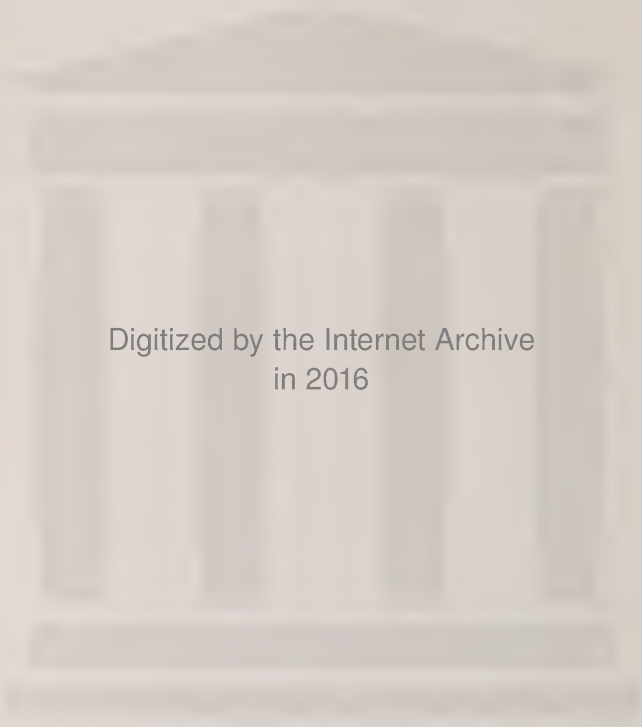

VERSLAE

VAN DIE

NATURELLE-APPÈLHOWE

1954 (1)

1955

1956

REPORTS

OF THE

NATIVE APPEAL COURTS

Prys 10/- Price.

DIE STAATSDRUKKER ♦ PRETORIA ♦ THE GOVERNMENT PRINTER

C.P.-S.103973—1954-5—815

NORTH EASTERN NATIVE APPEAL COURT.

N.A.C. CASE No. 88 OF 1953.

ZULU *v.* ZULU.

VRYHEID: 6th January, 1954. Before Steenkamp, President, Thompson and McCabe, Members of the Court.

ZULU CUSTOM.

Native Deceased Estate—Heir—Nomination of Indhlunkulu wife —Competent prior to 1st November, 1932, for Native other than hereditary Chief to nominate—On that date such privilege lapsed, and where no nomination had yet been made, the first wife married is the Indhlunkulu wife.

Summary: In an estate inquiry the Native Commissioner declared that Bicycle Zulu, the eldest son of the first wife, Sallie, is the general heir. Godfrey Zulu, the appellant, is the eldest son of the wife, Elsie, with whom the late Mshiyeni, father of the parties, entered into a customary union and afterwards married by civil rites during 1938.

Held: That as the late Mshiyeni was not the eldest son of a chief, he was not an hereditary chief.

Held further: That prior to the 1st of November, 1932, even a commoner in Zululand could nominate his Indhlunkulu wife but where no nomination had been made prior to that date the privilege lapsed and the first wife married is deemed to be the Indhlunkulu.

Cases referred to:

Ngema *v.* Ngema, 1933, N.A.C. (T. & N.), 3.

Statutes, etc., referred to:

Natal Code of Native Law, 1932.
Natal Code of Native Law, 1878.

Appeal from the Court of the Native Commissioner, Nongoma.

Steenkamp (President):

The late Mshiyeni, a brother of the late Paramount Chief of the Zulus, Solomon Dinizulu, became regent of the Zulu nation after the death of Solomon Dinizulu.

A dispute arose in connection with the distribution of the immovable property of the late Mshiyeni Ka Dinizulu and the Native Commissioner of Nongoma was called upon to institute an inquiry to determine the name of the person entitled to such property. There were two contenders, viz., Bicycle Zulu, who alleges that he is the eldest son of the first wife, Sallie, whom Mshiyeni married by Native Custom. Bicycle is 39 years of age. The other contender is Godfrey Zulu who alleges he is the eldest son of the wife Elsie with whom Mshiyeni first entered into a customary union and afterwards married by Civil Rites during 1938. Godfrey's age is given as 29 years.

After evidence had been given by (1) Bicycle (2) Godfrey (3) Peter Zulu, half-brother of Mshiyeni, (4) Elsie Zulu, the Native Commissioner declared that Bicycle Zulu, the eldest son of the first wife, Sallie, is the general heir.

The fifth witness was an official in the office of the Native Commissioner at Nongoma, and his evidence consisted of the production of a copy of a declaration made by Mshiyeni and Elsie at the time the Civil marriage was entered into by them. The only important items in the certificate are the facts that Mshiyeni described himself as a "Widower" and that Bicycle, then 24 years of age, was his eldest son of the previous marriage.

Neither of the contenders to the heirship were legally represented at the Enquiry. The Native Commissioner gave his finding on 22nd April, 1953, and on 30th September, 1953, Godfrey (hereinafter referred to as the appellant) through a firm of attorneys noted an appeal to this Court. At the same time he filed an application supported by an affidavit for the condonation of the late noting of the appeal.

The grounds of appeal are as follows:—

"1. Although the deceased was no longer acting chief when he died, the learned Native Commissioner failed to take into account that the deceased was a member of the Royal Zulu Household and, as such, had a right to nominate his heir and, in fact, according to the evidence of Peter Zulu, did nominate the appellant, Godfrey Zulu, as his heir.

2. The learned Native Commissioner should have found that Elsie Zulu, the mother of the appellant, was the principal wife of the deceased, and that all the assets of the estate at the time of the death the deceased were acquired by the deceased during the time when the deceased was living with his said principal wife.

3. The learned Native Commissioner erred in finding as a fact that the deceased was married to Sally Mbata as, it is submitted, there is insufficient evidence of such marriage either by Native Custom or by Christian Rites and, in consequence it is submitted that Bicycle Zulu is illegitimate.

4. Alternatively to ground 3 *supra,* in the absence of proof of the marriage of Sally Mbata to the deceased, it is submitted that the learned Native Commissioner should have found that the appellant Godfrey Zulu, was the chief heir to the deceased by reason of the fact that Elsie Zulu the mother of the appellant was married to the deceased by Christian Rites, of which marriage appellant adduced proof.

5. Alternatively, in any event, the learned Native Commissioner should have found the chief heir to be the appellant, Godfrey Zulu, on the ground that the mother of the appellant, Elsie Zulu, was the only wife to whom the deceased was married by Christian Rites."

In his affidavit in support of the application for the condonation of the late noting the appellant avers that the decision of the Native Commissioner was a great shock to him and was quite contrary to his expectations and contrary to the position as he understood it both in fact and in law and that in consequence of the said shock he had experienced he was unable to decide what to do.

It will be difficult if not impossible to find a more fantastic reason by an unsuccessful litigant and I am of opinion that this reason is without substance and does not commend itself for any serious consideration.

The next reason in the affidavit is that appellant was unaware that he had the right of appeal. Such a statement from a person of standing—appellant being the son of a man who was Regent to the Zulu Nation—cannot be accepted and I am certainly not prepared even to consider it as being of any importance.

There is also the question contained in the affidavit, that although appellant's attorneys obtained a copy of the record of the proceedings of the Enquiry, on 13th August, 1953, the appeal was not noted until 30th September, 1953. This further delay certainly militates strongly against any consideration being given by this Court for the condonation of the late noting.

Appellant also avers that he has a chance of success on appeal and this is an aspect which this Court will consider and it will be seen from what follows that in my opinion appellant has not even a reasonable prospect of success.

To his notice of appeal the appellant has attached an application for an order from this Court that the matter be referred back to the Native Commissioner and leave be granted to the appellant to adduce further evidence before the Native Commissioner. In the supporting affidavit the appellant admits that in answer to the Native Commissioner he indicated that he did not desire to call any further evidence. The further evidence he now wishes to be called may be divided into two categories, viz., to prove—

(*a*) that no proper marriage or customary union existed between the mother of Bicycle and appellant's father Mshiyeni; and

(*b*) that the late Mshiyeni at different times made declarations that appellant's mother Elsie was the principal wife and that he (appellant) was the heir.

Under the first item the appellant wishes to call seven witnesses and under item (*b*) 18 witnesses. Included under item (*b*) is one Peter Zulu, half-brother of the deceased Mshiyeni who has already given evidence on behalf of appellant's contention that he is the heir.

Before dealing with the evidence as recorded by the Native Commissioner it is necessary to set out certain facts and how these facts are affected by the legal issues as I understand them.

The late Mshiyeni, up till the time he assumed the Regency of the Zulu tribe was for all intents and purposes a commoner. It is true he was the son of a Chief but not the eldest son and therefore not an hereditary chief. He lived away from Zululand and there is evidence that he lived in the Transvaal for many years. The late Chief Solomon Dinizulu died on 4th March, 1933, and this date is very important to remember in arriving at the correct legal issues involved. It was after this date that Mshiyeni returned to Zululand. The Natal Native Code published under Proclamation No. 168 of 1932, came into force on 1st November, 1932, and is applicable to Zululand. Prior to this date even a commoner in Zululand could nominate his Indhlunkulu wife (see section 22 of the Old Code published under Government Notice No. 194 of 1878 and applied to Zululand by Proclamation No. 2 of 1887). This is a privilege commoners enjoyed until the New Code of 1932 came into force on 1st November, 1932, and if no nomination had been made prior to this date then the privilege lapsed and the first wife married is deemed to be the Indhlunkulu [see Ngema *v.* Ngema, 1933, N.A.C. (T. & N.), 3]. There is evidence by Peter Zulu that the deceased Mshiyeni told them that appellant was his heir at the time the Sokesim'bone kraal was built. Elsie gave evidence that this kraal was built in 1936 where Mshiyeni took her to live. My contention is that unless Mshiyeni had nominated his Indhlunkulu prior to 1st November, 1932, he was thereafter debarred by Statutory Law from nominating her and the first wife was the Indhlunkulu and remained as such.

It follows that even if evidence is adduced from the 18 witnesses appellant wishes to call, and their evidence is accepted as the truth, it will not assist appellant's case one iota as the deceased was not permitted by law to nominate an heir other than the eldest son of the first wife he married by Native Law and Custom.

The first ground on which appellant wishes to call further evidence is without substance. It is admitted by appellant that Bicycle's (hereinafter for the sake of convenience referred to as the respondent) full sister Nomtandazo was married off by Mahiyeni and he took the lobolo. Now if Mshiyeni and respondent's mother Sallie had not entered into a legal customary union, then the *lobolo* rights in Nomtandazo would have accrued to her maternal grandfather. There is an abundance of evidence apart from a preponderance of probabilities that a customary union existed between the late Mshiyeni and Sallie, the mother of respondent and of the girl Nomtandazo.

Both grounds for the application to have further evidence called must fail and therefore the application should be refused.

Reverting to the grounds of appeal it must not be overlooked that the late Mshiyeni only became prominent in the Royal Household after the death of Chief Solomon in 1933. He became Regent during the minority of the heir to the late Paramount Chief. He was not an hereditary chief as already mentioned and therefore there was no duty on his part to procreate a successor to the chieftainship. Section 98 of the Natal Native Code provides that with Natives other than hereditary chiefs the first wife is the chief wife. It follows that the first wife of the late Mshiyeni, who was not an hereditary chief, was the Indhlunkulu wife and the grounds of appeal are therefore without substance.

In the circumstances I am of opinion that the application for condonation should be refused with costs as applicant (appellant) has no prospect of success.

Thompson (Member): I concur.

McCabe (Member): I concur.

For Appellant: Mr. C. J. Uys, instructed by Cyril Cornish & Co.

Respondent in person.

NORTH EASTERN NATIVE APPEAL COURT.

DHLAMINI *v.* KUMALO.

N.A.C. CASE No. 40 OF 1953.

VRYHEID: 6th January, 1954. Before Steenkamp, President, Thompson and McCabe, Members of the Court.

LAW OF PROCEDURE.

Practice and Procedure—Appeals—Lapsing of for non-prosecution—Lapsed appeal cannot be re-instated.

Summary: Applicant, who had noted an appeal against a Native Commissioner's judgment, did not prosecute the appeal at the session for which the hearing thereof had been set down, whereupon the appeal accordingly lapsed. He thereupon applied to the Court for the re-instatement of the appeal.

Quaere: Whether a fresh appeal may be noted and condonation of late noting applied for.

Held: That once an appeal has lapsed it cannot be re-surrected and therefore an application for the re-instatement of an appeal which has lapsed cannot be entertained.

Cases referred to:
Mayor and Councillors of Pietermaritzburg *v.* Union Government, 1935 (1), P.H.D. 2.

Appeal from the Court of the Native Commissioner, Nongoma.

Steenkamp (President):—

An appeal was noted against the Native Commissioner's judgment but on the day the appeal was set down for hearing by this Court the appellant was in default, nor was he legally represented. This Court thereupon ordered that the appeal be and is hereby deemed to have lapsed.

The appellant has now applied to this Court for an order allowing the re-instatement of the appeal.

I do not see how an appeal which has lapsed may re re-instated on the roll. In the case of Mayor and Councillors of Pietermaritzburg *v.* Union Government, 1935 (1), P.H.D. 2 an interpretation of the word "lapsed" was given. The meaning given by Webster's Dictionary is "to become ineffectual or void".

Bell's legal distionary defines "lapse" to pass away; to become void.

Once an appeal has lapsed it cannot be re-surrected and therefore an application for the re-instatement of an appeal which has lapsed cannot be entertained. In other words, the appeal which had been noted is non-existent and I do not see how a non-existent matter can be revived.

I have duly considered the proviso to Rule 15 of the Native Appeal Court Rules published under Government Notice No. 2887 of 1951 and am of opinion the application mentioned therein must be made on the day the appeal is set down for hearing and this Court may then consider whether permission should be granted for the prosecution of the appeal at any subsequent session of the Court. Once the Court has ordered that the appeal has lapsed then no application for re-instatement of the notice of appeal may be entertained.

I am not expressing an opinion as to whether or not a fresh appeal may be noted and application made for the condonation of the late noting. Only if such an application is before the Court may the question be considered.

In the circumstances I hold that the application for the re-instatement of the appeal should be refused with costs.

Thompson (Member): I concur.
McCabe (Member): I concur.
For Applicant: Mr. C. J. Uys instructed by Wynne & Wynne.
Respondent in default.

NORTH EASTERN NATIVE APPEAL COURT.

KULU d.a. *v.* MTEMBU.

N.A.C. CASE No. 97 OF 1953.

VRYHEID: 6th January, 1954. Before Steenkamp, President, Thompson and McCabe, Members of the Court.

LAW OF PROCEDURE.

Practice and Procedure—Appeal from Chief's Court—Application for condonation of late noting—Meaning of "good cause"—Judgment by default in Chief's Court not to be delivered within 48 hours after time fixed for hearing of the action—Party should exhaust all available remedies in a lower Court before appealing to a higher Court.

Summary: Appellant, duly assisted, was sued in a Chief's Court for damages for defamation. At the time for hearing of action, the Chief who had to try the case, was absent and after some time defendant left. The Chief arrived later and a default judgment was given against defendant (appellant) who subsequently noted an appeal to the Native Commissioner's Court, and, as the appeal was noted late, applied to the latter Court for condonation of such late noting. The Native Commissioner refused the application and the matter was taken on for further appeal by the defendant. Application for rescission of the default judgment of the Chief was not made.

Held: That even if it is found that the defendant's application is such, in so far as the reasons for the default are concerned, that they are unacceptable, there still remains the question of " good cause " to be considered.

Held further: That it is not necessary for such an applicant to show a probability of success on the merits to establish " good cause " but that it is sufficient for him to show a *prima facie* case or the existence of an issue which is fit for trial, and that the Courts should lean rather towards re-opening than towards refusing.

Held further: That no default judgment shall be given in a Chief's Court within 48 hours after the time fixed for the hearing of the action.

Held further: That it is a principle of law that a party should exhaust all the available remedies in a lower Court before appealing to a higher Court.

Held: That although defendant (appellant) has not done so, this Court must come to her assistance in the interests of justice.

Cases referred to:

Brown *v.* Chapman, 1938, T.P.D. 320.
Newman *v.* Ayten, 1931, C.P.D. 455.
Makume *v.* Moletsane, 1941, N.A.C. (T. & N.), 127.

Statutes, etc., referred to:

Section *fifteen* of Act No. 38 of 1927.
Rule 2 (1) of the Rules for Chiefs' Courts.

Appeal from the Court of the Native Commissioner, Nqutu.

Steenkamp (President):

In the Chief's Court the plaintiff (now respondent) sued the defendant, a Native woman, duly assisted, for £5 being damages he suffered as a result of defendant having defamed him. The case was set down for the 22nd of February, 1952, for hearing by the Chief and on this day both the plaintiff and defendant were present at the Chief's Court. Defendant's husband, who assisted her, was also present. The Chief was away and defendant and her husband eventually left as they had to catch a bus. There is a dispute as to when they left. Defendant and her husband state it was about 2 o'clock but, according to the evidence adduced on behalf of the plaintiff it was about 12 o'clock in the morning. Let this be as it may the fact remains that the defendant did attend Court on the day in question and it was most unfortunate that defendant and her husband had to leave before the arrival of the Chief.

The Chief gave a default judgment in plaintiff's favour for £4 and costs £3. 12s. It is not stated in the Chief's judgment whether this was announced on the same day the parties were summoned to appear before the Chief or whether it was given at a later date. From the papers before the Court it would

appear that the default judgment was given on the same day and if this is the case then I am afraid such a judgment is irregular as according to Rule 2 (1) of the Chief's Courts Rules published under Government Notice No. 2885 of 1951 no default judgment shall be given within 48 hours after the time fixed for the hearing of the action.

Defendant did not apply for a rescission of the default judgment as provided for in sub-rule 3 of Rule 2 of the Chiefs' Courts Rules but on the 27th August, 1952, she applied for condonation of the late noting of the appeal and in her supporting affidavit she states that about a month after the date fixed for the hearing of the action before the Chief, the Chief's Messenger came to their kraal and attached an ox belonging to her husband. She made enquiries, apparently from the Chief's Messenger and was informed that the beast was being attached in pursuance of a judgment delivered against her by the Chief. She reported this to her husband, who was away at Dundee, and he consulted a firm of attorneys. It took some time before the true position was ascertained and when the necessary information was obtained that a default judgment had been given by the Chief, instructions were given to the attorneys to note an appeal.

She further states in the affidavit that she has a good defence in the action and will be able to prove that she at no time insulted the plaintiff's wife.

Plaintiff filed a replying affidavit and avers therein that the Chief commenced Court at about 11 a.m. and that the defendant left the Court before this. He further alleges that the defendant knew about two days after the default judgment had been granted that this was the case and in any event she does not live far from the Chief's kraal and had every opportunity to make enquiries. He also states that no actual attachment had been made as the defendant offered to pay and in fact paid a young bull which was accepted in full settlement of the judgment debt. Finally plaintiff avers that defendant was in wilful default and he opposes the application for condonation of the late noting of the appeal.

The application for condonation was set down for trial and both the defendant and her husband gave *viva voce* evidence. Plaintiff did not give evidence but he called the Chief's Tribal Constable. From the Tribal's Constable's evidence it is manifest that no evidence was called before the Chief gave the default judgment. This witness states:—

> "The Chief wished to discuss the case with the parties. He did not discuss it as the other parties were not there. No witnesses were called."

This witness admits the defendant and her husband were there that morning but they left before about 12.15 p.m. This evidence convinces me that the defendant was not in wilful default and it was entirely due to the Chief arriving late that the defendant was not able to defend her action as they had to catch a bus.

Even if we find that the defendant's application is such, in so far as the reasons for the default are concerned, that they are unacceptable there is still the question of "good cause" to be considered. The Acting Native Commissioner seems to labour under the mistaken belief that "good cause" refers to the reasons for the default by the defendant because in his reasons for judgment he states *inter alia*:—

> "I could not classify the reasons for the late noting of the appeal as 'good cause' and may not therefore condone it."

The defendant has in her affidavit denied that she had insulted the plaintiff's wife. She should be given an opportunity to substantiate this and that I think is in itself sufficient reason for the Court to have granted the condonation.

In the case of Brown *v.* Chapman, 1938, T.P.D. 320, it was held that the applicant was not required to show a probability of success on the merits to establish "good cause". It is sufficient for him to show a *prima facie* case or the existence of an issue which is fit for trial.

It is a very drastic provision which enables judgments to be taken by default and Courts should not refuse to re-open where there is a doubt as to whether the default may have been otherwise than wilful, Courts should lean rather towards re-opening than towards refusing (see Newman *v.* Ayten, 1931, C.P.D. 455).

The same principle should be applied in the instant appeal although the defendant should have applied to the Chief for a rescission of the default judgment rather than taking the case on appeal.

After the Acting Native Commissioner had refused the condonation for the late noting of the appeal, the defendant noted an appeal to this Court.

It is not necessary to set out the grounds of appeal as in my opinion the case should be disposed of in the light of the powers granted to this Court by section *fifteen* of the Native Administration Act, No. 38 of 1927.

The defendant should have applied for a rescission of the default judgment and it is a principle of law that a party should exhaust all the available remedies in a lower Court before appealing to a higher Court. Defendant has not done so and I am satisfied that such an omission was entirely due to ignorance and we must come to her assistance in the interests of justice.

Counsel for respondent has quoted the cases of Makume *v.* Moletsane, 1941, N.A.C. (T. & N.), 127, in which an application for condonation of the late noting of an appeal against a judgment which had been granted by default, was made and the Court dismissed the application on the grounds that the applicant may still apply to the lower Court for a rescission of the default judgment.

It seems immaterial to me whether the application should be dismissed or the proceedings in the Native Commissioner's Court set aside as either of these two solutions has the same effect.

In the instant appeal I am of opinion that the setting aside of the proceedings in the Native Commissioner's Court would be more appropriate and it is accordingly ordered that all the proceedings before the Native Commissioner's Court be and are hereby set aside. Defendant (i.e. the applicant) is ordered to pay costs in this Court as well as in the Native Commissioner's Court.

Thompson (Member): I concur.
McCabe (Member): I concur.
For Appellant: Mr. D. B. Hine of Acutt & Worthington.
For Respondent: Mr. C. W. Cox of S. E. Henwood & Co.

NORTH EASTERN NATIVE APPEAL COURT.

KANYILE *v.* MAHAYE.

N.A.C. CASE No. 95 OF 1953.

ESHOWE: 26th January, 1954: Before Steenkamp, President, Oftebro and Thompson, Members of the Court.

LAW OF DELICT.

Damages for Assault—Severe injuries—Quantum of damages.

Summary: Plaintiff sued defendant for £100 damages for assault. Plaintiff lost seven teeth and sustained a fractured jaw as a result of the assault and was detained in hospital for three months.

The Native Commissioner awarded him damages in the amount of £2.

Held: That the Native Commissioner has drawn the wrong conclusions from the evidence of defendant.

Held further: That by no stretch of the imagination can it be held that, in warding off a blow from a fist by an old man on to a much younger man, a light knobbed stick as testified to by defendant could have caused the injuries sustained by plaintiff.

Held further: That an award of £26 as damages would be more in keeping with the injuries sustained by plaintiff.

Appeal from the Court of the Native Commissioner, Nkandhla.

Steenkamp (President):

This appeal has been before this Court previously when the judgment of the Native Commissioner's Court confirming a Chief's judgment in which £2 was awarded as damages for assault, was set aside and the record returned to the Native Commissioner for the hearing of defendant's evidence.

The defendant's evidence was heard and the Native Commissioner again dismissed the appeal from the Chief's Court.

Plaintiff has again appealed to this Court against the *quantum* of damages which, in his grounds of appeal, are described as grossly inadequate.

The Native Commissioner has found proved that the blow which caused loss of 7 teeth and fractured plaintiff's jaw was not struck deliberately but accidentally in warding off the blow aimed at defendant by the plaintiff.

It is not necessary to traverse the same remarks which were made in a judgment by this Court on 21st July, 1953, where the facts as adduced by the plaintiff were dealt with.

Defendant has now given evidence and I think the Native Commissioner has drawn the wrong conclusions from the evidence.

It cannot, by any stretch of imagination, be held that in warding off a blow from a fist by an old man on to a much younger man, a light knobbed stick as testified to by the defendant could have caused the injuries already referred to. Only a deliberate blow with a certain amount of force could have caused the damage and damages in an amount of £2 are grossly inadequate and this Court will have to increase it.

The plaintiff was in hospital for three months and although he was treated free of charge the amount of £1 he paid as bus fare must be taken into consideration in assessing damages.

Although plaintiff claimed £100 this Court is of opinion the amount is too high and a figure of £26 would be more in keeping with the injuries plaintiff sustained.

It is ordered that the appeal be and it is hereby allowed with costs and the Native Commissioner's judgment is altered to read:—

"The appeal is allowed with costs and the Chief's judgment is altered to read:—

'For plaintiff for £26 and costs.'"

Oftebro (Member): I concur.
Thompson (Member): I concur.
For Appellant: Mr. W. E. White instructed by A. C. Bestall & Uys.
Respondent in person.

SOUTHERN NATIVE APPEAL COURT.

MDINDELA *v.* ZONO.

N.A.C. CASE No. 1 OF 1954.

PORT ST. JOHNS: 4th February, 1954. Before Israel, President; Warner and Thorpe, Members of the Court.

LAW OF PROCEDURE.

Native Appeal Case—Procedure—Appeal against judgment of absolution from the instance—Such judgment not competent where onus of proof is on defendant—Inability to prove exact quantity of materials spoliated does not debar plaintiff from judgment for amount claimed unless defendant able to prove a lesser value—Application of omnia praesumuntur contra spoliatorem.

Summary: This is an appeal against a judgment of absolution from the instance with costs in a case in which plaintiff claimed certain fencing material or payment of its value which she contended had been wrongfully and unlawfully removed from her land by defendant, but which defendant, in turn, claimed to be his own property by virtue of the fact that he had bought the fencing material from plaintiff.

The Acting Assistant Native Commissioner stated that as there was nothing to choose between plaintiff and defendant in so far as credibility was concerned, he gave judgment of absolution from the instance.

He also stated that even had plaintiff's evidence been accepted in preference to that of defendant, she must have failed because of her inability to prove the exact quantity and value of the fencing materials removed by defendant.

Held:

(1) That as the onus was on defendant to prove his allegation that he had bought the fencing material from plaintiff, a judgment of absolution from the instance was not competent.

(2) If defendant removed fencing material belonging to plaintiff, he would be in the position of a spoliator and the maxim *omnia praesumuntur contra spoliatorem* would apply, i.e. plaintiff would be entitled to judgment for the amount claimed by her unless defendant showed that the materials removed by him were of less value.

The Court was of the opinion that the defendant had established his allegation and the appeal was accordingly dismissed with costs, but under the powers granted to the Court by section *fifteen* of Act No. 38 of 1927, ordered that the judgment be altered to one for defendant with costs.

Statutes referred to: Section *fifteen* of Act No. 38 of 1927.

Appeal from the Court of the Native Commissioner, Ngqeleni.

Warner (Member):—

This is an appeal against a judgment of absolution from the instance with costs in a case in which plaintiff claimed certain fencing material or payment of its value £25, and judgment of £10 general damages and costs.

It is common cause that plaintiff who is the widow of the late Richard Mdindela, to whom she was married by Christian rites, was granted permission to occupy a piece of land in Location No. 7 called Mqwangqweni, in the District of Ngqeleni, on condition that it should be fenced. Plaintiff complied with this condition by fencing the land. In September and October, 1951, plaintiff was a patient in the Umtata hospital. While she was there defendant visited her and it was agreed that he should plough her land. On her discharge from hospital plaintiff went to live at the kraal of Simon Maqolo. While she was there, her three huts were set on fire, only the walls being left standing. Plaintiff made arrangements to remove to Ndungunyeni location and purchased a kraal-site there for £8. In November or December, 1951, she removed some of the fencing material from her land. She was unable to obtain permission to remove to Ndungunyeni location and recovered repayment of the amount of £8 paid for a kraal-site. She went to East London to work and returned in October, 1952. Defendant then removed the fencing material from the land.

Plaintiff alleges that, when defendant removed the fencing material in October, 1952, portion of it of the value of £25, was her property. She claims return of this fencing material or payment of its value and damages.

Defendent pleaded that after plaintiff had removed portion of the fence, he bought the remaining portion from her so that the material he removed in October, 1952, was his own property.

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

Plaintiff admits that when defendant visited her in hospital she gave him a note to her late husband's brother letting him know that she was allowing defendant to use the land. Under cross-examination, a document (Exhibit "C") was shown to her and she acknowledged that this was the letter which she had written. When the document was read out to her, however, she denied that she had written it. She was then asked to write certain words on a piece of paper which she did (Exhibit "D"). The case was postponed and, on a later date her brother-in-law, Simon Maqolo, gave evidence. He produced another document (Exhibit "F") stating that defendant had brought it to him when plaintiff was in hospital. Defendant states that plaintiff wrote the letter (Exhibit "C") and he showed the document to Simon Maqolo but did not leave it with him as he wanted to produce it to the headman. In the one document (Exhibit "C") it is stated that plaintiff is selling her kraal to defendant whereas in the other (Exhibit "F") it is stated that it had been agreed that defendant should plough the garden on half shares and look after the kraal. The Acting Assistant Native Commissioner states that both these documents are "highly suspect", Exhibit "C" because of the alterations and erasures appearing thereon, and Exhibit "F" because of the fact that the handwriting of this document appears to be identical to that in Exhibit "C". I agree that the handwriting on all three documents (Exhibits "C", "D" and "F") is almost identical and these documents give the impression that they were written by the same person. Besides this, the word "operation" has been written in English and in each case it has been spelt "oparation". I am unable to agree, however, that the document (Exhibit "C") should be viewed with suspicion because of alterations and erasures. Plaintiff seems to have difficulty in spelling words. When she wrote the document in Court (Exhibit "D") she commenced to spell the word "Gideon" "Geod", drew a line through these letters and wrote "Gideon". Defendant says that, when she wrote the letter in hospital (Exhibit "C") he lent her a pencil with a rubber on the end of it and she erased several words and rewrote them. I have been unable to find any words which have the appearance of having been written by someone else and consider that defendant's statement that

Exhibit "C" is the document which plaintiff wrote in hospital should be accepted. It is inconceivable that, as suggested by plaintiff, defendant could have handed the document (Exhibit "F") to Simon Maqolo and then, when the dispute arose, could have written the other document (Exhibit "C") copying plaintiff's handwriting so well that the two documents appear to have been written by the same person.

If it is accepted that plaintiff has attempted to deceive the Court by denying that she wrote Exhibit "C", the question arises as to why she did so. The answer to this must be that the reason is that Exhibit "C" contains a statement that defendant was buying her kraal. Her denial that she sold fencing material to defendant must therefore, be viewed with suspicion.

Plaintiff made all arrangements to remove to Ndungunyeni Location and even went to the length of paying money for a kraal-site and obtaining a permit for the removal of her cattle. She says that although she agreed that defendant should plough the land on half-shares, she told him that she was taking away the fence. She states that she took labourers to the land and they dismantled portion of the fence but defendant came and persuaded her to allow the remaining portion to remain until the crop had been reaped. This was in December, 1951. In March, 1952, she informed defendant that she was going away to work. He then claimed £18 which he said he had paid for the fencing material and kraal-site. She says that she became annoyed and decided to pull down the remaining portion of the fence; that she went to her kraal where she found defendant and his wife; that the headman was also there and defendant pleaded with him that the fence should be allowed to remain and it was not pulled down.

Defendant says that he arranged to take over plaintiff's kraal but a price was not fixed. He ploughed the land and then in November, 1951, he found her removing the fence. He offered to buy the remaining portion from her and paid her 10s. for some aloes forming the fence on one side and 15s. for poles. He says that plaintiff wanted £5 for the walls of the huts which had been burned and £6. 10s. for the remaining fencing material. He offered her a beast but she refused saying that she wanted cash. He then sold the beast and paid her £11. 10s. in December. In March, 1952, plaintiff went with some men and removed one roll of netting wire and three strands of barbed wire from the fence. Defendant states, therefore, that not only has plaintiff no right to the fencing material which he removed in October, 1952, because he had bought the whole fence in December, 1951, but she is indebted to him in respect of the material which she removed in March, 1952.

The Acting Assistant Native Commissioner states that as there was nothing to choose between plaintiff and defendant in so far as credibility is concerned, he gave a judgment of absolution from the instance. Defendant, however, admits that he removed fencing from plaintiff's land and alleges that he bought it from her. The onus was on him, therefore, to prove his allegation. As the onus was on defendant a judgment of absolution from the instance is incompetent.

The Acting Assistant Native Commissioner also states that even had plaintiff's evidence been accepted in preference to that of defendant, she must have failed because of her inability to prove the exact quantity of fencing materials removed by defendant and their value. This is incorrect. If defendant removed fencing material belonging to plaintiff, he would be in the position of a spoliator and the maxim *omnia praesumuntur contra spoliatorem* would apply. In other words, plaintiff would be entitled to judgment for the amount claimed by her unless defendant showed that the materials removed by him were of less value.

The only question to be decided is whether defendant has proved his allegation that he purchased the fencing material from plaintiff. The Acting Assistant Native Commissioner has not commented on the demeanour of the witnesses so I must decide this question mainly on the probabilities.

The Acting Assistant Native Commissioner says that one reason for not favouring the evidence of either party is that he suspected the authenticity of both letters produced (Exhibits "C" and "F"). As pointed out earlier, he had reason to believe that the one letter (Exhibit "F") was written with the object of deceiving the Court but he had no right to hold that the other letter (Exhibit "C") was a forgery merely because it contained alterations and erasures.

I consider that plaintiff's story that she allowed defendant to plough the land on half-shares should not be accepted. She admits that she has made no attempt to obtain the half-share due to her and it is unlikely that she would expect defendant to incur the expense of erecting a fence round the land if he was to obtain merely half the crop for one season.

Plaintiff had made all arrangements to leave the location. It seems to me that she would need money and materials for establishing a new kraal so that defendant's statement that she sold the fencing material is more probable than her statement that she allowed it to remain without any payment being promised to her.

Plaintiff's denial of the fact that she wrote the letter (Exhibit "C") means that she was trying to hide the fact that she agreed to sell her kraal to defendant. If she agreed to sell the kraal, it is probable that she agreed to sell the fence as well.

For these reasons, I am of opinion that defendant has established his allegation that the fencing material which he removed was his own property, having been purchased from plaineiff.

The appeal should be dismissed with costs, but, under the powers granted to this Court by section *fifteen* of Act No. 38 of 1927, the judgment should be altered to one for defendant with costs.

Israel (President): I concur.
Thorpe (Member): I concur.
For Appellant: Mr. J. G. S. Vabaza, Libode.
For Respondent: Mr. L. D. Crowther, Ngqeleni.

SOUTHERN NATIVE APPEAL COURT.

NCELENI *v.* NKAZIMLO.

N.A.C. CASE No. 2 OF 1954.

PORT ST. JOHNS: 5th February, 1954. Before Israel, President, Warner and Midgley, Members of the Court.

LAW OF DELICT.

Native Appeal Case—Malicious prosecution—Essential elements of this delict discussed—Assessment of quantum of damages in an actio injuriarum*—Native Commissioner not entitled to go outside record in determining question of status.*

Summary: Plaintiff instituted proceedings against defendant for malicious prosecution, claiming a total of £82 in damages, of which £7 represented actual expenses incurred and £75 injury to his character and reputation. Judgment was awarded to plaintiff for £7 actual loss and £50 general damages.

In his reasons for judgment the Native Commissioner remarked, *inter alia,* that plaintiff belonged to a family well known throughout Eastern Pondoland, and that plaintiff's status was well above that of the ordinary Native. "To testify to this fact", says the Native Commissioner, "the Court noticed that the Court-room, during the course of the action, was filled with Headmen and other 'notables' from the population of the district."

Defendant appealed against the judgment on the ground, *inter alia,* that the amount of damages awarded was excessive particularly in view of the status of the parties.

Held:

(1) That the Native Commissioner had gone outside the record to arrive at his conclusion on the question of status, as well as when he remarked upon the audience in the Court-room. He was not entitled to do this, and should have confined himself to the record in arriving at a finding of fact.

(2) That where plaintiff has suffered an *injuria,* but not to the extent of lowering his standing, in ordinary Native society or damaging his character in the eyes of his compatriots to any appreciable extent, he is nevertheless entitled to some measure of compensation.

(3) That a fair measure of compensation under the circumstances is one head of cattle, or its value, £10, in respect of general damages.

The appeal against the amount of damages awarded was upheld, and the Native Commissioner's judgment altered to read, "For plaintiff for £17 with costs of suit".

Cases referred to:

Waterhouse *v.* Shields, 1924, C.P.D., 162.

Fyne *v.* African Realty Trust, 1906, E.D.C., 257.

Works of Reference:

McKerron's "Law of Delict".

Appeal from the Court of the Native Commissioner, Flagstaff.

Israel (President):—

In the Native Commissioner's Court plaintiff instituted proceedings against defendant for malicious prosecution, the particulars of his claim being as follows:—

"1. During or about December, 1952, the defendant wrongfully, unlawfully and maliciously set the law in motion without reasonable and probable cause by laying a false charge of attempted murder against the plaintiff and instigating and causing his arrest and imprisonment.

2. During or about January, 1953, the Solicitor-General of the Eastern Districts declined to prosecute the plaintiff on the said charge which was withdrawn by the Public Prosecutor of Flagstaff on the 19th day of January, 1953, in the Magistrate's Court, Flagstaff.

3. By reason of the defendant's wrongful, unlawful and malicious acts as aforesaid the plaintiff was put to an expenditure of £7 in connection with his defence to the said charge and has had to make a number of journeys to and from the Court and has further been injured in his character and reputation and has sustained damages in the sum of £75, which defendant fails and neglects to pay or any part thereof after demand, a total of £82."

To this defendant pleaded:—

"1. In reply to Paragraph No. 1 of summons defendant admits that he made a report to his Headman to the effect that the plaintiff had fired a shot at him and that as a result thereof the plaintiff was arrested and lodged in gaol but the defendant denies that he acted 'wrongfully, unlawfully and maliciously' and submits that he acted in perfectly good faith in laying such a charge.

2. Admit Paragraph No. 2.

3. In reply to Paragraph No. 3 deny all liability in damages and furthermore puts plaintiff to the proof of any damages that he has suffered."

Judgment was awarded to plaintiff for £57 with costs, made up according to the Native Commissioner's reasons as follows:—

(*a*) £7 actual loss unnecessarily sustained in defending the criminal charge; and

(*b*) £50 general damages.

The judgment is now appealed against on the grounds that (*a*) the judgment is against the weight of evidence and the probabilities, and (*b*) the amount of damages awarded is excessive particularly in view of the status of the parties.

At the outset and to avoid the burden of traversing the relevant evidence in detail it may be said that this Court is satisfied as was the Court, *a quo,* that the incidents upon which defendant admittedly instigated the criminal proceedings against plaintiff have been clearly proved not to have happened, that is to say that plaintiff was innocent of the charge laid against him. But, as Gardiner, J. said in the case of Waterhouse *v.* Shields, 1924, C.P.D., at page 162, innocence is not by itself proof of one of the essential elements of the delict of malicious prosecution. namely: the absence of reasonable and probable cause as defined by Hawkins, J. in the English case of Hicks *v.* Faulkner and quoted with approval in Waterhouse's case (*supra*) and other cases in S.A. Courts. There, reasonable and probable cause is defined as "an honest belief in the guilt of the accused based upon a full conviction, founded upon reasonable grounds, of the existence of a state of circumstances which, assuming them to be true, would reasonably lead any prudent and cautious man, placed in the position of the accuser, to the conclusion that the person charged was probably guilty of the crime imputed.". In the present case, the circumstances leading to defendant's charge against plaintiff have been proved to be false and to exist only in the mind of defendant. They are the creature of his own imagination and being within his knowledge without truth cannot constitute the foundation of a conviction upon which to base an honest belief in plaintiff's guilt of the alleged attempted murder. There is thus an absence of a reasonable and probable cause for the charge against plaintiff.

Malice, however, must be present in addition to absence of reasonable and probable cause to render the institution of a prosecution an actionable wrong. By malice is to be understood "not necessarily personal spite and ill-will, but any improper or indirect motive" (McKerron's Law of Delict quoting Kotze, J.P., in Fyne *v.* African Realty Trust, 1906, E.D.C., p. 257). In this regard plaintiff says in his evidence: "Defendant and I are on bad terms. The trouble between us has been renewed recently because Dovalele has been sued by defendant and defendant says I am the one who tells Dovalele not to give up the ox". Later under cross-examination he stated: "Defendant usually accuses people whom he does not agree with—he has done it to many—and he brings false charges against people," and proceeded to give one or two instances. These statements remain uncontradicted and defendant's only remarks in this connection is an admission that he is not on good terms with his neighbours.

Here then, in my opinion, we have all the elements of malice as described by Kotze, J.P. (*supra*). In addition, as has been intimated above, this Court is satisfied that defendant deliberately manufactured the charge against plaintiff. In these circumstances the Court agrees with the Native Commissioner that defendant acted maliciously.

Plaintiff is therefore entitled to damages. The amount of £7 awarded for expenditure incurred by plaintiff in defending the criminal charge laid against him is considered a proper award, but the judgment of £50 for general damages appears to me to be arguable. In justifying this part of his sentence the Native Commissioner remarks in his reasons that:—

"£50 general damages was considered to meet the case appropriately for the following reasons:—

(i) Plaintiff belongs to a family which is very well known, not only in this district, but in the whole of Eastern Pondoland. His status in Pondo society is well above that of the ordinary Native. To testify to this fact the Court noticed that the Court-room, during the course of the action, was filled with headmen and other 'notables' from the population of this district.

(ii) While not allowing the plaintiff to unjustly enrich himself at the expense of the defendant, this Court felt that the gravity of defendant's malicious action should be brought home to him, and a realisation instilled in him that he owes his neighbour a duty not to do him any wrong.

(iii) The nature of the charge maliciously laid by defendant against plaintiff was also considered in arriving at the *quantum* of damages awarded. There can be no doubt that a person, be he but a Native, would be held in greater contempt by the general public for committing the crime of attempted murder than, for example, contravening the dipping regulations."

The question of status is admittedly a point for consideration in assessing the *quantum* of damages in an *actio injuriarum,* which is the case now before us, but there must be something on record from which this factor can be determined. A careful search of the record, however, reveals no trace of any evidence of this nature except a remark by plaintiff under cross-examination that he is the brother of Mbabala who was one of the richest men in the area. This is clearly insufficient upon which to base the findings in paragraph (i) of the above quotation, and the Native Commissioner has gone outside the record to arrive at his conclusion on the question of status as well as when he remarks upon the audience in the Court-room. This he is not entitled to do and must confine himself to the record in arriving at a finding of fact.

The sentiments referred to in paragraph (ii) of the quotation are unobjectionable, but it seems to this Court that the objects referred to therein can be achieved equally well by mulcting the defendant in damages reasonably substantial but more in accordance with the acknowledged standards of life and circumstances of the ordinary rural Native.

As regards paragraph (iii), McKerron in his Law of Delicts says that in an action for malicious prosecution it must be proved, apart from actual pecuniary loss, that the charge was calculated to injure the plaintiff's reputation. Now, there is nothing in the evidence to show that plaintiff has suffered any injury to his reputation; nor in our opinion would an accusation of this sort, even if established, lower the standing of the accused in ordinary Native society, or damage his character in the eyes of his compatriots to any appreciable extent.

Plaintiff, however, has suffered an *injuria* and is entitled to some compensation therefor, but not in so large a sum as £50. Had he brought his case before a Tribal Court it is doubtful whether he would have recovered more than one head of cattle, and this, it seems to me, is a fair measure to go on. I consider therefor that £10 is the amount of general damages which should have been awarded.

The appeal on the first ground is dismissed; it succeeds on the second ground and the Native Commissioner's judgment is altered to read: "For plaintiff for £17 with costs of suit."

As appellant has failed in one part of his appeal, but has succeeded substantially in the other, there will be no order as to the costs of appeal.

Warner (Member): I concur.
Midgley (Member): I concur.
For Appellant: Mr. C. Stanford, Lusikisiki.
For Respondent: Mr. F. C. W. Stanford, Flagstaff.

SOUTHERN NATIVE APPEAL COURT.

MAGWA *v.* NQABILE.

N.A.C. CASE No. 3 OF 1954.

PORT ST. JOHN'S: 5th February, 1954. Before Israel, President, Warner and Midgley, Members of the Court.

LAW OF THINGS.

Native Appeal Case—Possessory action—Husband liable as spoliator even although the physical act of spoliation committed by his wife—Inclusion of legal expenses in claim for ordinary damages not allowed.

Summary: This is a possessory action in which plaintiff sued defendant for the return of certain cattle, or their value, which cattle were at all material times in the lawful possession of plaintiff and which defendant wrongfully seized and spoliated.

In addition to her claim for the return of the cattle or their value, plaintiff claimed £10 damages, of which £6. 15s. was in respect of expenses incurred in engaging legal assistance.

Defendant appealed against the whole of the Native Commissioner's judgment and contended that he was not a spoliator and thus not liable in the summons as it was his wife who had committed the actual act of spoliation.

Held:

(1) That by receiving the cattle into his kraal and retaining them after demand, defendant was liable as if he had himself committed the physical act of spoliation.

(2) Plaintiff is entitled to damages arising directly from the spoliation, but is not permitted to include in the quantum of damages the expenses incurred by her in engaging legal assistance.

The appeal was dismissed with costs, but the amount of the damages awarded by the Native Commissioner was altered from £10 to £4.

Cases referred to:

African Ice Coy. *v.* Kalkbay Fisheries, 1907, T.H. 263.

De Villiers *v.* Murraysburg School Board, 1910 C.P.D. 538.

Appeal from the Court of the Native Commissioner, Flagstaff.

Israel (President):—

This is an appeal from the judgment of the Native Commissioner in a possessory action which plaintiff (now respondent) brought against defendant (now appellant) based on the following particulars:—

(1) The plaintiff was at all material times in lawful possession of a certain dun heifer, in calf, and an *inco* cow, having calved once (Izibule), which cattle are valued at £20 each, the dun heifer may or may not have calved now, but if calved, calf valued at £20.

(2) On or about July, 1952, the defendant wrongfully and unlawfully seized and spoliated the said described cattle from the grazing ground near Hambangana Mboyi's kraal in Mketengeni's Location, and drove them away.

(3) That by reason of the said wrongful and unlawful act of the defendant plaintiff has been put to legal expense, has lost the use of the cattle, has been inconvenienced and has incurred additional expense by having to make various journeys because of the said spoliation and has in consequence sustained damages in the sum of £10.

Wherefore plaintiff prayed:—

(1) That the defendant may be ordered to deliver to plaintiff the herein described cattle or to pay their value as indicated.

(2) That the defendant may be ordered to pay plaintiff the sum of £10 damages.

(3) That the defendant may be ordered to account for any increase and deliver same to plaintiff or pay value thereof £20.

(4) For alternative relief and costs of suit.

The Native Commissioner gave judgment for plaintiff for delivery of two head of cattle or their value £10 each; the sum of £10 damages; and costs of suit, but absolved defendant from the instance in regard to the increase. Against the whole of this judgment defendant has now noted appeal on the grounds that "the judgment was against the weight of evidence and probabilities and that in any event no damages were proved".

The question of the evidence is easily disposed of. Out of a mass of contraditions, inconsistencies and vague statements certain facts emerge so clearly that it is not necessary for the Court to traverse the record in this judgment. They are, (*a*) that the cattle in question were at the time in the lawful possession of plaintiff, being the progeny of an nqomaed beast apportioned to her by one Nqawana, and (*b*) that these cattle were brought by defendant's wife, Mavali, to defendant's kraal and were there retained by him despite demand for their return.

Mr. Stanford for appellant has argued that appellant (defendant) was not a spoliator and thus not liable in the summons as it was his wife who had committed the actual act of spoliation. This contention is not tenable. By receiving the cattle into his kraal and retaining them after demand defendant has unlawfully deprived plaintiff of her rights of possession in them and, on the analogy of African Ice Coy. *v.* Kalkbay Fisheries, 1907, T.H. 263, is thus liable as if he had indeed himself committed the physical act of spoliation. In giving judgment against him, therefore, the Native Commissioner was, in the opinion of this Court, perfectly justified.

As regards damages, plaintiff states in her evidence that after the cattle were taken she had to hire other draught animals at a cost of £2 for carting mealies and £2 for ploughing. In instituting proceedings she says she engaged an attorney for £6 and incurred expenditure of 15s. for transport, but claimed £10 as inclusive damages. These statements of her expenditure in con-

sequence of the spoliation have not been contradicted or even challenged by the defence and must therefore be regarded as proved. Consequently she must be deemed to be entitled to the cost of hiring the draught animals, £4, as damages arising directly from the spoliation, but this Court is not prepared to allow her to include in the quantum of damages the expenses incurred in engaging legal assistance and travelling for that purpose. To do so would be, in effect, to award her not only the ordinary party and party costs which she has already obtained and to which she is entitled, but in addition attorney and client costs for which extraordinary and penal order there is no justification and which Courts are very averse from granting (Maasdorp, J.P., in De Villiers *v.* Murraysburg School Board, 1910, C.P.D. at page 538).

The appeal is dismissed with costs but the amount of the damages awarded by the Native Commissioner is altered from £10 to £4; the rest of the judgment stands.

Warner (Member): I concur.
Midgley (Member): I concur.
For Appellant: Mr. F. C. W. Stanford.
For Respondent: Mr. H. H. Birkett.

SOUTHERN NATIVE APPEAL COURT.

NYUKA *v.* **MTSHWAYISA.**

N.A.C. CASE No. 4 OF 1954.

PORT ST. JOHNS: 5th February, 1954. Before Israel, President; Warner and Midgley, Members of the Court.

PONDO CUSTOM.

Native Appeal Case—Native Custom—Dissolution of customary union—Elements of a valid tender of cattle in restoration of dowry discussed—Delivery of cattle to be made to absentee kraalhead's nearest male major relative when a keeper *has not been appointed.*

Summary: Plaintiff sued defendant for the return of his wife or the restoration of dowry.

Defendant pleaded that he had tendered to plaintiff certain cattle, etc., as restoration of dowry. The stock were driven to plaintiff's kraal, but plaintiff was found to be absent therefrom, and the kraal in the apparent charge of plaintiff's mother, and at her suggestion the stock were then driven to the kraal of Jungwana, a relative of plaintiff, who held himself to be in charge of plaintiff's affairs during the latter's absence, and who accepted the stock on plaintiff's behalf.

Judgment was given for plaintiff for, inter alia, the balance of the dowry cattle still in the hands of plaintiff's relative, Jungwana, and plaintiff to pay defendant's costs.

Plaintiff appealed against the whole of this judgment.

Held: That where an absentee kraalhead has not appointed a specific keeper, delivery of cattle to his nearest available male major relative, for the purpose of marking the dissolution of a customary union, constitutes a valid restoration of dowry to the absentee kraalhead.

The appeal was dismissed with costs.

Cases referred to:

Mdontsha *v.* Fumbalele, 1946, N.A.C. (C. & O.), 68.
Robinson *v.* Randfontein Estates G.M. Co., Ltd., 1925, A.D. 198.

Mendziwe *v.* Lubalele, 3, N.A.C., 170.

Statutes referred to:

Government Notice No. 2886 of 1951, sections 43 (2) (*a*) and 43 (6).

Works of Reference:

"Native Law in South Africa"—Seymour.

Appeal from the Court of the Native Commissioner, Bizana.

Israel (President):—

In this case plaintiff (now appellant) sued defendant (respondent) in the Native Commissioner's Court for the return of his wife Mamfondini (defendant's daughter) or the restoration of dowry of six head of cattle or £48, one horse or £10 and £5 cash to mark the dissolution of the customary union. At the trial the right of plaintiff to a refund of the dowry was not disputed, and the question of the actual number of dowry cattle involved was disposed of by plaintiff's reducing his claim by two head of cattle, i.e. to four head of cattle, one horse and £5 in cash, thus leaving the way clear for a decision on a plea by defendant to the effect that:—

(1) In the month of January, 1952, Mamfondini and her guardian the defendant (through their attorney) tendered to plaintiff 4 head of cattle, 1 horse, and the sum of £5 in cash as restoration of dowry to mark dissolution of the union between plaintiff and Mamfondini. The four head of cattle and horse were driven to plaintiff's kraal but plaintiff was found to be absent therefrom, and the kraal in apparent charge of plaintiff's mother, and at her suggestion the cattle and horse were then driven to headman Jungwana, a relative of plaintiff, who held himself to be in charge of plaintiff's affairs in plaintiff's absence. The four cattle and horse were there and then accepted by the said Jungwana in the presence of plaintiff's mother, and it was agreed that the £5 cash, which was in the hands of defendant's attorney, would be taken by the plaintiff personally at a later stage. The horse was there and then physically delivered to headman Jungwana. The cattle were taken back to be transferred at the tank, and on transfer were physically delivered to the headman, and the horse and cattle have been in possession of the headman ever since as agent of the plaintiff.

(2) The £5 cash has never been claimed from defendant's attorney by plaintiff.

Wherefor defendant admits liability to plaintiff for £5 only which he again tenders and pays same into Court, and defendant denies any further liability and prays for judgment (save for £5 tendered) with costs.

To this, plaintiff replied as follows:—

(1) In reply to paragraph 4 of the plea plaintiff states that he was away at work for 13 months, and on his return in November, 1952, was informed by his mother that the defendant had tendered dowry restoration of 4 head of cattle, a horse and £5 during plaintiff's absence, that plaintiff's mother reported the tender to headman Jungwana and was thereafter informed that the 4 cattle and the horse had been delivered to Jungwana.

(2) The plaintiff says that headman Jungwana had no authority whatever to accept dowry restoration on his behalf during his temporary absence. The plaintiff has not received the cattle and the horse from Jungwana.

(3) The plaintiff declines to accept the tender made by the defendant.

In limine the Native Commissioner recorded that "Mr. McLeod (for defendant) intimates that the plea be accepted as a special (plea) and defendant is to prove the plea. Mr. Palmgren (for plaintiff) is agreeable to this". Then, after the headman in ques-

tion had given evidence followed by the messenger of defendant's attorney who had delivered the restored dowry and defendant's attorney himself, the Native Commissioner ruled, according to the record, " that defendant had failed to prove the headman had authority to act for plaintiff and the special plea was disallowed ". The hearing was then continued without objection by plaintiff's attorney or further pleadings by defendant, and judgment for plaintiff was eventually given for " £5 as tendered and the balance of the live dowry cattle still in the hands of the headman, and plaintiff to pay defendant's costs ". The present appeal is brought by plaintiff against this judgment on the grounds:—

> That the judgment is bad in law and against the weight of evidence in that the defendant accepted the onus of proving his special plea that the tender and payment of 4 head of cattle and a horse to headman Jungwana was a good and lawful tender and payment to the plaintiff; that the Native Commissioner after hearing evidence ruled, on good and sufficient grounds, that the defendant had failed to prove that headman Jungwana had authority to act for plaintiff and disallowed the special plea; that this ruling was, in effect, a judgment for the plaintiff for 4 head of cattle and a horse (or their alternative value) and the only issue then remaining for the Court to determine and decide was whether or not the plaintiff was further entitled to recover the additional 2 head of cattle claimed by him and that, on plaintiff abandoning the additional claim, he was entitled to the judgment (then applied for) for 4 head of cattle, a horse (or their alternative value as claimed) and £5 with costs to the time of the ruling disallowing the special plea; that the final judgment given is wholly in conflict with the ruling disallowing the special plea of payment to the headman.
>
> For these reasons it is submitted that the judgment should be for the plaintiff for 4 head of cattle (less 2 head accepted by him in the possession of the headman), a horse (or their alternative value as claimed in the summons) and the sum of £5 cash with costs to the date of the disallowal of the special plea.

Now, while it is correct that respondent's allegation in his plea that the headman was plaintiff's agent had been found to be not proved, the trial court after hearing the evidence adduced in that connection found, nevertheless, that due restoration of the dowry had in fact been established. This defence of due restoration, it is also true, was not specifically preferred in defendant's plea, but its absence could not embarrass or prejudice the plaintiff for the matter had been fully investigated, and he had had every facility to place all the facts before the Court. In these circumstances, on the analogy of the case Robinson *v.* Randfontein Estates G.M. Co., Ltd., 1925, A.D. at page 198, this Court, like the Appellate Division in that case, can find no justification for interfering, or for holding that the Native Commissioner's final judgment was wrong in the face of his ruling disallowing the so-called special plea. Nor does the evidence justify such a conclusion. It is virtually common cause that four head of cattle and a horse were driven on behalf of defendant to plaintiff's kraal and from there to the headman's and that £5 was in the hands of defendant's attorney for uplifting by plaintiff, and the only question to be decided is whether this constituted a valid restoration of the dowry. It is admitted that plaintiff was not at home when the delivery was made, but there is sufficient undisputed evidence by the headman and the messenger who drove the cattle to prove that both plaintiff's mother and an adult brother Mbalelwa were at his kraal at the time, and that it was they who asked that the cattle be taken to the headman who would hold the cattle while plaintiff was notified of the restoration. Plaintiff tried to say that another brother Mkuluma, and not his mother or Mbalelwa, was in charge of his kraal in his absence, but he had to admit that this brother was also away at work. Now, according to one of the principles enunciated in Mdontsha *v.* Fumbalele,

1946, N.A.C. (C. & O.), 68, a kraal can never be left without someone being in charge while the kraalhead is away. It is but logical to conclude that an alleged appointed representative, who is himself an absentee, cannot be such a person, so that we are constrained to seek further to find an "eye" or "keeper" of the kraal, to whom delivery of the dowry cattle could be made. Seymour in his *Native Law in South Africa* says at page 54 that when an absentee kraalhead has not appointed a "keeper" his nearest male major relative may take control of the kraal. This, in the opinion of this Court, is a correct statement of the relative Native Custom, and the principle it enunciates is applicable even when a "keeper has been appointed, but, through his own absence, is not available to undertake the responsibility. Plaintiff's mother spontaneously observed the custom when, according to her evidence, she, at the time the dowry cattle were tendered, called into consultation and sought the guidance of plaintiff's brother Mbalelwa who was presumably his nearest male major relative then immediately available. There was, thus, a responsible person to receive the cattle. But this still leaves for solution the question whether the mode of delivery itself constituted a valid restoration. In his grounds of appeal the plaintiff implies that defendant's case rested on the fact that the cattle were taken in charge by the headman, and contended that, as the headman had been ruled not to be the plaintiff's agent, there was thus no delivery of the tendered dowry and therefore no valid restoration. Defendant's evidence however established that delivery had indeed first been made to plaintiff's kraal and that it was plaintiff's representative as determined above who had caused their transfer to the headman's custody. This Court holds that that is in fact the position: That the cattle had been properly delivered at plaintiff's kraal. Therefore, all the elements of a valid tender of cattle in restoration of dowry were present, and as such tender was bound to be accepted (see Mendziwe *v.* Lubalele, 3, N.A.C. 170), the Native Commissioner was consequently correct in finding for defendant.

His judgment, however, is not literally in accordance with that finding, although its effect on fulfilment might be. Defendant in his plea admitted liability only for the £5 in cash which plaintiff had failed to collect from his (defendant's) attorney, and he again tendered it and paid it into Court presumably in terms of Rule 43 (2) (*a*) of the Regulations for Native Commissioner's Courts published under Government Notice No. 2886 of 1951. The Native Commissioner, in effect, has found that there was no more due to plaintiff than the amount so paid in, and should consequently, in terms of Rule 43 (6), have first ordered payment out to plaintiff of the £5 and then given judgment for defendant with an appropriate order as to costs.

The appeal is dismissed with costs, but the judgment in the Court *a quo* is altered to read:—

> "It is ordered that the amount of £5 paid into Court be paid out to plaintiff.
>
> Judgment is awarded to defendant with costs."

Warner (Member): I concur.
Midgley (Member): I concur.
For Appellant: Mr. C. Stanford.
For Respondent: Mr. H. H. Birkett.

CENTRAL NATIVE DIVORCE COURT.

NGWENYE *v.* NGWENYE.

N.D.C. CASE No. 395 OF 1952.

JOHANNESBURG: 5th February, 1954. Before W. O. H. Menge, Presiding Officer.

LAW OF PERSONS.

Maintenance and Alimony: Variation of agreement as regards payment of maintenance and alimony.

Summary: Applicant sought an order to vary a somewhat ambiguous agreement which had been made an Order of Court, in terms of which he has to pay £10 per month to his former wife in respect of what the Court found to be alimony and maintenance of the child of the marriage. He contended that his financial position made it impossible for him to comply with the order.

Held: That insofar as the agreement related to alimony the Court had no power to vary its terms and that in so far as it related to maintenance insufficient reasons had been advanced why the Court should vary the amount.

Held further: That the Court could and would vary the agreement, not as to the amounts payable thereunder, but so as to remove the ambiguity appearing on the face of it.

Menge (Presiding Officer):—

In this matter applicant seeks an order to vary an agreement which was made an Order of Court on the 7th May, 1953, when his former wife, the respondent, obtained a decree of divorce against him on the ground of desertion. The agreement contains two clauses which are now in point. In the first it is provided that the applicant will pay £10 per month maintenance for the minor child of the marriage, of which respondent was given the custody, until such time as the child becomes self-supporting. The second clause provides that in the event of the child dying the applicant will pay respondent £5 per month until she remarries.

The applicant remarried immediately after divorce; and he has produced evidence to show that he cannot afford to pay £10 per month. Among his commitments are £5 for the maintenance of two former illegitimate children, £5 for the support of his mother and a £7 monthly payment on sitting room furniture, including a £35 radiogram, which he has purchased. His total monthly salary is £45 and his expenditure £40. 2s. 6d., which leaves him only £4. 2s. 6d. to spare. His wife is also earning a salary, but will soon be relinguishing her post as she is expecting a child.

The applicant offers to pay £3 per month. He has already been prosecuted for failure to pay the maintenance and was ordered to pay £5 pending the conclusion of these proceedings.

The application was made on the 14th July, 1953, and was heard on the 27th idem. On that date the respondent took the defence that the Court had no power to vary the agreement "except maintenance". Thereafter the matter was postponed from time to time. A replying affidavit was filed on the 6th January, 1954, and a reply thereto on the 5th February, 1954. On that day evidence was led and the Court heard argument. The appellant's attorney and counsel for the respondent both argued on the assumption that the matter is covered by section *ten* (2) of the Matrimonial Affairs Act, 1953; in other words, that the Court had the power to vary the agreement, but it seems that this point is not so simple. The applicant also argued that the agreement in so far as it provides for alimony it is *contra bonos mores*. As to that, whatever may have been the position before (see Hahlo "The South African Law of Husband and Wife", pages 371/2) that argument now falls away in consequence of section *ten* of the new Act.

I shall assume that section *ten* of the Act is not inapplicable to this Court. I see no reason why it should be. But it is necessary first to examine the agreement. Counsel for respondent contended that the entire £10 was payable in respect of maintenance for the child. That contention does not seem to be correct. The

respondent herself indicated clearly in evidence that this money is for the support of herself and the child. In fact, if the contention were correct, the agreement would be invalid as being *contra bonos mores* since by virtue of its second paragraph it would be placing a premium on the death of the child. It seems clear that what the parties intended when they entered into this agreement was that the applicant would be contributing £5 towards the maintenance of the child and a further £5 towards the support of the respondent. On such a construction the agreement remains valid.

Now it seems to me that sub-section (2) of section *ten* can only be invoked if application is made in terms of the Act. In this case, however, the application was made some months before the Act came into operation. It seems to me therefore that this application must be dealt with in terms of the law as it existed prior to the promulgation of the Act.

As the law then stood an agreement to pay alimony was purely contractual. Even when made an Order of Court it did not become an order *ad factum praestandum* and the Court could no more vary it than it could vary any other contractual obligation existing between two parties.

Now, having come to the conclusion that of the £10 payable in terms of the agreement £5 are for alimony, I am unable, for these reasons to vary that amount. The parties are at liberty to invoke the ordinary rules of contractual liability in regard to this £5. They can, if my previous assumption is correct (as regards the applicability of section *ten* of the new Act), also apply in terms of the Act for a variation of this amount, in which event additional grounds unconnected with the debtor's ability to pay can be relied on—grounds which in the present case were not and could not be enquired into.

The remaining £5 are on a different footing. This amount can be varied by the Court. But in this case no sound reasons have been advanced why the Court should do so. True, the applicant is hard pressed to meet his commitments, but—according to the evidence—not unavoidably so. For instance, part of the £5 which he pays to his mother goes to the support of an able bodied yet quite unemployed brother, and then there is also the matter of the radiogram. It does not seem that the applicant cannot adjust his affairs in such a manner that the £5 maintenance can be paid.

It follows that the application must fail; but, having regard to the conclusions at which I have arrived and the possibility of further litigation, I think that the order should nevertheless be varied to the extent of making its meaning clear. I therefore make this order: That of the £10 payable monthly in terms of the agreement between the parties which was made an Order of this Court on the 7th May, 1953, £5 are and shall be payable as and for maintenance of the minor child. The applicant must pay the costs of these proceedings.

For Appellant: Mr. H. Helman, of Messrs. Helman & Michel.
For Respondent: Adv. I. E. Lubinsky, instructed by Messrs. Gratus, Sacks and Bernard Melman.

SOUTHERN NATIVE APPEAL COURT.

METULA *v.* SIKAKA.

N.A.C. CASE No. 5 OF 1954.

KOKSTAD: 16th February, 1954. Before Israel, President; Warner and Kruger, Members of the Court.

LAW OF PROCEDURE.

Native Appeal Case—Practice and Procedure—Judgment—Claim to land—Owner of land not joined in action—Stay of proceedings.

Summary: Plaintiff agreed to buy certain land from Mtsheneni Mbele and handed defendant £40 to be paid to Mtsheneni Mbele as purchase price. Defendant fraudulently represented to Mtsheneni Mbele that he was purchasing the property and Power of Attorney and Declarations of Seller and Purchaser were completed by Mtsheneni Mbele and defendant indicating the latter as purchaser but transfer was not passed. Mtsheneni Mbele died and plaintiff sued defendant, claiming an order (*a*) compelling defendant at his own expense to take transfer into his own name of the property on the aforementioned Power of Attorney and Declarations of Seller and Purchaser executed by late Mtsheneni Mbele and defendant; (*b*) compelling defendant simultaneously to pass transfer to plaintiff, at plaintiff's expense of the said property and for this purpose to sign and execute the necessary documents: (*c*) alternative relief.

Held:

(1) That under the claim for alternative relief an order could be made declaring plaintiff to be entitled to receive transfer of the property from estate of the late Mtsheneni Mbele were it not for the fact that the executor of Mtsheneni Mbele's estate had not been joined in the action.

(2) That plaintiff should be given leave to amend his summons and action should be stayed until plaintiff had joined the executor of Mtsheneni Mbele's estate as a party to the action.

Cases referred to:

Williams *v.* Rhodes Fruit Farms, Ltd., 1917, C.P.D.
Collon *v.* Toffie, 1944, A.D., 456.
Queensland Insurance Co., Ltd., *v.* Banque Commercial Africaine, 1946, A.D., 272.
Paul *v.* Cullum, 1933 (2) P-H (F. 166).
Deintje *v.* Grantler, 1949, A.D., 1.

Works of Reference:

Beck's "Theory and Principles of Pleading", p. 46.
Cockle's "Cases and Statutes on Evidence".
Phipson on Evidence, p. 284.

Appeal from the Court of the Native Commissioner, Umzimkulu.

Warner (Member):—

In his particulars of claim, plaintiff alleged as follows:—

(1) The parties to this action are adult male Natives resident as stated on face hereof.

(2) During the year 1937 the plaintiff handed the defendant the sum of £40 with which to purchase from a certain Mtsheneni Mbele, now deceased, the latter's portion of the farm Strangers Rest, in this District, in extent 20 acres, more or less.

(3) The late Mtsheneni Mbele was the registered owner of 7/270th undefined share in the said farm, but the farm has actually been subdivided, subdivisional diagrams have been framed but no Partition Transfer has been registered, and each owner is in occupation of a surveyed and defined portion of the farm.

(4) In due course defendant reported to plaintiff that he had effected the purchase of the said land on plaintiff's behalf and pointed out the beacons to him.

(5) Plaintiff thereupon took possession of the said land, erected his kraal thereon and has been in occupation thereof ever since and still is.

(6) In February, 1938, the defendant wrongfully and unlawfully and without plaintiff's knowledge or consent got the said Mtsheneni to sign a Power of Attorney to transfer the said property into the name of the defendant as also a Declaration of Seller, but defendant never proceeded to have transfer of the property registered in his name on these documents which are at present in the possession of the plaintiff's attorneys of record who actually framed them in February, 1938.

(7) Plaintiff now wishes to have the property transferred into his name but defendant takes up the attitude that he purchased the property for himself and denies that he did so on behalf of plaintiff and also that plaintiff handed him the sum of £40 for the purpose.

(8) The Estate of the late Mtsheneni Mbele was liquidated, administered and distributed under the jurisdiction of the Master of the Supreme Court at Pietermaritzburg, Natal, as the late Mtsheneni resided in the Ixopo (Natal) District where he owned immovable property at the time of his death, and the property in question in this case was not disclosed as an asset in his Estate.

(9) The Executor in Mtsheneni's Estate nevertheless denies all knowledge of the sale by Mtsheneni during his lifetime of the Strangers Rest property and declines to take any action in the matter.

He claimed an order—

(*a*) compelling the defendant at his own expense to take transfer into his name of the said property on the aforementioned Power of Attorney and Declarations of Seller and Purchaser executed by the late Mtsheneni and by the defendant on the 11th day of February, 1938;

(*b*) compelling the defendant simultaneously to pass transfer to the plaintiff, at the plaintiff's expense, of the said property and for this purpose to sign and execute the necessary documents, with costs of suit.

Defendant filed the following plea:—

(1) Defendant admits paragraphs Nos. (1) and (3) of the Particulars of Claim.

(2) Defendant denies paragraph (2) of the Particulars of Claim and particularly denies that plaintiff ever handed him the sum of £40 and ever requested him to purchase from Mtsheneni Mbele the latter's portion of the farm Strangers Rest.

(3) Defendant states that in or about February, 1938, he, defendant, purchased the late Mtsheneni Mbele's share of the farm Strangers Rest from the late Mtsheneni Mbele for himself.

(4) Defendant denies paragraphs Nos. (4) and (5) of the Particulars of Claim and states that after having purchased the said landed property he informed plaintiff of this fact and thereafter plaintiff and defendant entered into a verbal agreement whereunder defendant let to plaintiff a portion of the said landed property purchased by him at a rental of £3 per annum payable after the reaping season each year. That thereafter he pointed out the beacons of the said property to plaintiff and plaintiff thereupon took occupation of a portion of the said land as defendant's tenant but not as owner of the said property.

(5) That in or about the year 1942 plaintiff and defendant agreed the defendant should let to plaintiff the whole property purchased by defendant from the late Mtsheneni Mbele at an increased rental of £6 per annum and that plaintiff thereupon paid the rental each year for the said property to defendant save and except that at the end of the reaping season in the year 1952 plaintiff wrongfully and unlawfully failed and neglected to pay to defendant the rental for the said property amounting to the sum of £6.

(6) Defendant admits that plaintiff has erected, at his own expense, certain huts upon the said landed property.

(7) Defendant admits that in or about February, 1938, the late Mtsheneni Mbele signed a Power of Attorney to transfer the said landed property into the name of defendant and also signed a Declaration of Seller but that he, defendant, never proceeded to have transfer of the property registered in his name, but defendant has no knowledge as to whether or not plaintiff was aware of these facts and denies that it was necessary to obtain plaintiff's consent for the said documents to be signed as aforesaid and further denies that his, defendant's, action was in any way wrongful and unlawful.

(8) Defendant admits that the documents referred to in the preceding paragraph are to the best of his knowledge in the possession of plaintiff's Attorneys of record who actually framed such documents.

(9) Save that defendant specially pleads that he purchased the said property for himself the allegations contained in paragraph (7) of the Particulars of Claim are admitted.

(10) Defendant has no knowledge of the correctness or otherwise of the allegations contained in paragraphs (8) and (9) of the Particulars of Claim.

(11) Defendant denies that plaintiff is entitled to the orders claimed by him in plaintiff's summons.

Wherefore defendant prays that plaintiff's claim may be dismissed and judgment entered for defendant with costs of suit.

He also filed the following counterclaim:—

(1) Defendant, now plaintiff in reconvention, craves leave to refer to his plea filed in this suit and prays that the allegations contained therein may be considered as inserted and contained in this counterclaim.

(2) That by reason of the allegations made in paragraph (5) of defendant's plea, there is due and owing by plaintiff to defendant the sum of £6 as and for rental for defendant's portion of the said farm Strangers Rest.

Wherefore defendant claims from plaintiff payment of the sum of £6 with costs of suit.

Plaintiff pleaded as follows to the claim in reconvention:—

(1) Defendant in reconvention denies that there was ever any such agreement between himself and plaintiff in reconvention as is alleged in paragraph (5) of the plea, he also denies that he has ever paid any rent to plaintiff in reconvention as alleged or that he is indebted to him in the sum claimed or in any amount whatsoever.

(2) Defendant in reconvention states that the portion of the farm Strangers Rest which he has been occupying since 1937 was purchased by him from the late Mtsheneni Mbele through the agency of plaintiff in reconvention and that the question of his paying rent to plaintiff in reconvention in respect to his occupation of the said property has naturally never arisen.

Wherefore defendant in reconvention prays that judgment may be granted, on the claim in reconvention, in his favour with costs of suit.

After the case had come before Court and been postponed, defendant filed the following application:—

"Be pleased to take notice that application will be made at the resumed hearing of this case for the amendment of defendant's plea, by the amplification of paragraph (11) of the said plea, by the addition of the following words:—

'because even if the allegations made by plaintiff in his particulars of claim and denied by defendant, are correct,

plaintiff would not be entitled to an order—

(*a*) compelling defendant at his own expense to take transfer into his name of the said property on the said Power of Attorney and Declarations of Seller and Purchaser, executed by the late Mtsheneni and by the defendant on the 11th February, 1938;

(*b*) compelling defendant simultaneously to pass transfer to the plaintiff of the said property, and for this purpose to sign and execute the necessary documents.'"

Plaintiff then gave notice of an application as follows:—

"Kindly take notice that at the next hearing of this action application will be made to amend the summons by the addition thereto after claim (*b*) of—

'(*c*) alternative relief.'"

In due course, the application for amendment of plea and summons were granted by the Court. After hearing evidence the Assistant Native Commissioner gave the following judgment:—

"(1) For defendant on the claim in convention, as prayed, with costs.

(2) On the claim in reconvention for plaintiff in reconvention, i.e. defendant in convention, as prayed, with costs."

Plaintiff has appealed on the following grounds:—

(1) That the judgment on the claim in convention is against the probabilities and the weight of evidence and is wrong in law in as much as even if the defendant is entitled to succeed by virtue of the allegations contained in paragraph (11) of the plea then the correct judgment of the Court should be one dismissing plaintiff's summons and not a judgment in favour of defendant; and

(2) that the judgment on the claim in reconvention is against the probabilities and the weight of evidence.

It is common cause that the portion of the farm Strangers Rest in the District of Umzimkulu, which is the subject of this action, was owned and registered in the name of Mtsheneni Mbele who resided in the District of Ixopo, Natal, and who offered the property for sale.

Sabina, widow of Mtsheneni, states that, after her husband's death, she instructed an attorney to administer his estate and furnished him with particulars of the assets therein but did not include the property in question as deceased had told her that he was selling the land. She knew that he had disposed of the property but did not know to whom he had done so.

Plaintiff states that he was residing on another portion of the farm Strangers Rest in 1937 when he heard that this portion was for sale. He did not know Mtsheneni so he arranged with defendant, his neighbour, with whom he was very friendly, to take him to Mtsheneni. They went to Mtsheneni and, in the presence of his wife, arranged that plaintiff should buy the property for £40. Plaintiff and defendant returned home. A few weeks

later plaintiff, in the presence of his wife and brother, handed defendant an amount of £40 and asked him to pay it to Mtsheneni for the purchase of the land. A few days later defendant reported that he had paid the money to Mtsheneni. Plaintiff then took occupation of the property and has been living on it ever since. He fenced the garden, planted fruit trees and a hedge and put up a kraal consisting of three rondavels, a big square house and a shed. Plaintiff asked defendant on two occasions to go with him to Mtsheneni in order to effect transfer of the property, but defendant told him that everything was in order and there was no urgency in the matter. Plaintiff went to work in Cape Town and was away for about three years. After his return, Mtsheneni died and defendant then denied that plaintiff had purchased the property. When plaintiff took occupation of the property, a man named Fana Mlandela was living on it but he left shortly afterwards of his own accord. Plaintiff says that he never paid rent to defendant.

Plaintiff's wife supports his statement that he handed £40 to defendant and the latter reported that he had paid the amount to Mtsheneni.

Plaintiff's brother, Kelly Metula, states that he was present when the amount of £40 was handed to defendant and helped to count it. He says that subsequently defendant told him that he had paid the money to Mtsheneni. He asked for a receipt but defendant said that Mtsheneni could not write.

Manasse Mahlasela, a teacher who owns another portion of the farm Strangers Rest, says that defendant told him that he had bought a portion of the farm Strangers Rest from Mtsheneni for plaintiff for £40. He asked why he had not bought it for himself and defendant replied that he did not have the cash.

Fana Mlandelwa states that he was a tenant on the property in question and paid rent of £6 a year to Mtsheneni but the latter told him he had sold the property to plaintiff for £40 and he then left. He did not pay any rent to defendant.

Defendant says that he went to Mtsheneni to buy the property in question and took plaintiff as a witness. Mtsheneni agreed to sell the property at £1. 10s. per acre. He paid £31. 10s. and it was agreed that there would be an adjustment of the price when the extent of the property was ascertained. Afterwards defendant and Mtsheneni met at the office of Messrs. Dell and Jennings in Umzimkulu and signed the documents necessary for passing transfer of the property. Defendant was told that the extent of the property was 22 acres so that the price would be £33. Later, at his kraal, he paid an additional amount of £1. 10s. to Mtsheneni. Mtsheneni gave him permission to occupy the property before he had paid the balance. He then made arrangements to lease the property to plaintiff at a rent of £6 per annum. Fana was also living on the property so he and plaintiff each paid £3 per annum. Afterwards he instructed Fana to leave the farm and he did so. Fana owed him £6 in rent and he instructed Mr. Attorney Jennings to collect the amount. Subsequently Mr. Jennings handed him £4 saying that the balance of £2 was due to Mtsheneni. Defendant goes on to say, " After Fana had left, the plaintiff continued paying rent to me. He now owes me £12 rent. At the time of the issue of the summons he owed me £6 but today he owes me £12. I claim £6 which he owes me with costs." He states that he did not cause the property to be transferred into his name because he was told that the transfer costs would amount to £7. 10s. and he had been unable to raise the money.

Defendant's wife, Grace, states that she saw defendant pay Mtsheneni £31. 10s. for the property. Subsequently she said that defendant showed her the money before he went to Mtsheneni. She says that she saw defendant pay Mtsheneni £1. 10s. at defendant's kraal and she saw plaintiff pay rent to defendant on three occasions.

Stanford Nombuza, defendant's brother-in-law, states that plaintiff told him that he was hiring the land, on which he was living. from defendant.

Exhibit "A" is a document signed by George Sikaka (defendant) declaring that £38. 15s. is the purchase price given by him to Mtsheneni Mbele for certain 7/270th share of Farm No. A5, called Strangers Rest, situate in the District of Umzimkulu, East Griqualand, measuring 1,200 morgen.

Exhibit "B" is a Power of Attorney signed by Mtsheneni Mbele authorising transfer of the property to George Sikaka and acknowledging that the purchase price of £38. 15s. had been paid.

Exhibit "C" is an affidavit signed by Mtsheneni Mbele on more or less the same lines as Exhibit "B".

Exhibit "D" is an extract of a ledger account of Messrs. Dell and Jennings with Mtsheneni Mbele. This shows that on 10th July, 1942, Fana Mlandelwa paid an amount of £8 on account of claim for rent.

Exhibit "E" is an extract of a ledger account of Messrs. Dell and Jennings with Sikaka George. This shows a debit of 1s. for stamp on Power of Attorney in connection with transfer from Mtsheneni to Sikaka. It does not show any credits.

These documents were all filed of record by consent.

The Assistant Native Commissioner states that he rejected plaintiff's evidence because, firstly, plaintiff states that Mtsheneni's wife was present when it was agreed that the property should be sold to plaintiff whereas she states that she did not know to whom it was sold, and secondly, it is extremely improbable that Mtsheneni would have signed documents "B" and "C" declaring that he had sold the property to defendant if he had sold it to plaintiff. In doing so he has, in my opinion, misdirected himself. Sabina gave her evidence before plaintiff did, and there is no note on the record that plaintiff was required to leave the Court while she gave her evidence. Mr. Elliot states, however, that plaintiff was required to leave the Court while Sabina gave her evidence but there is no reason for coming to the conclusion that plaintiff expected her to say that she knew that he was the purchaser of the property. The witnesses were testifying in regard to events which had taken place fifteen to sixteen years previously and it seems to me that the discrepancy should be regarded as a genuine mistake on the part of one of them rather than as a concoction of evidence. Then again, Mtsheneni was an illiterate Native. He signed documents by affixing his mark. Plaintiff and defendant came to him together in regard to the purchase of the land. Defendant was known to him but plaintiff was not. If defendant came alone subsequently, bringing the money to complete the transaction, it is unlikely that Mtsheneni would concern himself as to whose name appeared on the documents as purchaser.

This being the case, this Court is in as good a position as the Assistant Native Commissioner was to assess the value of the evidence and it becomes necessary, therefore, to examine it.

There has been considerable delay on the part of plaintiff in taking action in this matter but it must be remembered that he is a Native to whom the necessity for transfer of the title deed into his name would not carry much significance especially if his friend, defendant, who conducted the sale, told him that the matter was not one of urgency; that he was in undisturbed possession of the land, and he was away at work for a number of years.

It has not been denied that plaintiff effected improvements to the land and erected substantial buildings on it. It seems to me that he would be unlikely to have done this if he had not bought the property.

Plaintiff's brother, Kelly Metula, states that he has been employed by Messrs. Strachan and Co. of Umzimkulu for about 30 years in collecting money from Native debtors. In my opinion, he would be unlikely to have retained this employment for a long period if he were dishonest. Defendant is unable to suggest any reason why this witness should give false evidence against him.

Manasse Mahlasela is a teacher and landowner and seems to be a man of standing. He states that he is on equally good terms with both plaintiff and defendant. The latter does not deny this and cannot give any reason why the witness should give false evidence.

Fana Mlandelwa states that when he left the property he owed rent to Mtsheneni and paid it to Messrs. Dell and Jennings. This statement is supported by the entries on Exhibit "D". He says that he is not related to either party and there does not seem to be any reason why his evidence should not be accepted.

Defendant's evidence teems with discrepancies. He states that he paid £33 for the property but cannot explain why he signed a document showing that the purchase price was £38. 15s. In the documents the property is described as a 7/270th share of the farm Strangers Rest measuring 1,200 morgen. Now a 7/270th part of 1,200 morgen is about 31 morgen or 65 acres, so it is difficult to understand why defendant should have been told that the size of the property was 22 acres.

Defendant does not explain why if he purchased the property, he did not occupy it instead of leasing it to plaintiff.

Defendant's statement that Messrs. Dell and Jennings collected an amount of £6 on his behalf is not supported by the documents produced.

The evidence given by defendant's wife and her brother is unconvincing and, in my opinion, it should not outweigh the strong evidence brought in support of plaintiff's case which is supported by the probabilities and the discrepancies in defendant's evidence.

I consider that the evidence establishes plaintiff's claim that it was he who bought the property from the late Mtsheneni and not plaintiff.

In regard to the counterclaim, the Assistant Native Commissioner states: "As the Court found that the property was purchased by the defendant for himself, it follows that he is also entitled to rent." In this he has misconceived the position. Even if defendant did purchase the property for himself he would not be entitled to claim rent unless plaintiff had agreed to pay it. However it is not necessary to consider this aspect because, if it is found that plaintiff purchased the property, defendant's claim for rent must be dismissed.

I feel that the appeal should be allowed with costs, but difficulty arises when considering what form of order should be made. Plaintiff seems to have appreciated the fact that an order could not be made in terms of paragraphs (*a*) and (*b*) of his claim because, when this matter was raised, he amended his claim by adding paragraph (*c*) alternative relief. I am of the opinion that under the claim for alternative relief an order could be made declaring plaintiff to be entitled to receive transfer of the property in question from the estate of the late Mtsheneni Mbele were it not for the fact that the executor of the estate, who is stated to be Macikwa, has not been joined in the action. In the case of Williams *v.* Rhodes Fruit Farms, Ltd., 1917, C.P.D., the learned Judge stated, at page 9: "The practice of this Court, for a very long time, has been that in an action where a declaration of rights is claimed relating to land, all the registered owners must be before the Court." In that case an exception was taken and upheld.

In the present case an exception of non-joinder was not taken, but in the case of Collon *v.* Toffie, 1944, A.D., 456, it was stated on page 466: "The Court postulates a case in which A sues B to have a transfer declared void and cancelled and the trial Court gives judgment as prayed. In an appeal to the Supreme Court based on other grounds, it comes to the knowledge of the latter Court that in terms of B's title the property, on B's death, has to pass to C. The judgment (Bekker *v.* Bekker's Executor 2 M, 436), states that in such a case, even if the Appeal Court held the appeal to be unfounded, on the grounds on which it rested, it would not only be competent but it would be the duty of the Appeal Court either to reverse the judgment of the Trial Court or to stay the proceedings until notice has been given to C to enable the latter to intervene if he thought fit."

In that case the proceedings were stayed and it seems to me that the same procedure should be followed in the present case. The judgment of the Court below should be set aside; plaintiff should be given leave to amend his summons and the action should be stayed until plaintiff has joined the executor of Mtsheneni's Estate as a party to the action. As defendant did not raise the exception but contested the appeal on the facts unsuccessfully, he should be ordered to pay the costs of appeal.

Israel (President): I concur.
Kruger (Member): I concur.
For Appellant: Mr. F. W. Zietsman.
For Respondent: Mr. W. L. D. Elliot.

CENTRAL NATIVE APPEAL COURT.

JORDAN *v.* NOBADULA and ANOTHER.

N.A.C. CASE No. 1 OF 1954.

JOHANNESBURG, 16th February, 1954. Before Marsberg, President, Menge and Liefeldt, Members.

NATIVE LAW OF SUCCESSION.

Rule of primogeniture in Native Law.

(NOTE.—This matter also gave rise to review proceedings reported below in the case immediately following.)

Summary: In the Court below plaintiff sought an order declaring him the general heir in the estate of the late John Nobadula. Plaintiff alleged that he is the nearest male descendant of the deceased. He further alleged that first defendant had been appointed general heir through false representations.

Held: That plaintiff had no *locus standi* to challenge the appointed heir as he is not the nearest relative to the deceased.

Appeal from the Court of Native Commissioner, Benoni.

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

In the Native Commissioner's Court at Benoni, plaintiff, Theodore Jordan (Nobadula), sued Russel Fikile Nobadula N.O. 1st defendant, and Russel Fikile Nobadula, 2nd defendant, for an order declaring that plaintiff is the general heir in the estate of the late Jonothan Nobadula. The plaintiff alleged that he is the nearest direct male descendant and relative according to Native Law of the late Jonothan Nobadula. He further alleged that defendant had been appointed general heir in the estate by falsely claiming that the late Jonathan Nobadula, father of defendant, and his mother Oriana were married by Native Custom.

Evidence which was led before the Native Commissioner for both parties clearly established that plaintiff was not the nearest direct male descendant and relative of Jonothan Nobadula. The evidence disclosed that he was not a descendant. He was a cousin five or six degrees removed. The evidence disclosed another cousin nearer than plaintiff and also the possibility that other relations nearer than both were alive.

The Native Commissioner decreed absolution from the instance with costs.

Native Law was applied. The law of succession under Native Law recognises one heir only and the rule of primogeniture recognises only that person who is the nearest to the deceased, to the exclusion of all others. Therefore, as plaintiff is not the nearest relative of the deceased, Jonothan Nobadula, he is out of Court and has no *locus standi* to challenge the appointed heir.

In the circumstances it is unnecessary to inquire whether defendant obtained his appointment by false representations.

Plaintiff's appeal against the Native Commissioner's judgment is dismissed with costs.

Menge and Liefeldt (Members) concurred.

For Appellant Adv. D. Spitz instructed by Messrs. Helman & Michal.

For Respondent: Mr. J. Fine.

CENTRAL NATIVE APPEAL COURT.

JORDAN and OTHERS *v.* **THE NATIVE COMMISSIONER, N.O.**

N.A.C. CASE No. 1 OF 1954.

JOHANNESBURG: 16th February, 1954. Before Marsberg, President, Menge and Liefeldt, Members.

LAW OF PROCEDURE.

Review proceedings—Native Estates Regulations—Citing Native Commissioner nomine officio *as respondent—Reopening of estate finally disposed of.*

(NOTE.—This matter is closely connected with and arose out of the matter Jordan versus Nobadula and another reported in the case immediately preceding this case.)

Summary: Applicants sought by means of review proceedings to have an estate re-opened which devolved and had been finalised some years ago. One of the appellants had failed in precisely the same object in a civil case.

Held: That the Court has no jurisdiction to hear review proceedings in which a Native Commissioner is cited as respondent *nomine officio.*

Held further: That section 3 (3) of the regulations does not allow of the re-opening of an estate which has been finally wound up.

Statutes, etc., referred to:

Sub-section (4) of section *twenty-three* of Act No. 38 of 1927.
Sub-section (3) of section 3 of Government Notice No. 1664 of 1929.

Rule 22 of the Native Appeal Court Rules.

Review proceedings citing the Native Commissioner, Benoni, N.O., as respondent.

Menge, Permanent Member (delivering judgment of the Court):—

This is an application for review closely connected with the case of Theodore Jordan versus Russel F. Nobadula and another, in which we have already given judgment.

It appears that Russel Nobadula, defendant in this case, was appointed heir to the estate of his late father in 1948. After about 5 years trouble arose between Russel and his mother, and with her support Theodore Jordan, the first applicant in the present proceedings, set up a claim to be the heir and asked the Native Commissioner to hold an enquiry into the distribution of the estate. The Native Commissioner refused to hold such an enquiry and suggested to Theodore that he proceed by way of action. This he did. He sued Russel in the Native Commissioner's Court claiming to be declared heir, but his suit failed. The Native Commissioner granted absolution from the insurance and we upheld this judgment on appeal. After the disposal of this case in the Native Commissioner's Court plaintiff again asked the Native Commissioner to hold an enquiry. One fails to appreciate why plaintiff should ask for an enquiry into an issue which had been fully ventilated and finally decided in the case which he lost, but in any case the Native Commissioner once more refused the request.

The present proceedings are brought by way of review against the refusal of the Native Commissioner to hold the enquiry. They are brought, as stated, by the plaintiff in the case, Theodore Jordan, and two others who were apparently his witnesses in the case before the Native Commissioner. The original application is dated 24th November, 1953, and there is a further application for the condonation of the late noting of the review dated the 4th February, 1953.

The application cites the Native Commissioner as respondent. Mr. Spitz, counsel for the applicant, was unable to explain how this Court could have jurisdiction over a party to the proceedings who is not a Native, but he submitted that the Court had jurisdiction to hear the review. We decided that this point would have to be settled before the merits of the allegations contained in the many affidavits, and counter affidavits from the Native Commissioner, could be considered.

Mr. Fine, the attorney who had represented the defendant in the appeal case, appeared, presumably on behalf of the heir Russel Nobadula. Mr. Spitz contended that Mr. Fine had no locus standi. That is no doubt correct, but Russel Nobadula is the person primarily concerned with the proceedings and the issue concerns the very proceedings which went on appeal. He should also have been cited as a respondent and he could certainly have intervened. However, without deciding his locus standi, we have not considered it necessary to call upon Mr. Fine to address us.

In arguing the question of the Court's jurisdiction Mr. Spitz relied firstly on section *twenty-three* (4) of the Native Administration Act, 1927. He argued that the Native Commissioner's refusal to hold the enquiry asked for is a "decision" for the purposes of that sub-section and as such appealable; and, he argues further that being appealable it is also reviewable. There is no substance in these arguments. A "decision" such as is referred to in sub-section (4) is one "under this section"—as explained in the words following the word "decision", and as such can only be consequent upon a "determination" of a "dispute" or "question which may arise out of the administration", etc. In other words there must have been an investigation into the dispute, but in this instance the Native Commissioner refused to hold the investigation; and rightly so having regard to the civil case which he had just tried.

Counsel also relied upon sub-section (3) of section 3 of the Estates Regulations, and argued that this section made it obligatory for the Native Commissioner to open an enquiry when a dispute arises. This argument is also fallacious. This obligation exists only so long as there is an estate to be administered or distributed. In this case the estate was finally wound up in 1948, and section 3 (3) of the regulations does not allow of the re-opening of an estate which has been finally wound up.

We consider that the Native Commissioner was correct in refusing to re-open this estate; and we also consider that his refusal to do so cannot be the subject of review proceedings. A review can only be entertained by this Court under its Rule 22, which refers to proceedings between litigants, not between a Native and the Native Commissioner in his official capacity.

The application for review would therefore have no prospect of success and in these circumstances the application for condonation of the late noting thereof is dismissed with costs.

CENTRAL NATIVE APPEAL COURT.

TWALA *v.* NSUNTSHA.

N.A.C. CASE No. 3 OF 1954.

JOHANNESBURG: 17th February, 1953. Before Marsberg, President, Menge and Liefeldt, Members.

LAW OF PROCEDURE.

Practice and Procedure.—Married Native woman—Proof of assistance in legal proceedings—Locus standi in judicio.

Summary: Respondent, a Native woman, sued appellant for ejectment. The evidence disclosed that she was married but there was no proof of assistance by her husband.

Held: An allegation of *locus standi* is essential to confer a cause of action on a married woman.

Held further: That where such an allegation of *locus standi* is controverted in the pleadings the allegation has to be proved like any other allegation which is essential to a cause of action.

Cases referred to: Wilson-Yelverton *v.* Gallymore, 1950 (2), S.A., 26. Amod *v.* Ramkalia, 1952 (1), S.A., 21.

Appeal from the Court of the Native Commissioner, Johannesburg.

Menge (Permanent Member), delivering judgment of the Court:—

Plaintiff, a Native woman, sued defendant, also a Native woman, for ejectment. She gave evidence that she was the owner of a building in which defendant had hired a room; that she now requires the room for the accommodation of her daughter; that she has given defendant due notice to vacate and that despite this defendant refuses to vacate the room. Defendant denied receipt of the notice and that plaintiff reasonably requires the room for her daughter.

During the plaintiff's evidence it transpired that she was a married woman. Counsel who appeared for defendant thereupon with the Court's approval added a special plea that plaintiff is not entitled to sue unassisted by her husband. Plaintiff's attorney

then asked for an amendment of the summons alleging her husband's assistance as far as needs be. This was granted after defendant's counsel had objected to the amendment on the grounds that there is no evidence that plaintiff is so assisted.

At the close of plaintiff's case absolution from the instance was applied for on the ground, *inter alia,* that assistance by the husband had not been proved. This was refused and evidence was led for defendant.

Thereafter judgment was given for plaintiff.

Defendant now appeals against this judgment and attacks it on what has in argument before us been reduced to three grounds, viz.:—

1. That a copy of the notice had not been properly served on the Rent Board;
2. That plaintiff did not reasonably require the room; and
3. That plaintiff had no *locus standi.*

We propose to deal with the last of these grounds first because if the defendant succeeds in this his appeal must succeed irrespective of the merits of the other grounds.

There is no evidence whatsoever that the plaintiff was assisted in the action. In his reasons for judgment the Additional Native Commissioner somewhat unconvincingly considers that assistance can be inferred from the fact that the husband resides with plaintiff in the same building and must therefore be aware of the proceedings. He also argues that plaintiff's position is analogous to that of a public trader. In support of this contention he cites Morris *v.* Lillian Myers, 1916, W.L.D. 158. But this case merely laid down that a woman who is in fact a public trader need not be assisted by her husband. There is no evidence whatsoever that plaintiff conducts a business analogous to that of a public trader. What is meant by the expression "public trader" has been set out in Grobler *v.* Schmilg and Friedman, 1923, A.D., at page 501. That decision lends no support to the Additional Native Commissioner's contention. The present case is very similar to that of Wilson-Yelverton *v.* Gallymore, 1950 (2), S.A., 26, in which it was held that a married woman cannot sue for ejectment from premises owned by her in the absence of an allegation of *locus standi.* In the case now before us there is indeed such an allegation; but this is controverted in defendant's plea. An essential allegation which is controverted in the pleadings requires to be proved. Some proof of assistance there must be, however meagre [Amod *v.* Ramkalia 1952 (1), S.A., 21]; but in the instant case proof of assistance is entirely absent.

Mr. Smits who appeared for the respondent argued that the admission of respondent that she is married is no evidence of a legal marriage or of a customary union. We do not see the point of this assertion. He also argued that respondent's ownership of the building in itself gives her the right to sue. That is not so. If the marriage is in community of property (and that is presumed) the marital power, and indeed the co-ownership of the husband in the property, is not ousted. Finally Mr. Smits argued that it does not rest with the respondent to prove that she is assisted by anybody and that, if the appellant alleges incapacity, then the onus of proving it rests on her. That is not the case when, as here, the respondent's own evidence establishes incapacity.

For these reasons the appeal on this ground must succeed, and it is therefore unnecessary to deal with the other grounds.

The appeal is allowed with costs and the judgment of the Court below altered to one of absolution from the instance.

Marsberg (President) and Liefeldt (Member), concurred.

For Appellant: Adv. J. E. Lubinsky instructed by Messrs. Gratius Sacks and Bernard Melman.

For Respondent: Mr. B. A. S. Smits.

SOUTHERN NATIVE APPEAL COURT.

MGQOBELE *v.* MBULAWA.

N.A.C. CASE No. 6 OF 1954.

UMTATA: 26th February, 1954. Before Israel, President; Warner and Young, Members of the Court.

LAW OF PROCEDURE.

Native Appeal Case—Practice and procedure—Res judicata—*Estoppel.*

Summary: Plaintiff obtained judgment against defendant in a Chief's Court for a declaration of rights in respect of a certain girl. Defendant did not hand the girl to plaintiff as ordered by the Chief's Court but gave her in marriage. Plaintiff sued defendant in the Native Commissioner's Court for the *lobola* received for her. Defendant pleaded that he was the person entitled to her dowry.

Held: That while the judgment of the Chief's Court stood, defendant was estopped from denying plaintiff's rights in respect of the girl.

The appeal was dismissed with costs.

Appeal from the Court of the Native Commissioner, Mqanduli.

Warner (Member):—

Plaintiff is entitled to the dowry of his sister Nonotise, who gave birth to two girls Ntombizanele and Mbutyumbutywana, of whom defendant is the father. Plaintiff brought an action against defendant in respect of the girl Ntombizanele in the Court of Chief Dabulamanzi Mtirara which gave the following judgment: "Court's judgment was against Nonkabatshulana Mgqobele by saying he should return this child to Sinana Mbulawa he has no right to her."

Defendant noted an appeal against this judgment to the Native Commissioner's Court but failed to prosecute it so that it was struck off the roll with costs. He did not comply with the order of the Chief's Court by returning Ntombizanele to plaintiff but gave her in marriage without consulting plaintiff and received dowry for her.

Plaintiff has now sued defendant in the Native Commissioner's Court for (*a*) a declaration of rights in regard to the girl Nombutyumbutywana and (*b*) the dowry received for Ntombizanele.

Defendant pleaded that he is the father and "dowry eater" of Ntombizanele and as such is entitled to her dowry.

Plaintiff did not reply to this plea but, at a pre-trial conference, it was agreed that the party who is entitled to the custody and dowry of the girl Ntombizanele is entitled also to the custody and dowry of the girl Nombutyumbutywana and the point to be decided was whether the judgment of the Chief's Court could be regarded as *res judicata* against defendant so that he would be estopped from denying plaintiff's rights to the girls.

After hearing argument, the Additional Assistant Native Commissioner upheld plaintiff's contention that estoppel applied and gave judgment in his favour.

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

"The judgment is wrong in law in that the Court erred in deciding that the judgment of Chief D. Dalindyebo given at the Chief's Court on the 6th September, 1952 (registered on 10th October, 1952, No. 37), rendered the present action (Case No. 29/1953) *res judicata* and estopped defendant (now appellant) from disputing plaintiff's claim.

Defendant averring that the said Chief's judgment is—

(*a*) vague and has no direct bearing on the issues raised in the Pleadings of Case No. 29/1953;

(*b*) is unenforceable in law and therefore *void ab origine*."

According to the statement furnished by the Chief, plaintiff claimed, in his Court, the girl Ntombizanele on the ground that her mother had been rendered pregnant by defendant who had not paid a full fine in respect of the pregnancy. The Chief gave judgment that defendant should return the child to plaintiff because defendant had no right to her. To my mind, there is no doubt that the Chief's judgment was, in effect, a judgment in favour of plaintiff for a declaration of rights in respect of the girl Ntombizanele. While this judgment stands, defendant is estopped from denying plaintiff's rights to the girl.

When defendant applied for an extension of time in which to note an appeal against the Chief's judgment, he submitted an affidavit in which he stated, *inter alia,* that plaintiff had sued him in the Chief's Court for an order declaring him to be the dowry eater of Ntombizanele and the Chief gave judgment against him. This shows that he understood that the Chief gave judgment against him for a declaration of rights in favour of plaintiff in respect of the girl Ntombizanele and he cannot now be heard to say that the judgment is vague and has no direct bearing on the issues raised in the pleadings of the present case.

The statement in the notice of appeal that the Chief's judgment is unenforceable in law and therefore *void ab origine* is not understood and no authorities in support of this statement have been quoted in this Court.

I consider that the judgment of the Additional Assistant Native Commissioner is correct and the appeal should be dismissed with costs.

Israel (President): I concur.
Young (Member): I concur.
For Appellant: Mr. Knopf, Umtata.
For Respondent: Mr. Muggleston, Umtata.

SOUTHERN NATIVE APPEAL COURT.

MAVUMA *v.* **MAVUMA.**

N.A.C. CASE No. 7 OF 1954.

UMTATA: 26th February, 1954. Before Israel, President, Warner and Young, Members of the Court.

NATIVE CUSTOM.

Native Appeal Case—Native Custom—Adoption of heir by kraalhead who is without male issue—Adoption for such purpose permissible even though it disentitles blood relative from succeeding to estate—Good cause *not an element in such an act of adoption.*

Summary: In the Native Commissioner's Court plaintiff alleged that he was the heir to his late elder brother Desele Mavuma who died without male issue, and as such claimed from defendant certain property belonging to the estate of the said Desele. Defendant resisted the claim and pleaded that he is the heir of the late Desele by legal adoption.

Judgment was given for defendant, and plaintiff appealed on the grounds that:—

"In as much as plaintiff was heir to the estate of the late Desele Mavuma, any act on the part of the latter's purporting to appoint defendant as his heir without a specific disinherison of plaintiff for just cause, was invalid."

Held:

(1) A collateral's right of succession, in common with that of every male member of the family, is potential only.

(2) A kraalhead who is without male issue is entitled to adopt an heir, even though the effect is to disentitle collaterals from succeeding to his estate, provided that the formalities for a valid adoption are complied with.

(3) That *good cause* is not an element in the act of adoption of an heir by a kraalhead who is without male issue.

The appeal was dismissed with costs.

Cases referred to:

Nohele *v.* Nohele, 6, N.A.C. 19.

Sibozo *v.* Notshokovu, 1, N.A.C. 198.

Appeal from the Court of the Native Commissioner, Qumbu.
Israel (President):—

In the Native Commissioner's Court plaintiff alleged that he was the heir to his late elder brother Desele Mavuma who died without male issue, and as such claimed from defendant certain property belonging to the estate of the said Desele. Defendant resisted the claim and pleaded that he is the heir of the late Desele by legal adoption.

The general facts of the matter are not in dispute. Plaintiff, as Desele's brother, would in the normal course have been heir to the latter's estate, but some months before his death Desele, in consequence of a serious disagreement with plaintiff over the disposal of certain dowry stock, called a meeting of members of his family and relatives and there declared his intention of adopting defendant, the son of a younger brother, as his heir. The customary formalities of such a meeting were duly observed. The meeting was properly convened for the purpose; plaintiff and defendant's father (defendant being then a minor) were present; and the chief was duly notified of the decision. As an added precaution Desele had the announcement of the adoption of defendant as his heir reduced to writing. In these circumstances the Native Commissioner found that the defendant had been properly constituted heir to the estate of the late Desele and gave judgment for defendant accordingly.

Plaintiff now appeals on the grounds that: "In as much as plaintiff was heir to the estate of the late Desele Mavuma, any act on the part of the latter's purporting to appoint defendant as his heir without a specific disinherison of plaintiff for just cause, was invalid."

Now, it is admittedly established Native Custom that before a son may be disinherited there must be good and sufficient cause for such a step (see Nohele *v.* Nohele, 6, N.A.C. 19, referred to with approval and applied in many subsequent cases in this Court), but the case now before us is not one of

disinherison of a son by his father. It is simply the adoption of an heir by a kraalhead who was at the time without male issue, and although its effect is to disentitle the plaintiff from succeeding to his brother's estate, it violated no inherent right in him to do so for, as a collateral, plaintiff's right of succession to his brother was potential only in common with that of every other male member of the family. Indeed, plaintiff himself recognised that this is so when, under cross-examination he said: "I agree that I cannot say that I was my brother's heir during his lifetime."

That being so, I am of the opinion that "good cause" is not an element in the act of adoption of an heir by a kraalhead who is without male issue. In fact, the formalities for a valid act of adoption laid down in the case of Sibozo *v.* Notshokovu, 1, N.A.C. 198, as distinct from those prescribed for a valid act of disinherson (see Nohele's case *supra*), confirm that good cause is not even necessary to be shown, let alone being essential. All that is required is that the decision to adopt should be announced at a meeting of the family and relatives properly convened for the purpose and that the chief should be duly notified if not actually present. As stated above, all these requirements had been fulfilled in the instant case and the Native Commissioner was therefore correct in holding that there had been a valid adoption and institution of heir by Desele. And this would be so, I consider, whether or not all or any of the members of the family present at the meeting agreed with the announcement made thereat.

The appeal is dismissed with costs.

Warner (Member): I concur.

Young (Member): I concur.

For Appellant: Mr. Airey, Umtata.

For Respondent: Mr. Muggleston, Umtata.

SOUTHERN NATIVE APPEAL COURT.

NGXOLO *v.* SAMUEL.

N.A.C. CASE No. 8 OF 1954.

UMTATA: 1st March, 1954. Before Israel, President, Warner and Young, Members of the Court.

LAW OF PROCEDURE.

Practice and Procedure—Judgment given in Chief's Court—Action in respect of same subject matter brought in Native Commissioner's Court—Res judicata—Estoppel.

Summary: Plaintiff received cattle from dowry paid for a girl named Dyaduvana. Plaintiff died and his widow, Notawuli, mother of plaintiff, took possession of the cattle. Defendant, brother of Dyaduvana sued Notawuli in a Chief's Court for the cattle and judgment was given in his favour. The Chief's messenger attached the cattle and handed them to defendant. Plaintiff then sued defendant in the Native Commissioner's Court claiming to be the owner of the cattle.

Held: That a Native Commissioner's Court should not lend itself to reversing the judgment of a Chief's Court, other than by way of appeal.

Held further: That the Native Commissioner had the power to raise a plea of *res judicata* and should have done so.

The appeal was dismissed with costs.

Cases referred to:

Tsautsi *v.* Nene & Another, 1952 (1), N.A.C., 73 (s).

Appeal from the Court of the Native Commissioner, Mqanduli.

Warner (Member):—

Plaintiff is the heir of the late Putye Sikoyi who had a sister named Nompoyi who was married to a man named Samuel Jim. Samuel absconded and Nompoyi went to live at Putye's kraal. Her children including defendant and a girl named Dyaduvana, grew up there. Dyaduvana was married and Putye received cattle from her dowry.

Defendant sued Notawuli, widow of the late Putye and mother of plaintiff, in the Court of Chief Zwelinzima Sinyekeni, for eight head of cattle. He stated that the cattle were dowry for his sister, Dyaduvana, and had been kept for him by Putye but he (defendant) had now established his own kraal and desired that the cattle should be in his possession. Notawuli denied that the cattle were defendant's property. After hearing the case, the Chief gave judgment ordering Notawuli to hand over the eight head of cattle mentioned to defendant (plaintiff in his Court).

In pursuance of this judgment, the Chief's messenger attached four head of cattle at Putye's kraal and four head at Sikoyana's kraal, where they are said to have been placed under *nqoma* custom, and handed them to defendant.

Plaintiff then sued defendant in the Native Commissioner's Court, alleging that he was the owner of the cattle, that he was not a party to the suit in the Chief's Court and that he was not aware of it. Defendant pleaded that the cattle were his property.

The Assistant Native Commissioner gave judgment of absolution from the instance with costs and plaintiff has appealed on the ground that the judgment is against the weight of evidence and probabilities of the case.

Now, the position is that the Chief's Court has declared defendant to be the owner of certain cattle. If plaintiff were to succeed in the present action, it would mean that two Courts of concurrent jurisdiction would give contrary decisions, each declaring a different person to be the owner of the same cattle.

As was stated in the case of Tsautsi *v.* Nene and Another, 1952 (1), N.A.C. 73 (S), public interest demands that a Native Commissioner's Court should not lend itself to reversing or even confirming the judgment of a Chief's Court, other than by way of appeal.

In that case it was also held that the Native Commissioner has the power to and should, raise the plea of *res judicata* whenever the judgment appealed from is a final judgment.

To establish a plea of *res judicata,* it must be shown that the parties, the subject matter and the cause of action are the same in both cases. There is no doubt that the subject-matter, i.e. the cattle, and the cause of action, i.e. the ownership of the cattle, were the same in both cases. In the Chief's Court, Notawuli was sued as being the person in charge of the property in Putye's estate. In the Native Commissioner's Court, plaintiff has sued as the heir of this estate. In my opinion, therefore, the parties must be regarded as being the same.

Plaintiff stated, in his summons, that he was not aware of the suit in the Chief's Court. In his evidence, however, he stated that Notawuli attended twice at the Chief's Court and after the first attendance she told him that defendant was claiming the cattle. In any case, he must have been ware of the Chief's judgment when the cattle were attached by the Chief's messenger.

Plaintiff could have intervened as co-defendant in the Chief's Court or he could have appealed against the Chief's judgment as privy to the party against whom it was given. This is the procedure which he should have adopted instead of endeavouring to obtain a reversal of the Chief's judgment without appealing against it.

Without going into the merits of the case, therefore, I consider that the appeal should be dismissed with costs.

Israel (President): I concur.

Young (Member): I concur.

For Appellant: Mr. Airey, Umtata.

For Respondent: Mr. Muggleston, Umtata.

NORTH EASTERN NATIVE APPEAL COURT.

MAHLANGU *v.* SIBIYA.

N.A.C. CASE No. 2 OF 1954.

PRETORIA: 12th March, 1954. Before Steenkamp, President, Ramsay and O'Connell, Members of the Court.

NATIVE LAW AND CUSTOM.

Children—Trafficking in children is contra bones mores.
Costs—Point taken for first time mero motu *by Native Appeal Court.*

Summary: Plaintiff sued defendant for the *lobolo* paid to defendant in respect of a girl Martha. Defendant is the maternal uncle of Martha.

Martha is the natural daughter of one Matthew, who was previously married to Martha's mother, and on the death of her father, Matthew, his widow, Elizabeth, returned to her people with the child Martha. Elizabeth was then given in marriage to plaintiff. Plaintiff alleges that when he married Elizabeth and paid *lobolo* he thereby also acquired from Elizabeth's late father the girl Martha.

Held: That the guardian of Martha is the heir of Matthew and he is entitled to her *lobolo* and the receiver of the *lobolo,* viz., defendant, holds that *lobolo* until such time as Matthew's heir claims it.

Held further: That the Courts will not countenance under any guise the trading in children, which is *contra bones mores.*

Held further: That if a party will come to Court and rely on a transaction of this nature and whether the point was raised in the Court below or in this Court or *mero motu* by this Court, he is not entitled to costs.

Cases referred to:

Ntombele *v.* Ntombele, 1937, N.A.C. (T. & N.), 95.

Appeal from the Court of Native Commissioner, Pretoria.

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

Judgment was given on 25th November, 1953, but the appeal was only noted on 5th January, 1954, i.e. well beyond the prescribed period of twenty-one days.

Application for written reasons for judgment was made on 5th December, 1953, i.e. also not within the prescribed period of seven days.

Application is made for the condonation of the irregularity and as the appellant has a reasonable prospect of success the application is granted and the parties called upon to argue the appeal.

When the plaintiff (now respondent) married Elizabeth, sister of the defendant (now appellant) she already had a female child, Martha, of which the plaintiff was not the father. Elizabeth was previously married to Matthew Muguni and it is alleged that Martha was the natural daughter of Matthew who died and Elizabeth returned to her people from where she was given in marriage to the Plaintiff.

Plaintiff alleges that when he married Elizabeth and paid *lobolo* he thereby also acquired from Elizabeth's late father the girl Martha.

There is a dispute as to whether Martha lived with Plaintiff and her mother, Elizabeth, but it is immaterial as to whether she did or not and the probabilities are that she lived with her late mother but what is manifest from the record is—

> that when Martha got married she was living with her late mother's people and her maternal uncle, the defendant, received her *lobolo*.

Plaintiff has now sued the defendant for the *lobolo* received for Martha and in his claim he alleges he is entitled thereto for the reason that when Elizabeth was handed over to him by her father, the daughter was also handed over to him and he became the guardian.

The Native Commissioner gave judgment for plaintiff for 10 head of cattle, being the number of cattle defendant received as *lobolo* for Martha and costs.

An appeal has been noted to this Court on several grounds but for the purposes of this judgment it is only necessary to quote ground 3, which reads as follows:—

> "(3) The judgment is further bad in law in that the Additional Native Commissioner rejected entirely the evidence of the appellant and that of his witnesses and accepted that the Respondent is Martha's father and guardian when this was not proved."

Assuming that the evidence given by plaintiff is accepted as the truth and that of defendant wholly discarded, the plaintiff could never have become the guardian of the girl Martha as trafficking in children is *contra bones mores* and cannot possibly be countenanced by a Court of Law.

Martha's guardian is the heir of her late mother, Elizabeth's first husband, Mathew and he is entitled to her lobolo and the receiver of the lobolo, namely, defendant holds that lobolo until such time as Matthew's heir claims it. If defendant parts with the *lobolo* to the plaintiff, he runs the risk of Matthew's heir claiming the *lobolo* cattle from him and it will be difficult for him to resist the claim.

In the case of Ntombele *v.* Ntombele, 1937, N.A.C. (T. & N.), 95, quoting with approval other cases, it is stated that the Courts will not countenance under any guise the trading in children which is *contra bones mores.*

Counsel for Respondent has asked this Court to reverse its previous decisions that the sale of a girl is contrary to public policy and he has strenuously argued this aspect but we are of opinion that previous decisions are based on sound reasoning and we are not prepared to hold that they should be reversed.

There is the question of costs which respondent's Counsel has argued should be awarded to respondent but we hold the view that if a party will come to Court and rely on a transaction of this nature and whether the point was raised in the Court below or in this Court or *mero motu* by this Court he is not entitled to costs.

In the circumstances the appeal succeeds with costs and the Native Commissioner's judgment is altered to one for defendant with costs.

Ramsay (Permanent Member): I concur.

O'Connell (Member): I concur.

For Appellant: Adv. R. du Plessis instructed by M. Silber.

For Respondent: Mr. A. P. Nel of Nel & Nel.

NORTH EASTERN NATIVE APPEAL COURT.

MAHLANGU *v.* MAHLANGU.

N.A.C. CASE No. 99 OF 1953.

PRETORIA: 12th March, 1954. Before Steenkamp, President, Ramsay and O'Connell, Members of the Court.

NATIVE LAW AND CUSTOM.

Practice and Procedure—Competency of Native Commissioner's Court to hear and determine action between same parties on same subject matter where an alleged competent judgment by a Chief is in existence and no appeal has been noted against such judgment.

Disinherison: Not competent unless formalities complied with.

Deceased estate—Property found in kraal of deceased kraalhead at time of his death presumed to belong to kraalhead.

Summary: Plaintiff unsuccessfully sued defendant in a Native Commissioner's Court for certain cattle found in the kraal of their late father on the latter's death.

Plaintiff is the eldest son of the deceased's first wife and defendant the eldest son of the fifth wife.

At the hearing of the appeal plaintiff's (appellant's) Counsel took the preliminary point that the proceedings before the Native Commissioner were irregular in that he alleged a competent judgment by a Native Chief between the same parties on the same subject matter was in existence, and no appeal having been noted against that judgment.

Held: That plaintiff having brought the action in the Native Commissioner's Court, he brought about this condition himself and he could not derive any benefits from his own actions.

Held further: That it is a fundamental principle of Native Law that a Native may not disinherit his eldest son unless he follows certain formalities which are absent in the instant case.

Held further: That any property found at a kraal belong to the kraalhead and as the cattle in question were at deceased's kraal at the time of his death, a heavy onus rested on defendant to prove that the cattle are in fact his own property.

Appeal from the Court of Native Commissioner, Belfast.

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

Counsel for appellant (plaintiff in the Court below) before arguing the appeal took the preliminary point that the proceedings in the Native Commissioner's Court were irregular.

It appears from the record that the appellant sued the respondent in the Chief's Court for certain cattle, donkeys, etc., and obtained judgment in his favour. An attachment was made by the Chief's Messengers and certain cattle and donkeys were handed over to the plaintiff, the successful party.

Defendant obtained an interim interdict in the Native Commissioner's Court against the plaintiff, disposing of the various animals, pending a spoliatory action.

A writ Mandament van Spolie, supported by affidavit was applied for. Plaintiff filed a replying affidavit wherein he states *inter alia* that the cattle and donkeys came into his possession by virtue of an attachment made in pursuance of the Chief's judgment.

There is no record that the spoliatory action was heard and determined but we find that plaintiff, through a legal representative, issued a summons in the Native Commissioner's Court for certain property he alleges he inherited from his late father and which defendant claims as his property.

Counsel for appellant has now argued that it was not competent for the Native Commissioner to hear and determine the action, seeing that there is already in existence an alleged existing competent judgment by the Chief awarding the stock in dispute to the plaintiff and no appeal having been noted against that judgment.

It seems to me that plaintiff brought about this condition himself. He is responsible for the action being brought on in the Native Commissioner's Court and I do not see how he can derive any benefits from his own actions which, in fact, is what his Counsel seeks from this Court.

Plaintiff (now appellant) is the eldest son of the late Koek who had several wives, and therefore the general heir. After Koek's death the defendant, who is the eldest son of the fifth wife, took possession of all the property found at his late father's kraal and his defence is that he was appointed heir by their father. In support of this contention he handed in as an exhibit a certain document, signed by the late Koek about two months before his death.

This document, which is not a Testament, reads as follows:—

> "Hier mee bemaak ek my besittings aan my seun Kozaan as volg 4 osse 1s swarte, 1 Rooibles, 2 Rooies en as ek Koek die dag dood is dan moet al Kozaan se broers onder hom wees. Mbulau het 3 beeste aan sy eie 1 ossie en twee koeie aldrie swart en 1 perd en drie Donkies. Kozaan het aan sy eie 3 koeie 1 swarte 1 Rooie en 1 Rooie met wit bles. 1 Ploeg 1 Eg 1 Skoffelploeg 3 Jukke met Kettings en 15 Bokke 1 Donkie. Matabiel het aan sy eie 4 perde. Al die kinders wat vir my Koek sorg so lank ek leef moet na my dood na hulle oudste broer Kozaan gaan en al die jonger broers se vee val onder Kozaan sodat hy vir hulle daarvoor kan vrouens ruil."

Counsel for appellant (plaintiff) at the commencement of his argument intimated that he is only asking for judgment in respect of the four head of cattle mentioned by the late Koek in the document quoted.

Voluminous evidence was led concerning the alleged estate left by the late Koek and at the conclusion of the case the Native Commissioner gave judgment for defendant with costs.

An appeal has been noted to this Court on the grounds that the judgment is against the evidence and the weight of evidence.

It is not necessary to consider all the evidence led on behalf of both parties and we are of opinion that only the document signed by Koek need be referred to in view of the fact that Counsel for appellant has confined his arguments only to the four head of cattle.

It is a fundamental principle of Native Law that a Native may not disinherit his eldest son unless he follows certain formalities which are absent in the instant case nor may he dispose by will of House property. In any case, the document left by Koek is not a valid will nor was this contended by Counsel for respondent.

The document does, however, indicate what property Koek possessed just prior to his death. If these four head of cattle had been purchased by the defendant prior to Koek's death as testified to by the defendant and his witnesses, it is not understood why Koek should have stated that he bequeths the cattle to the defendant. This contention is unanswerable and therefore we must accept that the defendant's evidence cannot be entertained that he had purchased the cattle from other people out of his own earnings.

It has been decided by this Court on numerous occasions that any property found at a kraal belong to a Kraal Head and as these cattle were at the deceased's kraal when he died, a heavy onus rests on defendant to prove that the cattle are in fact his own property. He handed in the document signed by the late Koek. He was present when the document was written out and read over to Koek and if it is true, as alleged by him that the four head of cattle were already his property at the time, he would have objected to the bequest to him of his own property, especially as in the document the late Koek specifies what property already belongs to the Defendant.

There is evidence on record which this Court accepts, that one of the four head of cattle died between the period Koek signed the document and his death and therefore plaintiff is not entitled to claim the value of this beast.

In the circumstances we hold that the appeal should be allowed with costs and the Native Commissioner's judgment altered to read:—

> "For plaintiff for 3 head of cattle or their value £36 and costs."

Ramsay and O'Connell (Members), concurred.

For Appellant: Adv. A. S. van der Spuy instructed by J. E. de Villiers.

For Respondent: Adv. A. S. Botha instructed by V. D. Veimer.

NORTH EASTERN NATIVE APPEAL COURT.

DHLAMINI *v.* NDLELA.

N.A.C. Case No. 3/54.

Pretoria: 12th March, 1954. Before Steenkamp, President, Ramsay and O'Connell, Members of the Court.

LAW OF PROCEDURE.

Practice and Procedure: Magistrate has no jurisdiction to hear civil case between Native and Native: Locus standi *to sue for return of* lobolo *cattle where no customary union has taken place.*

Summary: From the record it appears that the judgment in the instant case was given by the Magistrate, Wakkerstroom. Plaintiff sued defendant for the return of cattle paid by his father to defendant's father for *lobolo* in respect of plaintiff's proposed customary union with defendant's sister. This sister died before the celebration of the customary union.

Held: That it is imperative that a presiding officer who holds the dual position of Magistrate and Native Commissioner should conduct a civil suit between Native and Native in his capacity as Native Commissioner and should sign all documents relevant thereto over the designation of Native Commissioner and nowhere should the title of Magistrate be used.

Held further: That as no customary union took place, the cattle remained the property of the person who had paid them, viz., plaintiff's father, and he is the only person who could sue for their repayment.

Held further: That only if a customary union had taken place, could plaintiff acquire any rights to the cattle on dissolution of the union.

Statutes etc. referred to:

Sections *ten* (1) and *seventeen* (4) of Act No. 38 of 1927.

Appeal from the Court of Native Commissioner, Wakkerstroom.

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

From the record it is observed that judgment was given by the Magistrate of Wakkerstroom. The signature of the Presiding Officer was signed over the designation of Magistrate on 27th August, 1952, 14th August, 1953, 25th September, 1953, and 16th October, 1953.

The reasons for judgment were signed by the Magistrate.

The certificate of record was however signed by the Presiding Officer in his capacity as " Native Commissioner ".

This Court wishes to point out that a Magistrate has no jurisdiction to preside over a case in which both parties are Natives *vide* section *ten* (1) of the Native Administration Act, No. 38 of 1927. Section *seventeen* (4) of the same Act specifically lays down that as from the date of the constitution in any area of a Court of Native Commissioner under the Act, a Magistrate's Court shall cease to have jurisdiction in that area in respect of any Civil suit arising under section *ten* of the Act. A Native Commissioner's Court was established for the district of Wakkerstroom *vide* Proclamation No. 298 of 1928, No. 174 of 1929 and No. 138 of 1932.

It is imperative that a Presiding Officer who holds the dual position of Magistrate and Native Commissioner should conduct a civil suit between Native and Native in his capacity as Native Commissioner and should sign all documents relevant thereto over the designation of Native Commissioner and nowhere should the title of Magistrate be used.

The plaintiff (now appellant) sued the defendant (now respondent) for return of 10 head of cattle plus £5 or alternatively, payment of the total sum of £55 and in his particulars of claim

the plaintiff alleges that he entered into an agreement with defendant's late father to marry defendant's sister and that he paid the full agreed *lobolo* of 10 head of cattle and £5. Defendant's father failed and refused to allow the customary union and also failed and neglected to hand over his daughter to the plaintiff.

Defendant's plea is to the effect that the *lobolo* agreed upon was 16 head of cattle and that Plaintiff's father only handed over 9 head of cattle. The girl, Jennie, died and defendant's father refunded to plaintiffs father the sum of £26 being the value of 9 head of cattle less £1 for the wrongful and unlawful abduction of Jennie and that plaintiff's father accepted the payment of £26.

The Native Commissioner gave judgment in favour of defendant with costs.

Plaintiff has now appealed to this Court on the grounds that the judgment is against the evidence and against the weight of evidence.

It is common cause that the girl, Jennie, died before any customary union had been entered into and that neither of her two younger sisters, who were pointed out as substitutes, were prepared to mary the plaintiff.

Plaintiff, that is the prospective bridegroom, is suing for the refund of the *lobolo* but he has overlooked the fact that as no customary union took place, the cattle remained the property of his father who is the only person who could sue for their repayment. He was the payer thereof and only if a union had taken place, could plaintiff acquire any rights to the cattle on dissolution of a union.

Plaintiff's father advanced the cattle to his son for the specific purpose of using these cattle for *lobolo* purposes and therefore the father did not lose ownership in these cattle until such time as a customary union actually took place. He retained ownership all the time and was the only person who could sue for refund.

There was a misjoinder and plaintiff is out of Court.

In dismissing the appeal with costs this Court has, however, to prevent any misunderstanding, ordered the Native Commissioner's judgment to be altered to read:

" Summons dismissed with costs."

Ramsay and O'Connell (Members) concurred.

For Appellant: Adv. M. Mandell (instructed by Samuel Wade).

For Respondent: Adv. J. H. Loots (instructed by Barry & Schuurman).

NORTH EASTERN NATIVE APPEAL COURT.

MASANGO *v.* TSHOKU.

N.A.C. CASE No. 93 OF 1953.

PRETORIA: 12th March, 1954. Before Steenkamp, President, Ramsay and O'Connell, Members of the Court.

LAW OF DELICT.

Damages—Malicious prosecution—Essentials to be proved.

Summary: Plaintiff sued defendant for £100 damages for malicious prosecution. He alleged that defendant had falsely and maliciously charged him before the Police with unlawfully issuing a pass to a Native resulting in plaintiff's arrest and detention for three days.

Held: That to determine whether defendant's actions constituted the *causa causans* of the prosecution of plaintiff it is necessary to show (*a*) that there was no reasonable or probable cause for the charge; and (*b*) that it was the action of the defendant which was the ultimate cause of the prosecution and not merely a subsequent decision of the competent authorities based on an initial report of the defendant.

Held further: That reasonable and probable cause is an honest belief in the guilt of the accused based upon a full conviction, founded upon reasonable grounds, of the existence of a state of circumstances, which, assuming them to be true, would reasonably lead any ordinary prudent and cautious man, placed in the position of the accuser, to the conclusion that the person charged was probably guilty of the crime imputed.

Cases referred to:
Hicks *v.* Faulkner, 8, Q.B.D., 171.
Nourse *v.* Farmers' Co-operative Company, 1906, E.D.C., 291.
Pyett *v.* Francis, 28, N.L.R., 194.

Appeal from the Court of Native Commissioner, Brits.

O'Connell (Member), delivering the judgment of the Court:—

In the Court below plaintiff (now respondent) sued defendant (now appellant) for £100 as damages for malicious prosecution.

The Native Commissioner entered judgment in plaintiff's favour for an amount of £10 and costs. Against this judgment defendant now appeals on the grounds (*a*) that it is against the evidence and the weight of evidence and (*b*) there is no evidence to shew that plaintiff suffered damages in the amount of £10 or at all.

A cross-appeal noted by the plaintiff against the Native Commissioner's refusal to amend the summons was abandoned at the hearing in this Court.

The facts giving rise to the action between the parties are these:—

Plaintiff and defendant reside on the farm Bultfontein where defendant occupies the position of foreman. He also presides over the Kgotla of the tribe on that farm. Defendant has been authorised to issue passes to the members of the tribe resident on Bultfontein. He does not write out the passes himself but validates passes written out by others by placing thereon a rubber stamp which shews his name and designation. On 20th January, 1953, plaintiff wrote out a pass in favour of one Justinus Majilu, a resident of Bultfontein. When Justinus presented this pass to defendant to be stamped, the latter impounded it and stated plaintiff was not authorised to write out passes and that he would put him in his place. Defendant thereupon called a meeting of the Kgotla at which he reported Plaintiff's conduct. The Kgotla did not call plaintiff to the meeting to give an account of himself but, in his absence, resolved that the matter be reported to the Police. Defendant, in terms of this resolution made a report to the Police at Brits who arrested plaintiff and detained him for 3 days in the police cells. Plaintiff was on 27th February, 1953, charged in the Magistrate's Court, Brits, with contravening regulation 9 of Proclamation No. 150 of 1934 in that he, not being a person authorised to issue passes to Natives in terms of such section, unlawfully issued a pass to Native Justinus Motzili purporting to permit the latter to proceed to a pass area. Plaintiff was found not guilty of this charge.

It is clear from the evidence that plaintiff and defendant are not on good terms and that it was defendant who carried out the Kgotla's resolution to report plaintiff's conduct to the police.

But these facts in themselves are insufficient to determine the question whether defendant's actions constituted the *causa causans* of the prosecution of plaintiff. It is also necessary to shew (*a*) that there was no reasonable or probable cause for the charge; and (*b*) that it was the action of Defendant which was the ultimate cause of the prosecution and not merely a subsequent decision of the competent authorities based on an initial report of the defendant.

Insofar as reasonable and probable cause is concerned the definition by Hawkins, J., in Hicks *v.* Faulkner (8 Q.B.D. 171), cited with approval in our Courts in Nourse *v.* Farmer's Co-operative Company (1906, E.D.C. 291) and Pyett *v.* Francis (28 N.L.R. 194) must be borne in mind. That definition reads:—

> "I should define reasonable and probable cause to be, an honest belief in the guilt of the accused based upon a full conviction, founded upon reasonable grounds, of the existence of a state of circumstances, which, assuming them to be true, would reasonably lead any ordinary prudent and cautious man, placed in the position of the accuser, to the conclusion that the person charged was probably guilty of the crime imputed."

The words "placed in the position of the accuser" are of particular importance.

In this instance it must be remembered that defendant is a Native ignorant of the finer points of the law governing the issue of passes. He, and the members of the Kgotla regarded the writing out of passes by plaintiff as unauthorised and resolved that this unauthorised conduct be reported to the authorities. There was therefore, in his mind, a reasonable and probable cause to consider the plaintiff's action as unlawful.

Though it is stated by the plaintiff that he was shown a statement made to the police by defendant, the contents of that statement are not mentioned in evidence. It is, therefore, not possible to say positively whether this statement specifically charged plaintiff with issuing passes in contravention of the law or whether it merely complained of his action in writing out passes unauthorised by the Kgotla. Either inference is possible in the circumstances. It is, therefore, not clear whether defendant's action or the actions of the police to whom he made the initial report constituted the *causa causans* of the prosecution. In the absence of any definite evidence on this point, this Court holds that plaintiff has not discharged the onus and in the circumstances that the appeal should be upheld with costs and the judgment of the Court *a quo* altered to read:—

"Absolution from the instance with costs."

Steenkamp, President, and Ramsay, Member, concurred.

For Appellant: Adv. H. J. Preiss instructed by Sive & Jacobson.

For Respondent: Adv. G. G. Hoexter instructed by J. S. Wichi.

SOUTHERN NATIVE APPEAL COURT.

SIGIDI *v.* **MFAMANA and ANOTHER.**

N.A.C. CASE No. 9 OF 1954.

KING WILLIAM'S TOWN: 16th March, 1954. Before Warner, Acting President; Jordaan and Schaffer, Members of the Court.

NATIVE CUSTOM.

Native Appeal Case—Claim for damages for seduction—Summons contained claim for cattle only—No provision for alternative monetary equivalent—Old established practice of claiming an alternative monetary value should be maintained.

Summary: Plaintiff sued defendants for five head of cattle as damages, alleging that first defendant in September, 1952, seduced and rendered pregnant his daughter Agnes, and that first defendant was an inmate of the kraal of second defendant.

The facts of the case are immaterial.

The summons contained a claim for five head of cattle without making allowance for an alternative value in money. At the hearing of the appeal the question of "alternative value" formed the subject of argument and the Court was requested to give a ruling on the matter.

Held: That a defendant, against whom a judgment has been given for the payment of cattle, and who wishes to relieve himself of the judgment debt, should be placed in the position where it is possible for him to satisfy the debt by payment in money if so desired. The old-established practice of claiming an alternative monetary value should therefore be maintained.

The appeal succeeds.

Cases referred to:

Bulukwana *v.* Nkobongeli, 1932, N.A.C. (C. & O.), 43.

Matolengwe *v.* Pateni, 1, N.A.C. (1949), 106 (S.).

Statutes referred to:

Government Notice No. 2886 of 1951 (Table "C").

Appeal from the Court of the Native Commissioner, Lady Frere.

Warner (Acting President):—

Plaintiff sued defendants for five head of cattle as damages alleging that first defendant in September, 1952, seduced and rendered pregnant his daughter Agnes and that first defendant was an inmate of the kraal of second defendant.

The plea was a denial of these allegations.

After hearing evidence the Additional Assistant Native Commissioner gave judgment for defendants and plaintiff has appealed on the ground that the judgment is against the weight of evidence and probabilities of the case.

Although it was denied in the plea that first defendant was an inmate of second defendant's kraal, when second defendant gave evidence he stated that first defendant lives with him at his kraal.

It is common cause that first defendant was attending school at Clarkebury but used to come home to Askeaton for his holidays, that he and Agnes were on terms of intimacy and that Agnes gave birth on the 18th June, 1953.

Agnes says that first defendant is the father of her child and that he made her pregnant in September, 1952. According to her evidence she saw defendant when he arrived on Friday, 26th September, 1952. She spoke to him again on Saturday and Sunday when he asked her to meet him on Monday afternoon. On Monday she was employed at the shop. She left to go home at 5 p.m. and on the way she met first defendant. She told him that

she had work to do at home so he asked her to meet him next afternoon. On Tuesday afternoon at about sunset she met first defendant in accordance with the appointment made and they went among some mimosa trees where they had intercourse. On the Thursday afternoon they again met by appointment and had intercourse. In November she realised that she was pregnant and advised first defendant by letter but he did not reply. When he came home for the holidays in December, 1952, she again told him that she was pregnant.

Constance Mngqibisa says that she lives at the same kraal as Agnes does and that, one afternoon at dusk in September, 1952, first defendant came to the kraal and he and Agnes went away together. Agnes afterwards returning alone.

This evidence receives strong corroboration from letters written by first defendant to Agnes in September, 1952, shortly before he was due to return home for the holidays. In these letters he expresses an ardent love for Agnes and a desire to meet her again. In his letter of 2nd September, 1952, he states: "I shall be home on the 25th September, 1952. I shall be wanting something we shall have a week's holiday." In this letter he also suggests that Agnes should go to Cala to meet him so that they could travel from there to Askeaton together.

Agnes says that after she had met first defendant when they had intercourse she went to Queenstown for a few days and a minister named Stephen Mgcambi travelled with her. It was suggested in cross-examination that it was this person who had made her pregnant. Agnes denied it and Stephen Mgcambi was called to refute the suggestion. No evidence was called by the defence to substantiate the suggestion and, in his reasons for judgment, the Native Commissioner does not mention the possibility that Stephen Mgcambi may be the father of the child born to Agnes.

The defence evidence is that first defendant did not come home in September but came at the beginning of October, 1952. First defendant says that he could not leave when the school holidays began as he became ill and therefore came home a week later. Second defendant states, however, that first defendant always remained at Clarkebury during the September holidays and only came home on this occasion because he had been sick. This evidence is inconsistent with the statements made by first defendant in his letters to Agnes.

First defendant says that he was at home for about four days at beginning of October, 1952, but made no attempt to see Agnes. This is difficult to believe in view of the statements in the letters written by him. He states that he is still in love with Agnes and admits that he used to "metsha" with her under mimosa trees.

The Native Commissioner found as a fact that first defendant was not at Askeaton during September and at the time of the alleged seduction and therefore is not responsible for the pregnancy of the complainant. Now, if first defendant had intercourse with Agnes a week later than the date mentioned by her, it would not be impossible for him to be the father of her child but the difficulty is that Agnes says that first defendant arrived home on the day that he had said in his letters that he would arrive.

The Native Commissioner does not say that he found first defendant to be a truthful witness and accepted his statement that he did not meet Agnes when he came home in October, 1952, but has pointed out discrepancies in the evidence of the witnesses for plaintiff while ignoring discrepancies in the defence evidence.

The Native Commissioner says in his reasons for judgment: "Letters were produced in evidence by both parties and I must say that first defendant's story is not inconsistent with the con-

tents of these letters." It is difficult to understand how it can be said that first defendant's story that he made no effort to meet Agnes when he returned home is not inconsistent with the contents of his letters which contain protestations of love and an anxiety to meet her as soon as possible.

The Native Commissioner points out that Agnes says she met first defendant at church and at the shop during September, 1952, and says that, if this is the case, plaintiff should have been able to bring other evidence to show that first defendant was at Askeaton during that month. If plaintiff had brought evidence to prove that Agnes and first defendant were seen together in September, 1952, by independent witnesses, his case would have been strengthened, but it must be remembered that first defendant admits that he "metshaed" with Agnes during the June holidays. A person seeing them together would have no particular reason for remembering the incident and, in any case, a Native giving evidence in July, 1953, of having seen Agnes and first defendant together at church or at the shop would have extreme difficulty in remembering whether this occured in June or September, 1952.

Be that as it may, the question to be decided is whether the evidence, taken as a whole, establishes plaintiff's allegations that first defendant is the father of the child born to Agnes or whether it establishes first defendant's allegations that he did not associate with Agnes after June, 1952, so that it is impossible for him to be the father of the child.

First defendant produced a letter from Agnes dated 20th October, 1952. In this letter she says that she went to Queenstown on the Saturday and was sorry to come back after he had left. This letter does not contain any reproaches for not visiting her and is consistent with her story that they met during the holidays.

On the other hand, the story told by first defendant is inconsistent with the statements contained in the letters written by him. He also says in his evidence: "When I came home for the holidays I naturally sought my sweetheart." The reason he has given for not doing so when he came home in September or October, 1952, is unsatisfactory and unconvincing. He says that when he left Clarkeburg he had stomach ache but when he got to Cala it was better and he walked from there to Askeaton, yet he says that the stomach ache stopped him from seeing Agnes.

In my opinion, the Native Commissioner should have found that the denial by first defendant that he met Agnes during those holidays was false and that this false denial afforded corroboration of the action of Agnes in fixing paternity on him and that judgment should have been given for plaintiff.

Agnes says that, at one time, a boy named Ziziliza was her sweetheart but she had rejected him a long time previously. She make the admission: "I had intercourse with him when he was my *metsha*". Mr. Tsotsi submits that, in view of this admission, plaintiff is not entitled to the full damages usually awarded for seduction and pregnancy. It seems to me, however, that this admission cannot be construed as a statement that they went beyond the practice observed when carrying out the custom of "ukumetsha" and that it does not rebut the presumption that she was a virgin when she was seduced by first defendant.

The summons contains a claim for five head of cattle without making allowance for an alternative value in money. Mr. Kelly states that he has done this deliberately because clients are continually instructing him to claim cattle in cases brought under Native Custom and he would like to have a ruling as to whether a successful plaintiff has the right to demand that the judgment debt be settled by the handing over of cattle instead of by payment in cash.

Mr. Kelly states that, owing to the overstocking of the commonages, introduction of cattle into Native reserves is totally prohibited so that there is a great demand for cattle in these reserves. He argues that, if a plaintiff demands that the judgment debt be settled by payment of cattle, and is prepared to take the risk that defendant might not have cattle with which to satisfy it, he should be allowed to do so as this is in accordance with Native Custom.

It is correct that it has been the practice of Native Law to demand and pay damages in cattle only. When Magistrates' Courts were established in the Native Territories the stamp duty on a summons was fixed in accordance with the amount claimed so that it became necessary to claim an alternative monetary value in the summons [Bulukwana *v.* Nkobongeli, 1932, N.A.C. (C. & O.), 43.]. This reason no longer exists as the Court fee on a summons is now 2s. irrespective of the amount claimed (Table "C" of Government Notice No. 2886 of 1951).

It seems to me, however, that there are other reasons why this practice, which has been observed for a very long time, should be maintained. Conditions no longer exist as they did when Magistrates' Courts were first established and there are frequent cases where damages or dowry is paid by stock other than cattle or by cash as being the equivalent of a certain number of cattle. If, as stated by Mr. Kelly, it is extremely difficult for a Native in a Native location to obtain cattle, it would mean that a defendant, against whom a judgment has been given for the payment of cattle, and who wishes to relieve himself of the burden of the judgment debt, would be unable to do so although he might have sufficient money.

It was pointed out in the case of Matolengwe *v.* Pateni, 1, N.A.C. (1949), 106 (S) that it is the practice to claim, in the alternative, the monetary value of cattle and, as the claim is not for particular cattle it follows that it is not possible to prove the actual value of the cattle but a plaintiff can prove the average value of the type of cattle usually paid as fine. If a defendant thinks that the value fixed by the Court is too high, he has the option of paying in cattle which plaintiff cannot reject provided that they conform to the type usually paid as fine.

In the present case, Mr. Tsotsi has agreed that the average value of the type of cattle usually paid as fine in the District of Xalanga is £8 per head. The appeal should be allowed with costs and the judgment of the Court below altered to one for plaintiff against both defendants, jointly and severally, the one paying, the other to be absolved to the extent of such payment, for five head of cattle or their value £40 and costs.

Jordaan (Member): I concur.

Schaffer (Member): I concur.

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

For Respondent: Mr. W. M. Tsotsi, Lady Frere.

SOUTHERN NATIVE APPEAL COURT.

KUMALO *v.* KUMALO.

NATIVE APPEAL COURT CASE NO. 10 OF 1954.

KING WILLIAM'S TOWN: 17th March, 1954, before Warner, Acting President, Jordaan and Schaffer, Members of the Court.

LAW OF PERSONS.

Native Appeal Case—Effect of Civil Marriage on subsisting Customary Union—Civil Marriage entered into by a partner of a Customary Union puts an end to Customary Union—Natal Native Code—Not intended that procedure therein for dissolution of Customary Union should be followed when partner of such union contracts Civil Marriage with someone else.

Summary: Plaintiff (respondent) married defendant (appellant) by Natal Native Customary Union in 1932. Because of marital disharmony, Plaintiff subsequently repudiated the customary union and married another Native woman by Christian Rites.

Plaintiff then issued summons in the Native Commissioner's Court, claiming, *inter alia,* " a decree of divorce from the bonds of the said customary union ".

The Native Commissioner ruled that a Native customary union no longer existed between the parties, and entered judgment of " Summons dismissed, Plaintiff to pay the costs."

Defendant appealed against this judgment on the ground that a customary union entered into in Natal cannot be dissolved by a subsequent civil marriage unless such dissolution is effected in accordance with the specific requirements of the Natal Native Code.

Held:

(1) That on the basis of previous legal decisions, a Native customary union is dissolved when one of the partners to the union subsequently enters into a civil marriage with another Native.

(2) It was never intended that the procedure laid down by the Natal Native Code for dissolution of a customary union should be followed when one of the partners has contracted a civil marriage with someone else, i.e. the provisions of the Natal Native Code do not override the provisions of the common law in this respect.

The appeal was dismissed with costs.

Cases referred to:

Kos *v.* Lephaila, 1945 N.A.C. (C. & O.) 4.

Nkambula *v.* Linda, 1951 (1) S.A. 377 (A.D.).

Statutes referred to:

Government Notice No. 2887 of 1951 (Section 7).

Native Administration Act, No. 38 of 1928 [Sections *fifteen* and *twenty-two* (7)].

Natal Native Code.

Appeal form the Court of the Native Commissioner, Salt River.

Warner (Acting President):—

In issuing summons in this case, plaintiff filed the following particulars of claim:—

1. The parties are Natives as defined by Act No. 38 of 1927, as amended.
2. Bavington Sebendevu has filed the attached consent to act as *Curator ad Litem* for the purpose therein set forth.

3. The plaintiff has duly intimated his intention to sue for a divorce as he hereby does and the said Bavington Sebendevu has in his capacity as Protector of the said Beauty Kumalo (in order to save time and due to the delay already herein occasioned) endeavoured to reconcile the parties but has failed to do so, the plaintiff having declared that he cannot countenance any living together with the defendant in view of the grounds for his seeking divorce as herein set forth.

4. The Natural guardian of defendant is Mvinjezela Zikalala of Berford farm, Klip River district, but he has refused to come forward and be present in the above Honourable Court to assist defendant, but has consented to the order prayed in regard to the consent paper above referred to and plaintiff craves leave to sue the parties in their respective capacities therein set forth as if the said description of capacities were embodied in this summons.

5. Plaintiff married defendant by Natal Native customary union at Ladysmith, Natal, on the 28th day of March, 1932, and the said union still subsists.

6. Six children were born of the said union whereof two have died leaving four alive whereof two are sons and two are daughters, one of the latter named Rosie is 18 years of age. The others are over the age of 21 years.

7. Plaintiff has handed eight out of the agreed ten head of *lobolo* to Mvinjezela Zikalala aforesaid and a further beast as Nqutu in respect of the first child has been handed to defendant's mother. The remaining two head were also delivered to the said Mvinjezela Zikalala but these have strayed back to the plaintiff's kraal and nothing further has been done to the matter since.

8. Defendant and plaintiff have lived in such disharmony since the year 1947 that conditions are such as to render the continuous living together of the partners insupportable, or dangerous.

9. Plaintiff and defendant have accordingly not lived together as husband and wife since the year 1951, when plaintiff repudiated defendant at an Administrative enquiry, held by the Native Commissioner's office, Salt River.

10. Plaintiff has, in view of the said repudiation since married another Native woman by Christian Rites.

Wherefore plaintiff prays—

(i) an order confirming the capacities of the said Bavington Sebendevu in terms of the consent filed with this summons;

(ii) a decree of divorce from the bonds of the said customary union;

(iii) such order as the Court may deem fit in regard to the *lobolo;*

(iv) an order that each party pays his/her own costs; with costs, if the action is undefended.

Defendant filed the following plea:—

1. Defendant admits paragraphs 1, 2, 3, 4, 5, 6 and 7 of plaintiff's summons.

2. Defendant denies paragraph 8 of plaintiff's summons and puts plaintiff to the proof thereof.

3. Defendant specifically pleads that the cause of unpleasantness between the plaintiff and the defendant has been solely and simply caused by the plaintiff. There is nothing whatsoever between the parties that makes continuous living together insupportable and dangerous.

4. Defendant specifically pleads that plaintiff only wishes a divorce because he has married another Native woman by Christian Rites and wished to avoid having to support the defendant.

5. Wherefore defendant prays that plaintiff's summons may be dismissed with costs.

When the case came on for hearing, the Native Commissioner gave a ruling that a Native customary union was no longer existing between the parties and entered judgment of "Summons dismissed. Plaintiff to pay the costs.". It appears that the Native Commissioner gave this judgment on the ground that the summons does not disclose a cause of action, although this is not stated.

Defendant has appealed against this judgment on the grounds that the Native Commissioner was wrong in applying the rule, that a customary union is dissolved when one of the partners enters into a civil marriage with another person, to customary unions entered into in Natal and that it is necessary for plaintiff to obtain an order from the Native Commissioner dissolving the customary union upon such grounds as are provided for in the Native Code applying to marriage contracts in Natal.

The Notice of Appeal does not comply with the provisions of section *seven* of the Native Appeal Court rules as it does not state whether the whole or part only of the judgment or order is appealed against, and, if part only, then what part. It seems unlikely, however, that defendant would appeal against the order that plaintiff should pay costs, so, in view of the provisions of section *fifteen* of Act No. 38 of 1927, the appeal is regarded as being directed against that portion of the judgment which dismissed the summons on the ground that it showed that the customary union between plaintiff and first defendant had been dissolved when plaintiff contracted a civil marriage with another woman so that the summons disclosed no cause of action.

The judgment in the case of Kos *v.* Lephaila, 1945, N.A.C. (C. & O.), 4, stated very clearly that a civil marriage entered into by a partner of a customary union puts an end to the customary union. This judgment was quoted with approval in the case of Nkambula *v.* Linda, 1951 (1) S.A., 377 (A.D.), in which it was stated that the Native Administration Act (No. 38 of 1927), while preserving and safeguarding the material rights of the woman and the issue of the customary union, does not contemplate the existence side by side of a civil marriage and a customary union and such co-existence is entirely repugnant to our idea of a civil marriage. There is little which can be added to these judgments.

The legal representative of the parties in the present case seem to be under the impression (evidently ignoring the judgments in the cases referred to) that, because the customary union was contracted in Natal, it can be dissolved only by following the procedure laid down in the Natal Native Code for the dissolution of customary unions. It cannot be argued, however, that the provisions of the Natal Native Code over-ride the provisions of the Common Law even if this code applied to the present case, there being no indication as to where the parties are domiciled at present.

The Natal Native Code requires that, before a customary union is dissolved attempts must be made to reconcile the partners. But where one partner has contracted a civil marriage with a person other than his partner of the customary union, attempts to reconcile him with his former partner would amount to attempts to induce him to commit adultery. This alone should

be sufficient to show that it was never intended that the procedure laid down by the Natal Native Code for dissolution of a customary union should be followed when one of the partners has contracted a civil marriage with someone else.

When plaintiff contracted a civil marriage with another woman, his action put an end to the customary union subsisting between him and defendant. Defendant may have an action against plaintiff for the material rights safeguarded to her by section *twenty-two* (7) of Act No. 38 of 1927, but she is not entitled to an order that the customary union between her and plaintiff continued to subsist after the latter contracted a civil marriage with another woman.

The appeal must be dismissed with costs.

Jordaan (Member): I concur.

Schaffer (Member): I concur.

For Appellant: Mr. T. Stewart, King William's Town.

For Respondent: No appearance.

INDEX OF LITIGANTS: 1954 (1).

INDEX OF SUBJECT MATTER: 1954 (1).