as the tort-feasor and the second defendant as being liable on the ground that the first defendant was an inmate of his kraal when the seduction took place.

With the leave of the Commissioner's Court the summons was amended by reducing the alternative value of the cattle claimed to R150 and by reducing the claim on this basis by R40 already paid.

In his plea the second defendant denied that the first defendant was an inmate of his kraal at the time of the seduction so that the onus of proof in this respect rested on the plaintiff.

The appeal is by the second defendant only and is brought on grounds which resolve themselves to this that the judgment is against the weight of the evidence and the probabilities of the case insofar as the Acting Additional Bantu Affairs Commissioner's finding that the plaintiff had discharged the onus, resting on him on the pleadings of proving that the second defendant was responsible for the tort in question, is concerned.

As submitted by Mr. Muggleston in his argument on behalf of the appellant and as conceded by Mr. Airey who appeared in this Court for the respondent, the plaintiff's testimony took the matter no further than that the first defendant lived away from the second defendant's kraal, i.e. in huts near the school at which he was a teacher. As also submitted by Mr. Muggleston and conceded by Mr. Airey, the evidence of the plaintiff's daughter for him that the first defendant went home to the second defendant's kraal during week-ends and holidays is inadmissible against the second defendant as it is based on admissions made verbally and in letters by the first defendant to her and is therefore hearsay insofar as the second defendant is concerned; and her evidence that she did not see the first defendant at times in the location in which he lived whilst teaching, is not probative of the fact that he was then at the second defendant's kraal as he may have been elsewhere. The second defendant, however, admitted in the course of his evidence that the first defendant whilst teaching used to spend week-ends at his (second defendant's) kraal at very irregular intervals and continued to do so until after the seduction, that the first defendant had no kraal of his own and that he (second defendant) regarded himself as the first defendant's kraalhead and had lost control over him only after the seduction.

The Commissioner relied in the main on the second defendant's admission that he regarded himself as the first defendant's kraalhead at the time of the seduction in finding that the first defendant was then an inmate of the second defendant's kraal and that the latter was, therefore, also liable for damages for the seduction. In arriving at that finding the Commissioner also relied on the evidence of the plaintiff's daughter including the letters written to her by the first defendant which were put in but, for the reasons given above, he erred in so doing. This aspect is, however of no moment in view of the admissions by the second defendant referred to above.

It is manifest from the evidence as a whole that the first defendant lived away from the second defendant's kraal in huts near the school at which he taught, for some years prior to the seduction that he was still living there when the seduction took place and that during this period he used to visit the second defendant's kraal at very irregular intervals over week-ends, at one time the interval extending to over six months. It follows that, as contended by Mr, Muggleston, the first defendant was at the time of the seduction residing away from the second defendant's kraal, the first defendant's visits to the second defendant's kraal not effecting this position, see *Mgoma versus Kulati and Ano.,* 1956, N.A.C. 198 (S), at page 202, and the authority there cited, viz., *Ex Parte Minister of Native Affairs,* 1941 (A.D.) 53, so that the first defendant could not be regarded as an inmate of the second defendant's kraal for the purposes of fixing kraalhead responsibility on the second defendant for the seduction. It is true that, as stressed by Mr. Airey, the second defendant admitted that the first defendant at the time of the seduction had no kraal of his own, that he was the first defendant's kraalhead and that at the time of the seduction he had control over him. But, as contended by Mr. Muggleston, it is not these factors but the place where the tort-feasor was residing at the time of the commission of the tort that is the criterion in fixing kraalhead responsibility for the tort seeing that the principle underlying this custom is the obligation of a kraalhead to exercise control over the inmates of his kraal which is only possible if they are residing there, see *Mgoma's* case (*supra*) at page 202 and *Genge versus Funani,* 1961, N.A.C. 33 (S), at page 34 cited by Mr. Muggleston. Admittedly, in *Mgoma's* case the Native assessors stated that kraalhead responsibility for the tort of a son continued whilst the son was away at work if he had no kraal of his own. But, as was conceded by one of his assessors, the custom obtained before employment of sons away from their home kraals was in vogue.

That being so and in view of the underlying principle set out above, kraalhead responsibility for torts falls to be fixed on the basis of the place at which the tort-feasor was residing at the time he committed the tort with the question as to where he was residing at the time to be determined in the manner indicated in *Ex Parte Minister of Native Affairs,* 1941 (A.D.) 53, at pages 58 to 60, as this course appears to be the fairest criterion in the light of the impact on the custom of migrant labour conditions. Therefore, if the tort-feasor was at the time of the commission of the tort residing at the kraalhead's kraal, the latter is also liable for damages for the tort but otherwise not, except of course where some special custom obtains as, for example, amongst the Pondos where a kraalhead can evade liability for the tort of an inmate who is not his son by giving the latter an *mgqabo* beast and instructing him to go to his own people, see *Motseoa versus Qungane,* 1 N.A.C. (S.D.) 16, at page 17.

It is perhaps as well to point out that the instant case is distinguishable from *Penxa and Ano. versus Fani,* 1947, N.A.C. (C. & O.) 120 as there is nothing here to indicate that the first defendant's stay away from the second defendant's kraal at the hut near the school where he was employed, was of such a temporary nature as to justify an inference that the first defendant's place of residence was at the second defandant's kraal. On the contrary, the fact that the first defendant had already lived at those huts for some years when the seduction took place and had not kept his clothing or property at the second defendant's kraal since prior to the seduction, as is manifest from the second defendant's uncontroverted evidence in this respect, coupled with the fact that the first defendant only visited the second defendant's kraal and then at very irregular intervals during the period showed that he was residing away from the second defendant's kraal at the time of the seduction.

Consequently, the first defendant cannot be regarded as having been an inmate of the second defendant's kraal when the seduction took place so that the latter is not liable for damages for the seduction.

It is also perhaps as well to add that, as submitted by Mr. Muggleston and conceded by Mr. Airey, the plaintiff's allegation in his evidence that the second defendant paid part of the damages to him and undertook to see him personally in regard to the balance, does not assist him, as not only is the allegation founded on hearsay and controverted by the evidence of his own witness, Dlangilanga, but it is apparent from the summons and the plaintiff's evidence that he did not rely on this aspect of the case.

In the result the appeal should be allowed, with costs, and the judgment of the Bantu Affairs Commissioner's Court altered to read as follows:—

> "Judgment by default for plaintiff as prayed with costs, as against the first defendant. As against the second defendant, for second defendant, with costs."

Yates and Collen, Members, concurred.

For Appellant: Mr. K. W. A. Muggleston of Umtata.

For Respondent: Mr. F. G. Airey of Umtata.

SOUTHERN BANTU APPEAL COURT.

MTSHOTANA vs. NGONYAMA.

N.A.C. CASE No. 32 OF 1962.

UMTATA: 18th September, 1962. Before Balk, President, Yates and Fourie, Members of the Court.

PRACTICE AND PROCEDURE.

Default judgment—rescission of—whether default wilful.

Summary: This was an appeal by the applicant from the judgment of a Bantu Affairs Commissioner's Court dismissing an application for rescission of a default judgment which was granted after the Court had been informed by applicant's (then defendant's) attorney that he had notified his client by letter of the date of set down of the case and could not explain his non-appearance.

In his affidavit in support of his application for rescission of the judgment the applicant stated that on receipt of the summons he had instructed his attorney to enter an appearance to defend and thereafter had awaited notification of the date of hearing. He denied that he had received a letter from his attorney advising him of the date of hearing of the case and only became aware that the case had come before Court after he had been notified of the default judgment. He submitted that consequently he had not been in wilful default. A period of over a year had elapsed between the time that the applicant had instructed his attorney to defend the action and the time he had received the letter from his attorney advising him of the default judgment. From the evidence it was apparent that the applicant was illiterate.

Held: That applicant's inaction over a lengthy period extending to over a year and dating from the time he instructed his attorney to defend the action to the time he received the letter from him advising him of the default judgment could not be regarded as wilful default bearing in mind that he was awaiting notification of the date of the trial of the action from his attorney during this period and that he was an illiterate Native and would therefore have the outlook of such a person and would rely wholly on his attorney and be content to await notification from him. For the same reason his inaction could not be regarded as negligence sufficient to debar him from the relief sought.

Cases referred to:

Silber versus Ozen Wholesalers (Pty.), Ltd., 1954 (2) S.A. 345 (A.D.), at pages 352 and 353.

Appeal from judgment of Bantu Affairs Commissioner's Court, Mqanduli.

Balk (President):

This is an appeal from the judgment of a Bantu Affairs Commissioner's Court dismissing, with costs, an application for rescission of a default judgment given against the applicant, then defendant, in his absence on the date on which the case was set down for trial.

The appeal is brought by the applicant on the ground that it is against the weight of the evidence and the probabilities of the case.

According to his reasons for judgment, the Additional Assistant Bantu Affairs Commissioner dismissed the application on the ground that the applicant had been in wilful default, accepting the evidence of the respondent's witness, Nontwanazana, that she had read to the applicant some months before the date fixed for the trial of the action on which the default judgment was given, a letter from his attorney notifying him of this date. The Commissioner also held that the applicant's inaction over the lengthy period of over a year which elapsed between the time he instructed his attorney to defend the action and the time he received the letter from his attorney advising him of the default judgment indicated that he was in wilful default.

The Commissioner states in his reason for judgment that Nontwanazana gave the Court the impression that she was truthful and that there was no reason to disbelieve her evidence as she remained unshaken. But, as pointed out by Mr. Muggleston in his argument on behalf of the appellant, the Commissioner appears to have lost sight of the inconsistency in Nontwanazana's evidence as to whether she was still at the applicant's kraal when she made the affidavit in connection with the application and gave evidence at the hearing thereof. This inconsistency is significant as it suggests that she tried to mislead the Court by creating the impression that she was impartial although she was the respondent's daughter and the action concerned the delivery of dowry for her, and is accentuated by her eventual admission in cross-examination that she had left the applicant's kraal because of mutual dislike over a period dating back to long before the default judgment was given against the applicant.

Then, as also pointed out by Mr. Muggleston, there are blatant inconsistencies in Nontwanazana's evidence as to when she stayed at the applicant's kraal.

The Commissioner passed no strictures on the applicant's demeanour nor mentioned any improbabilities in his evidence other than that it was strange that the applicant should have received his attorney's letter advising him of he default judgment but not the one notifying him of the date of the trial of the action on which that judgment was given. Whilst it is true that one would expect that the applicant would have received the last-mentioned letter in the ordinary course of events, the probabilities nevertheless favour his version that he did not in fact receive it as will be apparent from what follows. In the first place his evidence generally has the impress of truth and in particular as he did not hesitate to admit that Nontwanazana was at his kraal during October, 1961, when his attorney's letter notifying him of the date of the trial of the action was posted; nor did he hesitate to admit that Nontwanazana had read the summons in the action to him. Then, as stressed by Mr. Muggleston, it is highly improbable that the applicant would not have appeared at the trial of the action if he had received the letter from his attorney notifying him of the date of this trial as his conduct throughout indicates that he wished to defend the action seeing that he arranged with his attorney for it to be defended shortly after he had received the summons and approached his attorney again to apply for the rescission of the default judgment on receiving the letter from him advising him thereof.

It follows that the Commissioner erred in finding on Nontwanazana's evidence that the applicant had been in wilful default.

Admittedly, as pointed out by the Commissioner, the applicant does not appear to have approached his attorney after arranging with him for the defence of the action until he received the letter advising him of the default judgment and that the intervening period was a lengthy one extending to over a year. But, as pointed out by Mr. Muggleston, it is manifest from the applicant's affidavit filed in support of the application that he was then awaiting notification from his attorney of the date of the hearing of the action. Bearing this in mind and that the applicant is, according to the evidence, an illiterate Native and would therefor have the outlook of such a person and would rely wholly on his attorney and be content to await notification from him, his inaction cannot be construed as an indication that he was in wilful default as was properly conceded by Mr. Airey in the course of his argument for respondent. Consequently, the Commissioner also erred in holding that the applicant was in wilful default on this score. For the same reason the applicant's inaction cannot be regarded as negligence sufficient to debar him from the relief sought. That being so and as it is clear from the applicant's supporting affidavit that he has a substantial defence, he showed " good cause " as required by sub-rule 74 (5) of the

rules for Bantu Affairs Commissioners' Courts so that the application for rescission of the default judgment ought to have been granted by the Commissioner, see *Silber versus Ozen Wholesalers (Pty.), Ltd.*, 1954 (2) S.A. 345 (A.D.), at pages 352 and 353.

In the result the appeal should be allowed, with costs, and the judgment of the Bantu Affairs Commissioner's Court altered to read—

> "The application for rescission of the default judgment is granted, with costs, leaving it to the plaintiff or defendant to set down the case for hearing afresh in terms of Bantu Affairs Commissioners' Courts rule 52."

Yates and Fourie, Members, concurred.

For Appellant: Mr. K. Muggleston of Umtata.

For Respondent: Mr. F. G. Airey of Umtata.

SOUTHERN BANTU APPEAL COURT.

DUMEZWENI vs. MONYE.

N.A.C. CASE No. 10 OF 1962.

UMTATA: 26th September, 1962. Before Balk, President, Yates and Slier, Members of the Court.

NATIVE LAW AND CUSTOM.

Dowry—widow given by her people in second customary union—late husband's heir entitled to refund of dowry paid in respect of first union. Onus on person to whom dowry cattle paid to establish that such cattle accounted for to "dowry eater"—requirements in accounting for such cattle where "dowry eater" a minor and latter's guardian absent at time of payment. Deductions from dowry returnable dictated by number of children born of union.

PRACTICE AND PROCEDURE.

Presiding judicial officers—designation of Native Commissioner altered to Bantu Affairs Commissioner by Act No. 46 of 1962.

Summary: Plaintiff (present appellant) unsuccessfully sued defendant (now respondent) in a Bantu Affairs Commissioner's Court for the return of six head of dowry cattle or their value, R240. In his particulars of claim the plaintiff averred, *inter alia,* that he was the father and heir by Native Custom of the late Mvoco Nocese; that he (plaintiff) provided the late Mvoco with a wife, Nofundile, daughter of the late Mininye Monye, and in respect of such customary union paid to defendant dowry to the extent of eight head of cattle; that there had been two issue of this union neither of whom survives; that since the death of Mvoco defendant had again given Nofundile in marriage, thereby entitling Mvoco's heir to the return of six head of dowry cattle. In his plea defendant admitted having received the dowry in question but submitted that he had done so on account of and on behalf of one Ranisi the heir of the late Mininye and duly accounted to him therefor. He submitted further that there were three children born of the union between Nofundile and the late Mvoco.

In the course of his evidence the defendant averred that he had placed the dowry cattle in question at the kraal of the late Mininye, with the latter's widow, Nosenisi, and had by letter advised his (defendant's) elder brother, Mnyandu, who was the gaurdian of Mininye's heir, Ranisi, a minor, that he had done so, but received no reply. It was manifest from the defendant's evidence that Ranisi lived not at the kraal of the late Mininye but at the kraal of his (Ranisi's) late father, Ntondini, where the dowry was paid.

Held: That as it was common cause that Nofundile was given in a second customary union, the plaintiff was entitled as heir of his late son who was her partner in her first customary union, to a refund of the dowry cattle paid for her to the defendant in respect of her first union less the customary deductions for the children she had.

Held further: That the onus was on the defendant to establish that he had in fact accounted for the dowry cattle paid to him to the "dowry eater", Ranisi.

Held further: That according to Native law and custom the defendant should have placed the dowry cattle at Ranisi's kraal, i.e. at the late Ntondini's kraal, in the absence of authority from Ranisi's guardian, Mnyandu, to place them at the late Mininye's kraal with the latter's widow, Nosenisi. The fact that the defendant had advised Mnyandu by letter that he had placed the dowry cattle with Nosenisi at the late Mininye's kraal did not absolve him from liability for the return of the dowry cattle to the plaintiff as it could not be regarded as a proper accounting for the cattle to Mnyandu, the guardian of the "dowry eater", Ranisi, in that there was nothing to show that Myandu had received the letter mentioned by the defendant. On the contrary, there were these factors, viz., (1) that Mnyandu never replied to the defendant; (2) that, according to the defendant's evidence in cross- examination, which incidentally, was in conflict with his evidence in chief in this respect, Mnyandu returned after Nofundile's customary union in respect of which the dowry cattle were paid; and (3) that there was nothing to show that Mnyandu acknowledged receipt of the letter from the defendant nor that he had ratified the placing of the cattle with Nosenisi, which all went to show that the defendant had not accounted for the cattle to the "dowry-eater".

Held furher: That the instant case was distinguishable from that of *Dlumti versus Sikade,* 1947, N.A.C. (C. & O.) 47, relied upon by the attorney for the respondent in putting forward his contention that the defendant had properly delivered the cattle to Nosenisi as there was no-one else to whom he could have delivered them at the time as Ranisi and Mnyandu were then away at work and as Nosenisi required the cattle for her support. In the former case the identity of the "dowry-eater" was in doubt and the widow with whom the dowry cattle were placed by the defendant appeared to have been entitled to their possession for her support whereas in the instant case the identity and kraal of the dowry-eater as well as the identity and whereabouts of the latter's guardian were known and the widow, Nosenisi had, at the time of the delivery of the dowry cattle, other cattle for her support viz., cattle which had belonged to her late husband Mininye, as was evident from her testimony for the defendant; and there was nothing to suggest that she could not have subsisted on the cattle which had belonged to her late husband. On the contrary, her admission in the course of her evidence that the dowry cattle had died and that she was making an effort to repay Ranisi for them indicated clearly that she had no need of them for her support and that the defendant had no right to place them with her for, had she required those cattle for that purpose or had the defendant had the right to place them with her, she would not, in accordance with Native law and custom, have been liable for the cattle. The defendant being Ranisi's paternal male relative next senior to Mnyandu and as such the "eye" of Ranisi's kraal during Mnyandu's absence should in the circumstances have placed the dowry cattle at that kraal and arranged for them to be looked after there.

Held further: That the number of dowry cattle returnable to the plaintiff was dictated by the number of children born to Nofundile, in that one head was, in accordance with custom, deductable for each child born.

Per curiam: " It is perhaps as well to add that in view of the provisions of section *sixteen* of the Act No. 46 of 1962, the correct designation of Native Commissioner is now Bantu Affairs Commissioner and must be strictly adhered to in all proceedings in civil cases between Natives."

Cases referred to:

Dlumti versus Sikade, 1947, N.A.C. (C. & O.) 47.

Appeal from judgment of Bantu Affairs Commissioner's Court, Kentani.

Balk (President):

This is an appeal from the judgment of a Bantu Affairs Commissioner's Court for defendant (now respondent) in an action in which he was sued by the plaintiff (present appellant) for the return of six head of dowry cattle or their value, R240.

In the particulars of claim in the summons, the plaintiff averred that—

" 1. The parties are Natives as defined by Act 38 of 1927, Gaikas, conform to Native Custom and are subject to this Court's jurisdiction.

2. Plaintiff is the father and heir by Native Custom of the late Mvoco Nocese who left no son.

3. Plaintiff provided the late Mvoco Nocese with a wife by Native custom, namely Nofundile daughter of the late Mininye Monye, and in respect of such customary union paid to the defendant dowry of eight head of cattle of average value £20 (now R40) each.

4. There has been issue of the said union two children neither of whom survives.

5. Since the death of Mvoco Nocese defendant has again given Nofundile in marriage thereby entitling Mvoco's heir to the return of six head of the dowry cattle, which though duly demanded, defendant neglects and omits and/or refuses to return."

The defendant pleaded as follows:—

" 1. Defendant admits paragraph 1 and 2 of plaintiff's particulars of claim.

2. Defendant admits that the late Mvoco Nocese was provided with a wife by plaintiff and that the wife was the daughter of the late Mininye Monye and admits that he, defendant, received the dowry on account of, and on behalf of the heir Ranisi, of the late Mininye Monye, and duly accounted to him therefor.

3. Defendant denies that he is the heir of the late Mininye Monye and states that the heir is the said Ranisi Ntondini. Defendant also denies that he acted as a dowry holder, as the dowry was immediately on payment placed at the kraal of Ranisi Ntondini who was away at the time.

4. Without in any way admitting liability defendant avers in reply to paragraph 4 that there were three children born of the union.

5. In reply to paragraph 5 defendant knows that the said girl, Nofundile has again been given in marriage, but again he received no dowry or benefit therefrom."

The appeal is brought on the ground that the defendant failled to discharge on a balance of probabilities the onus resting on him of proving that he had accounted for the dowry cattle paid to him by the plaintiff for Nofundile to the person entitled thereto, i.e. to the " dowry-eater ".

As it is common cause that Nofundile was given in a second customary union, the plaintiff is entitled as heir of his late son who was her partner in her first customary union, to a refund of the dowry cattle paid for her to the defendant in respect of her first union less the customary deductions for the children she had so that the appeal resolves itself in the first place to the question raised in the ground of appeal viz., whether the defendant had established that he had in fact accounted for those cattle to the " dowry-eater ", Ranisi, the onus of proof of which rested on him, see *Dlumti versus Sikade,* 1947, N.A.C. (C. & O.) 47.

The defendant's version according to his evidence, is that he had placed the dowry cattle in question at the kraal of the late Mininye, the father of Nofundile, with Mininye's widow, Nosenisi, and had by letter advised his (defendant's) elder brother, Nnyandu, who was the guardian of Mininye's nephew and heir, Ranisi, a minor, that he had done so but received no reply.

As is manifest from the evidence for defendant, Ranisi lived not at the kraal of the late Mininye but at the kraal of his (Ranisi's) late father Ntondini, when the dowry was paid so that, according to Native law and custom, the defendant should have placed the dowry cattle at Ranisi's kraal, i.e. at the late Ntondini s kraal, in the absence of authority from Ranisi's guardian, Mnyandu, to place them at the late Mininye's kraal with the latter's widow, Nosenisi, as submitted by Mr. Airey in his argument on behalf of the appellant. The fact that the defendant had advised Mnyandu by letter that he had placed the dowry cattle with Nosenisi at the late Mininye's kraal does not, as also submitted by Mr. Airey, absolve him from liability for the return of the dowry cattle to the plaintiff as it cannot be regarded as a proper accounting for the cattle to Mnyandu, the guardian of the " dowry-eater ", Ranisi, in that there is nothing to show that Mnyandu received the letter mentioned by the defendant. On the contrary there are these factors, viz., (1) that Mnyandu never replied to the defendant; (2) that, according to the defendant's evidence in cross-examination, which, incidentally, is in conflict with his evidence in chief in this respect, Mnyandu returned after Nufundile's customary union in respect of which the dowry cattle were paid; and (3) that there is nothing to show that Mnyandu acknowledged receipt of the letter from the defendant nor that he ratified the placing of the cattle with Nosenisi, which all go to show that the defendant has not accounted for the cattle to the " dowry-eater ".

Mr. Knopf in his argument for the respondent contended that the defendant had properly delivered the cattle to Nosenisi as there was no-one else to whom he could have delivered them at the time as Ranisi and Nnyandu were then away at work and as Nosenisi required the cattle for her support. In putting forward this contention Mr. Knopf relied on *Dlumti's* case (*supra*), at page 48. But the instant case is distinguishable from that case as there the identity of the " dowry-eater " was in doubt and the widow with whom the dowry cattle were placed by the defendant, appears to have been entitled to their possession for her support whereas here the identity and kraal of the " dowry-eater " as well as the identity and whereabouts of the latter's guardian were known and the widow, Nosenisi, had, at the time of the delivery of the dowry cattle, other cattle for her support, viz. cattle which had belonged to her late husband, Mininye, as is evident from her testimony for the defendant; and there is nothing to suggest that she could not have subsisted on the cattle which had belonged

to her late husband. On the contrary, her admission in the course of her evidence that the dowry cattle had died and that she was making an effort to repay Ranisi for them indicated clearly that she had no need of them for her support and that the defendant had no right to place them with her for, had se required those cattle for that purpose or had the defendant had the right to place them with her, she would not, in accordance with Native law and custom, have been liable for the cattle. The defendant being Ranisi's paternal male relative next senior to Mnyandu and as such the "eye" of Ranisi's kraal during Mnyandu's absence should in the circumstances have placed the dowry cattle at that kraal and arranged for them to be looked after there. In this connection it is significant that the defendant alleged in paragraph 3 of his plea that the dowry was immediatly on payment placed at Ranisi's kraal which is not borne out by the evidence adduced by him as is apparent from what has been stated above.

It follows that the Assistant Bantu Affairs Commissioner erred in holding that the dowry cattle had been delivered to Nosenisi in accordance with custom and that the defendant's letter to Mnyandu absolved him from liability in the instant case.

Unfortunately, the disputed issue as regards the number of children born to Nofunile raised by the pleadings, which dicates the number of dowry cattle returnable by the defendant to the plaintiff in that one head is, in accordance with custom, deductable for each child born, was not convassed in the Bantu Affairs Commissioner's Court so that the case has to be remitted to that Court for a finding on that issue and for judgment for the plaintiff in the light therof. It should be added that it is common cause that eight head of cattle were paid to the defendant in respect of the dowry in question.

In the result the appeal should be allowed, with costs, and the judgement of the Bantu Affairs Commissioner's Court should be set aside and the case remitted to that Court for judgment for plaintiff for the number of cattle returnable to him, i.e. eight head less the deductions at the rate of one head per child based on the number of children which Nofundile had, to be determined by the Commissioner's Court on such evidence as may be adduced by the parties on this disputed issue, and costs.

A further matter calls for comment and that is that the presiding judicial officer signed the judgment and the proceedings in the instant case as Assistant Magistrate instead of as Assistant Native Commissioner as he ought to have done. However, he signed the certificate of record and his reasons for judgment as Assistant Native Commissioner and all the process and the cover of the case is headed "In the Native Commissioner's Court" so that following the dicision in *Mgoboza versus Ndlela*, 1962 (1) P.H., R.11 (S.N.A.C.), it must be accepted that he tried the case in his capacity as Assistant Native Commissioner and that his signature over the designation "Assistant Magistrate" was inadvertent. It is perhaps as well to add that in view of the provisions of section *sixteen* of Act No. 46 of 1962, the correct designation of Native Commissioner is now Bantu Affairs Commissioner and must be strictly adhered to in all proceedings in civil cases between Natives.

Yates and Slier, Members, concurred.

For Appellant: Mr. F. G. Airey of Umtata.

For Respondent: Mr. R. Knopf of Umtata.

SOUTHERN BANTU APPEAL COURT.

BATYI, d.a. vs. NONGCULA and ANO.

N.A.C. CASE No. 22 OF 1962.

UMTATA: 19th September, 1962. Before Balk, President, Yates and Collen, Members of the Court.

NATIVE CUSTOM.

Seduction and pregnancy—proof of intimacy prior to that relied upon in summons—admissible when damages claimed on customary scale pertaining to pregnancy—onus then on alleged tort-feasor to show that he not responsible for pregnancy.

Summary: This was an action for damages for seduction and pregnancy brought by the seduced girl's minor brother, duly assisted, against the two defendants, citing the first defendant as tort-feasor and the second defendant as being liable for the torts of the first who was his unmarried son. In the particulars of claim in the summons the girl, Momsa, was alleged to have been seduced and rendered pregnant by the first defendant in or about the middle and end of October, 1960, whereas according to Nomsa's evidence for the plaintiff the first defendant first had sexual intercourse with her in September, 1960, on the occasion of a wedding party and again on the 19th October, 1960, as a result of which she fell pregnant and give birth to a child on the 12th July, 1961.

The first defendant in his evidence denied that he had seen Nomsa in September, 1960, but the plaintiff's sister bore out Nomsa that the first defendant had been with her at the wedding party during that month.

Plaintiff's claim was for five head of cattle or their value, R100.

Held: That in a claim for damages for seduction and pregnancy brought under Native law and custom proof of intimacy at a time prior to that relied upon in the summons as having caused the pregnancy is relevant and admissible where damages claimed according to customary scale pertaining to pregnancy even thought such prior intimacy was not mentioned in the particulars of claim in the summons.

Held further: That on proof of such prior intimacy the onus was on alleged tort-feasor to show that he was not responsible for the pregnancy if he wished to escape liability.

Cases referred to:

Maphanga versus Koza and Another, 1 N.A.C. (S.D.) 204.
Ngcobondwana versus Gagela, 1958, N.A.C. 33 (S), at page 35.
Bacela versus Mbontsi, 1956, N.A.C. 61 (S), at page 68.

Appeal from judgment of Bantu Affairs Commissioner's Court, Tsolo.

Balk (President):

This is an appeal from the judgment of a Bantu Affairs Commissioner's Court decreeing absolution from the instance, with costs, in an action in which the plaintiff (present appellant), duly assisted, sued the two defendants (now respondents), jointly and severally, for five head of cattle or their value R100, as damages for the seduction and pregnancy of his sister, Nomsa. The first defendant was cited as tort-feasor and the second defendant as being liable for the torts of the first defendant who is his unmarried son.

In their plea the defendants admitted that the second defendant was liable for the first defendant's torts but denied that the latter had seduced and rendered Nomsa pregnant.

The appeal is brought on fact and on the ground that there was sufficient corroboration of Nomsa's evidence in regard to her intimacy with the first defendant.

In the particulars of claim in his summons the plaintiff averred that it was in or about the middle and end of October 1960, that the first defendant seduced Nomsa and rendered her pregnant but, according to her evidence for the plaintiff, the first defendant first had sexual intercourse with her in September, 1960, on the occasion of a wedding party at the kraal of one, Walaza, at Mbuto, and again on the 19th October, 1960, as a result of which she fell pregnant and gave birth to a child on 12th July, 1961. She also testified that she had slept at Umtata on Saturday, the 29th October, 1960, when the first defendant was stationed there but she did not state that she was then again intimate with him.

The first defendant in his evidence denied that he had seen Nomsa in September, 1960, but the plaintiff's witness, Nombulelo bears out Nomsa that the first defendant was with her at the wedding party during that month.

It is manifest that the Acting Bantu Affairs Commissioner did not take into account the alleged intimacy on this occasion as he does not mention it nor does he mention Nombulelo in his reasons for judgment.

The latter's evidence bears the impress of truth being consistent and according with Nomsa's evidence in regard to this incident. Moreover, Nombulelo did not hesitate to state that she had no knowledge of intimacy between Nomsa and the first defendant as she had only seen him arrive at the kraal at which they lived where she left him and Nomsa on going to the wedding party and that she later saw him with Nomsa at that party.

Mr. Airey, in his argument for the respondent, attacked Nombulelo's evidence, submitting that it was a fabrication, on the ground of her admission under cross-examination that she had been told that the wedding party had taken place in September, 1960. But this admission may well have amounted to no more than that the wedding party was referred to as the one that had taken place in September, 1960, when she was told by her grandfather that she was required as a witness in the instant case so that it cannot be said to detract from her credibility.

To my mind, her testimony ought to have been accepted by the Commissioner particularly as the only evidence to the contrary is that of the first defendant and his letter (Exhibit " B ") is, as submitted by Mr. Muggleston in his argument on behalf of the appellant, more consistent with Nomsa's evidence than his own in that he would hardly have stated in that letter that he had arrived safely in the Transvaal without more if, as he would have the Court believe, he had not seen her to tell her about his transfer to the Transvaal from Umtata particularly having regard to his admission that he had then been in love with Nomsa. Again, as also submitted by Mr. Muggleston, the first defendant's evidence that the Sunday referred to in his letter (Exhibit " B ") was the Sunday on which Nomsa travelled to East London is improbable in the light of his letter (Exhibit " A ") advising her that the bus for East London left on Saturday morning in response to a letter from her in this respect and having regard to Nomsa's evidence that the Sunday on which she travelled was the 30th October, 1960, when she returned to Mbuto after having spent the night at Umtata.

I follows that the plaintiff established that the first defendant had sexual intercourse with Nomsa in September, 1960.

I accept Mr. Muggleston's contention that the evidence in regard to the first defendant's having had sexual intercourse with Nomsa in September, 1960, is both relevant and admissible even though it is not mentioned in the summons as the claim is, in accordance with Native law and custom, based on Nomsa's having been rendered pregnant and not on her loss of virginity in that it is for five head of cattle which is the Native customary scale pertaining to a first pregnancy and not to loss of virginity; and as Nomsa fell pregnant during October, 1960, giving birth to her child on the 12th July, 1961, the fact that it was established that the first defendant had sexual intercourse wih her in September, 1960, placed on him the onus of showing that he did not render her pregnant if he wished to escape liability, see *Maphanga versus Koza and Another,* 1 N.A.C. (S.D.) 204, *Ngcobondwana versus Gagela,* 1958, N.A.C. 33 (S), at page 35, and *Bacela versus Mbontsi,* 1956, N.A.C. 61 (S) at page 68 cited in *Ngcobondwana's* case. This disposes of Mr. Airey's contention to the contrary in this respect.

Mr. Airey laid stress on the fact that under cross-examination, Nomsa had admitted that she could not have had intercourse with a man on the 19th October, 1960, because she would still be menstruating. But it is manifest from her evidence in chief and on re-examination that she did in fact have sexual inercourse with the first defendant on that date and that her statement under cross-examination was promted by confused thinking following questions as to when she had menstruated in the months preceding October, 1960.

As submitted by Mr. Muggleston, the Commissioner was not justified in doubting Nomsa's version on the ground that she did not explain why Nokwayiyo whom she stated had accompanied her at her request on the 19th October, 1960, to the Police Camp at Umtata where they found the first defendant, and who was not called as a witness by the plaintiff, should be hostile to her as it may well be that she was unaware of the reason for the hostility particularly as she explained that Nokwayiyo was not a friend of hers.

As also submitted by Mr. Muggleston, the Commissioner should not have held against Nomsa her statement in her letter (Exhibit "C") that she was a prostitute as it is obvious from the tone of the letter that this statement was prompted by irony.

It follows that Nomsa's evidence is to be preferred to that of the first defendant so that the latter failed to discharge the onus of proving that he had not rendered Nomsa pregnant and the plaintiff is, therefore, entitled to judgment as prayed.

The appeal should accordingly be allowed, with costs, and the judgment of the Bantu Affairs Commissioner's Court altered to one for plaintiff as prayed, with costs.

Yates and Collen, Members, concurred.

For Appellant: Mr. K. W. A. Muggleston of Umtata.

For Respondent: Mr. F. G. Airey of Umtata.

SOUTHERN BANTU APPEAL COURT.

BABA vs. LEMBESE and ANO.

N.A.C. CASE No. 3 OF 1962.

UMTATA: 20th September, 1962. Before Balk President, Yates and Collen, Members of the Court.

PRACTICE AND PROCEDURE.

Inspection in loco—necessity for presiding judicial officer to record findings as regards his observations—if not recorded such findings cannot be relied upon by court.

Summary: This case involved a dispute between the parties in regard to the ownership of certain cattle. The Bantu Affairs Commissioner examined the earmarks of the cattle in question at an inspection *in loco* but did not record his findings in regard to certain alterations on which he based his conclusions as set out in his reasons for judgment, i.e. " that where earmarks have been altered the latest alleged cut appears whiter and shows no growth of hair ".

Held: That the Bantu Affairs Commissioner ought to have recorded his findings on his inspection *in loco* of the earmarks of the cattle as regards his observations on which he based his conclusion that there were alterations in the earmarks and that as he did not do so and as those findings conflicted with evidence of expert witnesses in this regard, the Court was not entitled to rely thereon.

Appeal from judgment of Bantu Affairs Commissioner's Court, Engcobo.

Yates (Permanent Member):

This is an appeal from a Bantu Affairs Commissioner's Court against the judgment for plaintiffs (present respondents), with costs, in an action in which they sued defendant (present appellant) for the return of an *mtuqwa* ox and a red ox or their value, R50 each, alleging that the cattle had been unlawfully removed from their possession in the Glen Grey district and were subsequently found in the possession of defendant.

The defendant admitted being in possession of two beasts of that description but states that they were his own bona fide property and had never belonged to the plaintiffs.

The appeal is brought against this judgment on grounds which amount to this that it is against the weight of evidence and the probabilities of the case.

The Bantu Affairs Commissioner has stated in his reasons for judgment that the Bantu are traditionally cattle farmers and can be expected to identify their cattle by their general appearance. In this case, however, both sides are equally emphatic that the cattle in despute are theirs so that it becomes necessary to scrutinise their evidence, and particularly that of the witnesses for plaintiffs on whom the onus of proof rests, in some detail.

In regard to the *mtuqwa* beast plaintiff No. 1, Motolo Lembese, identified it as his and in this he was supported by two other witnesses, Mzinyana and Potololo, but their evidence in regard to the original earmarks, as pointed out by Mr. Airey in his argument on behalf of the appellant, differs in each case. According to Motolo his beast had a slit right ear and a skey behind and above the left ear. Mzinyana, who was one of the party that found the ox, stated that it was born at his kraal, that he used it for ploughing and that its earmarks were a slit right ear, skey underneath the same ear and a skey in front of the left ear; whereas Potololo the herdboy while agreeing that the right ear was slit stated that the skey was above and the left ear had a skey underneath.

Defendant and his son on the other hand both claim that this ox was born at defendant's kraal and their descriptions of the earmarks are consistent, i.e. winkelhaak underneath and a small stump on the right ear and a swallow tail and the skey on top of the left ear.

With regard to the red ox claimed by the second plaintiff, her witnesses, Twatwa, Ngxeke and Sikomane agreed that it had a hole in the left ear although Twatwa adds that there was a skey underneath that ear. Twatwa and Ngxeke state that the right ear was slit but whereas the former says there was a skey in front

the latter states the skey was underneath. Sikomane, on the other hand, states that the right ear had a swallow tail underneath and a slit.

It is clear therefore that there are major discrepancies in the evidence given by plaintiffs' witnesses as to what the original earmarks were but the Commissioner did not consider these discrepancies as important although, as pointed out by Mr. Airey, the witnesses purported to know the cattle well in which case their evidence in this regard should have been consistent. The Commissioner examined the earmarks at an inspection in loco but did not record his findings in regard to the alterations on which he based his conclusions as set out in his reasons for judgment, i.e. " that where earmarks have been altered the latest alleged cut appears whiter and shows no growth of hair ", as he ought to have done, for had he done so the defendant could have adduced evidence dealing specifically with certain cuts in the ears being whiter than others and showing no growth of hair. Moreover the Detective Sergeant and Stock Inspector who gave evidence that it was not possible to tell the ages of-earmarks six months after they were made could have been further examined thereanent. As submitted by Mr. Airey, the Commissioner was not in the circumstances justified in coming to the conclusions he did on his own observations, his view that observation of the earmarks indicated that they were fresh conflicting with that of the witnesses just mentioned.

Again, although the Commissioner stated that he accepted the evidence of Ngxeke and Sikomane to the affect that at the time the cattle were found they both bore fresh earmarks with fresh scabs still on them, a reference to the evidence recorded by him indicates that Sikomane made no mention of scabs but merely stated that the old earmarks were gone. Ngxeke's evidence that the earmarks were fresh and had scabs thereon is, as stressed by Mr. Airey, inexplicable when contrasted with that of Detective Sergeant Ferreira that when he examined the beasts in September, 1960, when they were found, it was impossible to establish whether additional earmarks had been placed on the cattle or to estimate the age of the earmarks.

The Commissioner has also regarded as not serious a discrepancy between the evidence of the herdboy, Potololo, who stated that plaintiff No. 2's beast had a white belly and that of the remainder of her witnesses who did not mention it. But, to my mind, it is inconceivable that a herdboy who stated that he had herded the beast in question would make such a mistake and is clear evidence that he was not telling the truth particularly, as when asked to identify the beast in question, he pointed out without hesitation the ox which, according to the Commissioner's notes of the inspection in loco, had no such white mark. The Commissioner considered that this defect was cured by the evidence of plaintiff's witnesses, Ngxeke and Sikomane, but this view is not justified regard being had to the discrepancies between their evidence and the evidence of the other witnesses for plaintiff No. 2 in regard to earmarks already referred to.

It is true that the unduly large earmarks on the red ox claimed by plaintiff No. 2 and the fact that defendant's son who was unmarried claimed that it had been given to him by his father instead of a heifer as is customary may give rise to some suspicion that all was not well in this regard. There are also inconsistencies in the defence evidence, as pointed out by Mr. Mugglestón in his argument on behalf of respondent and conceded by Mr. Airey, in regard to the time and place when branding, earmarking and castration took place but these factors do not serve to establish the plaintiff's case in view of the unsatisfactory features referred to above and only indicate that the defence case is not proved.

It follows that the plaintiffs have failed to discharge the onus on them of establishing that the cattle are theirs and the appeal should, therefore be allowed, with costs, and the Bantu Affairs Commissioner's judgment altered to one of absolution from the instance, with costs.

Balk, President, and Collen, Member, concurred.

For Appellant: Mr. F. G. Airey of Umtata.

For Respondent: Mr. K. W. A. Muggleston of Umtata.

NORTH-EASTERN NATIVE APPEAL COURT.

MAKOBA vs. XULU.

N.A.C. CASE No. 77 OF 1961.

ESHOWE: 17th April, 1962. Before Cowan, President; Craig and Colenbrander. Members of the Court.

PRACTICE AND PROCEDURE.

Jurisdiction of Native Appeal Courts—criminal convictions by Chief.

Summary: The appellant Makoba sought condonation of his delay in noting appeals to the Native Commissioner against four criminal convictions by a chief. His application was refused by the Native Commissioner and he appealed to the Native Appeal Court, North-Eastern Division against the refusal.

Held: That the Native Appeal Court has no jurisdiction to hear such an appeal.

Statutes referred to:

Act No. 38 of 1927, Sections 9, 10, 13, 15, 17, 18, 20.
Act No. 13 of 1955, Section 1.
Act No. 79 of 1957, Section 2.
Act No. 32 of 1944.
Act No. 56 of 1955.
Law No. 26 of 1875 (Natal).
Government Notice No. 1099 of 1943.
Government Notice No. 2885 of 1951.
Government Notice No. 2886 of 1951.
Government Notice No. 2887 of 1951.

Cases referred to:

R. versus Setai and Others, 1954 (1) S.A. 502.
R. versus Kaleni (i), 1959 (4) S.A.L.R. 542.
R. versus Dumezweni, 1961 (2) S.A.L.R. 754.
Mfulwane & Others versus Matabane, 1959 (1) S.A.L.R. 145.
Mfulwane & Others versus Ditsele & Others, 1959, N.A.C. 75.

Cowan, President:

At the hearing of this appeal on the 17th April, 1962, Mr. Brien, who appeared for the respondent, took the point *in limine* that this court had no jurisdiction to hear it as it was an appeal from the decision of a Native Commissioner sitting as a court of appeal in terms of Section 20 (6) of the Native Administration Act, Act No. 38 of 1927, as amended.

After hearing argument this court upheld the objection and struck the appeal off the roll for want of jurisdiction. It undertook to furnish its reasons for judgment at a later stage and we do so now.

I have had the opportunity of reading the judgment prepared by my brother Craig and as he has outlined the circumstances which gave rise to the appeal and the line which the arguments took I need not repeat them.

On the view which I take of the matter this court clearly has no jurisdiction. The case of *R. versus Setai and Others,* 1954 (1) S.A. 502, on which council for the appellant mainly based his argument was decided at a time when Section 20 (6) of Act No. 38 of 1927 made provision for an appeal by a person convicted by a chief to the "court of the native commissioner". At that time the only "court of a native commissioner" created under the Act was the court constituted under Section 10 and there was, therefore, a lot to be said for the reasoning in Setai's case that the appeal must neccessarily lie to this court notwithstanding the fact that it had been constituted for the hearing of civil causes and matters between Native and Native only. The very next year, however, and probably as a result of the decision in Setai's case Section 20 (6) was so amended by Section 1 of Act No. 13 of 1955 as to make the appeal no longer lie to "court of the native commissioner" but to the "native commissioner".

The reasoning underlying the judgment in Setai's case therefore falls away and it can no longer be contended that an appeal from a chief in a criminal matter lies to the court of a native commissioner constituted under Section 10 for the hearing of "civil causes and matters between Native and Native only". It would surely rather lie to the native commissioner in the exercise by him of the criminal jurisdiction now automatically vested in him by virtue of Section 9 of the Act as substituted by Section 2 of Act No. 79 of 1957. As in terms of that section the native commissioner and his court are deemed to be a magistrate and a magistrate's court respectively for the purpose of the Magistrates' Courts Act, 1944, and the Criminal Procedure Act, 1955, it follows that no further appeal would lie to a native appeal court constituted under Section 13 of the Act as, in terms of its constitution, such a court can hear appeals only from courts of native commissioners.

Colenbrander, Member, I concur.

Craig, Permanent Member:—

This matter originated in a chief's court where, it seems, the appellant was convicted of certain offences the nature of which is not clear from the record. He was fined three head of cattle during the years 1957 and 1958. Apparently criminal cases Nos. 190 of 1957, 169 of 1958 170 of 1958 and 175 of 1958 were registered in the Native Commissioner's office, Nkandhla but the register of Chiefs' criminal cases was not put in nor were the extracts from it.

The chief seized the 3 cattle and in 1960 the accused (applicant) instituted civil proceedings against him for their recovery and he states that it was in the course of those proceedings that he discovered that he had been convicted in respect of the four criminal cases. He states he was convicted in his absence.

He then made application in the Magistrate's Court for the district of Nkandhla for the condonation of the late noting of appeals against those convictions and on 8th August, 1961, after evidence was led the Additional Native Commissioner refused his application.

The accused has lodged an appeal to this court against that refusal and the question of whether or not this court has jurisdiction to hear an appeal in a criminal case immediately arises. Mr. Brien who appeared for the chief concerned who purported to be the respondent in this matter objected to the jurisdiction of this court and quoted the case of *Rex versus Kaleni* (i), 1959 (4) S.A.L.R. 542.

Mr. Juul, who appeared for the applicant, urged that this court did have jurisdiction and submitted that it could be implied because of the wide powers given this court by Sections 13, 15 and 18 of Act No. 38 of 1927. He also referred to the case of *Rex versus Setai,* 1954 (1) S.A.L.R. 502 and said he was relying on the latter portion of that judgment. It must be borne in mind that Setai's case was decided before a new Section 9 was inserted in Act No. 38 of 1927 by Act No. 79 of 1957. Mr. Juul also referred to the case of *Rex versus Dumezweni,* 1961 (2) S.A.L.R. 754 at or about line H. This case was heard by the Appellate Division and the sentence concerned reads as follows:—

> " It is not perhaps quite clear that any further appeal lies from the Native Commissioner but *prima facie* such an appeal could be entertained [of *R. versus Kaleni* (i), 1959 (4) S.A. 540 (E)] and as the matter has not been raised or argued before this court, I shall assume the correctness of the decision of Kaleni's case ".

This North-Eastern Native Appeal Court was established by virtue of Section 13 (1) of Act No. 38 of 1927 " for the hearing of appeals in any proceedings from courts of Native Commissioner ".

Standing alone the portion in italics would embrace both civil and criminal proceedings.

Section 7 of Law No. 26 of 1875 (Natal) gave the Natal Native High Court jurisdiction " to hear and try all appeal cases from the courts of the Administrators of Native Law all civil cases that may be brought before it under the provisions of this law and all criminal cases the trial of which is in this Law specially reserved to such High Court."

In terms of Section 17 (1) of Act No. 38 of 1927 " the Natal Native High Court shall cease to have jurisdiction in any civil matter and the powers up till that date vested in the High Court in respect of civil matters shall in so far as they relate to matters coming within the jurisdiction of such Native Appeal Court, vest in such court and so far as they do not relate to such matters, shall vest in the Natal Provincial Division of the Supreme Court ".

It is clear that appeals in civil matters from the courts of the Administrators of Native Law who are the logical " ancestors " of the present day Native Commissioners must be made to this court. In terms of Section 13 (1) this court is established for the hearing of appeals and obviously has no jurisdiction of first instance nor has it appellate jurisdiction in any but civil proceedings in view of Section 17 (1).

To my mind it seems clear that the reference in Section 13 (1) to " any proceedings " means any proceedings of a civil nature.

In terms of Section 9 of Act No. 38 of 1927 as substituted by Section 2 of Act No. 79 of 1957 " a Native Commissioner may hold a court in respect of any offence committed by a Native and in respect of the area for which a Native Commissioner has been appointed he and a court held by him shall for the purpose of the Magistrates' Courts Act, No. 32 of 1944, and the Criminal Procedure Act, No. 56 of 1955, be deemed to be a magistrate and a magistrate's court respectively in connection with any proceedings relating to any such offence ".

In terms of regulation 2 of Government Notice No. 1099 of 1943 (Chiefs' Criminal Courts) a native convicted by a native chief may appeal to the native commissioner and in terms of regulation 4 " the appeal shall be conducted and tried as if it were a criminial trial in a court of native commissioner and as if the offence of which the appellant was convicted in the first instance were an offence triable by a court of native commissioner ".

Thus the appeal is heard by way of a retrial of the accused. The Native Commissioner decides the appeal on the evidence led before him and not on that elicited before the chief. There is no record of the evidence heard by the chief as his is not a court of record.

Accordingly, if the Native Commissioner dismiss the appeal he, ineffect, convicts the accused and if he upholds the appeal he, in effect, acquits the accused.

That being so the matter falls to be dealt with under Section 9 quoted above and appeals lie as directed in the Magistrates' Courts and Criminal Procedure Acts. Appeals to this court are not governed by those two Acts.

All this boils down to the view that there has been no express conferment of appellate jurisdiction in criminal cases on this court.

Detailed regulations for chiefs' and headmen's civil courts are set out by Government Notice No. 2885 of 1951 and for Native Commissioners' courts in civil proceedings by Government Notice No. 2886 of 1951. Government Notice No. 2887 of 1951 sets out the rules for Native Appeal Courts and it is obvious they refer only to civil proceedings.

Government Notice No. 1099 of 1943 (Chiefs' Criminal Courts) promulgates 5 rules. Rules 2 and 4 have already been referred to. Rule 1 provides for the execution of a chief's judgment in a criminal case; rule 3 gives directions to the clerk of court to fix a date of hearing of the appeal and to notify certain persons of such date and rule 5 directions to the court in the event of non-appearance of the appellant.

The meagreness of these rules suggests that it was not the intention of the legislature to confer jurisdiction to hear criminal appeals in this court and accordingly it cannot be implied.

I refer also to the extracts from the report on the case of *Mfulwane and Others versus Matabane* [1959 (1) S.A.L.R. 145 which were quoted with approval by the Central Native Appeal court in Mfulwane and Others *versus* Ditsele and Others, 1959, N.A.C. 75].

I agree with the judgment of the learned President that this court has no jurisdiction to hear this appeal and that it must be struck off the roll.

For Appellant: Adv. T. Juul.

For Respondent: Mr. S. H. Brien.

NORTH-EASTERN NATIVE APPEAL COURT.

ZULU vs. ZULU.

N.A.C CASE No. 3 OF 1962.

PIETERMARITZBURG: 15th May, 1962. Before Cowan, President; Craig and Colenbrander, Members.

PRACTICE AND PROCEDURE.

Recording by Chief that a defendant admitted liability in his court does not, on its own, estop the defendant from proceeding further in his defence on appeal in the Native Commissioner's Court—Rules 12 (2), (3) *and* (4) *of Regulations of Chief's and Headmen's civil courts.*

Summary: Plaintiff obtained judgment against Defendant in a Chief's court for 12 head of cattle and according to the Chief's written record the Particulars of Defence were shown

to be "Admits liability". Defendant appealed to the Native Commissioner against this judgment and as a preliminary denied that he had admitted liability and applied that the Chief's record be amended to read "Denies liability". The Native Commissioner heard evidence on this preliminary point; refused the application for amendment and without further ado dismissed the appeal against the Chief's judgement on the main claim quoting *Qwabe versus Qwabe*, 1961, N.A.C. 3 as his authority therefor. Defendant then brought the whole matter on appeal to this court.

Held: That *Qwabe's* case is no authority for holding that for the sole reason that Defendant is reported by the Chief to have admitted liability in his court he is estopped from proceeding further in his defence.

Held further: That Rules 12 (2), (3) and (4) of the regulations of Chief and Headmen's Civil Courts remain operative no matter what the Chief's recorded impression is of a defendant's "Particulars of Defence" in his court and that the Native Commissioner was not entitled forthwith to dismiss Defendant's appeal against the Chief's judgment on the main claim.

Appeal from Court of Native Commissioner, Nkandla.

Cowan, President:

The appellant in this case who for the sake of convenience will hereafter be referred to as the defendant, was sued in the court of a Native chief by his father, who will be referred to as the plaintiff, for twelve head of cattle which the plaintiff alleged he had advanced the defendant to enable him to lobola his second wife. The chief gave judgment for the plaintiff for the twelve head of cattle with costs and furnished a written record of the case to the clerk of the court in terms of rule *six* of the regulations for Chief's and Headman's civil Courts contained in Government Notice No. 2885, dated 9th November 1951. In this written record the particulars of defence are stated to be "Admits liability" and the date of the judgment is given as being the 4th October, 1960.

On the 4th May, 1961, the defendant served a notice on the clerk of the court, the plaintiff and the chief that application would be made on the 4th July, 1961, to the court of the Native Commissioner for the amendment of the registration of the proceedings in the chief's court in respect of the particulars of defence reflected therein by the substitution of the words "Denies liability" for the words "Admits liability" which latter words, it is alleged, had been wrongly recorded. A further notice was served on the plaintiff that application would also be made on the same day for an extension of time in which to note an appeal against the judgment of the chief and that, if this application was successful, the appeal would be proceeded with forthwith. The record does not disclose that anything transpired on the 4th July and subsequently a notice of re-instatement was issued setting the "case" down for hearing on the 29th August, 1961.

The plaintiff and the defendant both appeared on the 29th August and the latter was also represented by an attorney. The proceedings on that day are headed: "Application for amendment of Record of Chief Bhekeyoke" and disclose, rather surprisingly, that the plaintiff was called on the adduce evidence that the defendant had in fact admitted the claim in the chief's court. The evidence of the plaintiff himself was, briefly, to the effect that in the chief's court the defendant had admitted his claim and had not given evidence because he admitted the claim.

He denied that the defendant had told the chief that there was a condition that he should repay the cattle when his daughter got married. Another son of the plaintiff, one Ndode, was then called. He stated in evidence that the defendant had admitted liability to the plaintiff's claim after it had been explained to

him by the chief. In cross-examination he said that the defendant had said, " I admit plaintiff's claim and I will pay him when my daughter gets married " and that this was said in the presence of the chief and his father (the plaintiff). Two witnesses were then called by the defendant. The first one said that the defendant had denied liability for the twelve head of cattle on the grounds that he knew that seven head belonged to his own house and he was, therefore, not liable for these, that of the balance two head belonged to him and two were represented by money which he had earned in Durban. This witness went on to say that the defendant had said that he had paid only eleven head as lobolo and that he knew nothing about the twelfth beast. The second of these witnesses merely said that the defendant had denied liability for the twelve head of cattle.

The case was then postponed to the 2nd October, 1961, when the Native Commissioner called the chief to give evidence. He stated that the defendant had admitted liability for the twelve head of cattle and that, because of this, he had given pudgment for the plaintiff. In his reasons for judgment, which were filed on the 4th July, he had said that the defendant had admitted liability and said that the plaintiff would " receive his claim when the defendant's daughter gets married ". He explained this in court by saying that it was after the session of the court had ended that the defendant had come to him and, while admitting liability, had pointed out an unmarried girl and said that the plaintiff should wait until this girl got married. Under cross-examination by the defendant's attorney he stated, " Defendant said that he had paid 12 head of cattle for his second wife which he had received from his father, plaintiff ", and went on to say that the defendant did give evidence. Finally, in reply to a question by the court, he said. " Defendant's reply to the claim was, ' I know the cattle my father wants ' ".

Having heard the evidence of these witnesses, the Native Commissioner dismissed the application and also dismissed the appeal and confirmed the Chief's judgment and both these judgments have been brought on appeal to this court.

The Native Commissioner, after analysing the evidence, states in his reasons for judgment that he was satisfied that the defendant had admitted liability in the chief's court and that it was for this reason that he refused the application to amend the " Chief's record ". He goes on to say that having done so he took no further evidence and " as the case could not be further proceeded with by virtue of the application having been refused I dismissed the appeal with costs and confirmed the chief's judgment. In dealing with this matter I referred to and took into account the remarks in the case of Qwabe *v.* Qwabe, 1961 (1), N.A.C. 3 particularly at page 5 *et seq.*".

Not only the Native Commissioner, but also the defendant's attorney in the court below and both the attorneys by whom the appeal was argued before this Court, would seem to have interpreted the judgment in Qwabe's case as laying down that a defendant who is recorded in a chief's written record as having admitted liability to a plaintiff's claim is for that reason alone debarred from appealing to a Native Commissioner's court unless and until the record of the proceedings in the chief's court has been amended by altering the particulars of defence recorded therein to one which, if established, would absolve the defendant from liability in regard to the plaintiff's claim . In my view that case is no authority for this proposition. Rule 12 (2) of the Regulations of Chiefs' and Headmen's Civil Courts enables a defendant to file a written statement of his defence to the plaintiff's claim not less than seven days before the hearing of the appeal and rule 12 (3) provides that a Native Commissioner's court may, indeed, record such a statement of defence at or

before the hearing of the appeal notwithstanding the time limit prescribed by rule 12 (2). Under rule 12 (4) the Native Commissioner is required to re-hear and re-try the case as if it were one of first instance in that court and, if a statement of defence has been submitted to that court, it is that statement read with the plaintiff's claim which determines the issues between the parties in the Native Commissioner's court and to which regard must be had in arriving at a just decision in the case. This is so even although the statement of defence in the Native Commissioner's court is in conflict with the particulars of defence as recorded by the chief [*Dube versus Dube,* 1947, N.A.C. (T. & N.) 76] Qwabe's case was one in which it would seem that the defendant had not seen fit to tender to the Native Commissioner's court a statement of defence in terms of rule 12 but had allowed the defence of "admits liability" in the chief's court to stand and I gather from the judgment that it was for this reason that this Court held that the defendant was precluded from "proceeding further in the matter". I am strengthened in this view by the rider which the court saw fit to add to its judgment, viz., "If Native Commissioners in appeals from Chiefs would only apply rule 12 (3) of the Rules for Chiefs' Courts, it would make matters much easier for themselves and for this Court". It seems to me inconceivable that the court would have addressed such an adjuration to Native Commissioners, if it had intended to hold that this recorded admission of liability in the chief's court in itself estopped a defendant from "further proceeding in defence". In addition, any other reading of the judgment would mean that it would be in clear conflict with the provisions of rule 12 and also an unjustified departure from the principle laid down in *Dube's* case cited above.

We desire to lay it down clearly, therefore, that a defendant in an action in a chief's court who, in the written record of those proceedings, is alleged to have admitted liability is not for this reason estopped from taking the chief's judgment on appeal to the court of a Native Commissioner nor does the fact that he is recorded as having admitted liability in the chief's court preclude him from availing himself on appeal of the right afforded him by rule 12 to file a fresh statement of his defence and that he may do so regardless of the fact that he has taken no steps to have the chief's written record amended in regard to his alleged admission of liability.

Dube's case would also appear to be an authority for the proposition that a defendant who has re-stated his defence in a Native Commissioner's court is at liberty to challenge in evidence on appeal the correctness of the particulars of his defence as recorded by a chief's court.

To revert to the present case, the application before the Native Commissioner was merely one to correct the register of civil matters heard and determined in chief's courts in which it was alleged that the particulars of defence had been wrongly recorded as "Admits liability" instead of "Denies liability". It is clear from the chief's evidence that the register did in fact correctly reflect what he intended to record and the application must therefore fail. Whether or not the chief had wrongly construed the defendant's reply to the claim was not in issue and the Native Commissioner went beyond the application in finding, as he purported to do, that the defendant had in fact admitted liability before the chief. It is therefore unnecessary and even undesirable for this Court to decide at this stage whether this decision of the Native Commissioner is supported by the evidence.

It follows from what has been said above that although the Native Commissioner rightly refused the application to amend the chief's record this in itself did not entitle him to dismiss the appeal against the actual judgment of the chief wihout more ado as it was still open to the defendant at that stage to restate his defence in accordance with the provisions of rule 12. The appeal itself was in any case not before the Native Commissioner's court at that stage as the application for condonation of its late noting had not yet been heard and adjudicated on.

The appeal in respect of the Native Commissioner's refusal to amend the chief's record is therefore dismissed but the appeal in respect of the dismissal of the appeal against the judgment of the chief is allowed and the case is remitted back to the court of the Native Commissioner to enable the defendant to take such further action as he may be advised. If the matter should come to trial again it should be heard by another Native Commissioner in view of the fact that the one who presided at the trial has already expressed the view that the defendant admitted liability to the claim.

It would appear from the record that neither party was responsible for the dismissal of the appeal against the chief's judgment by the Native Commissioner and that in doing so he acted *meru moto*. For this reason it will be ordered that the costs of appeal be costs in the cause.

Craig and Colenbrander, Members, concur.

For Appellant: Mr. S. H. Brien instructed by A. C. Bestall & Uys.

For Respondent: Mr. H. H. Kent.

REPORTS

OF THE

BANTU APPEAL COURTS

1963 (1 & 2)

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