VERSLAE

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NATURELLE-APPÈLHOWE

1956 (1)

REPORTS

OF THE

NATIVE APPEAL COURTS

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NORTH-EASTERN NATIVE APPEAL COURT.

SIBIYA *v.* MKONZA.

N.A.C. CASE No. 72 OF 1955.

VRYHEID: 3rd January, 1956. Before Steenkamp, President, Ashton and Craig, Members of the Court.

ZULU LAW AND CUSTOM.

Customary union—Property rights to children—Waiver of lobolo.

Summary: A widow lived with defendant without *lobolo* having been paid to her guardian for her. The defendant says he approached her late husband's people and her own people but neither would consent to her marriage with him. Plaintiff, however, declared that defendant would not pay *lobolo*. The woman persisted in living with defendant to whom she bore five children. Plaintiff, the heir of the woman's late real husband claimed the children so born. Defendant resisted on grounds that he married the widow, that plaintiff had waived his rights to *lobolo* or that plaintiff was a party to an immoral agreement and was precluded from profiting by it.

Held:

1. That defendant had no rights to the children.
2. That the circumstances did not constitute a waiver of *lobolo*.
3. That plaintiff did not make himself a party to an immoral agreement as the woman persisted in staying with plaintiff and he had no option but to leave matters as they were.

Appeal from the Court of the Native Commissioner, Louwsburg.

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

A woman by the name of Ntombintombi was first married by customary rights to the son of a man by the name of Matyeni Nkosi. After the death of the son the plaintiff's father, Magojela, paid *lobolo* to Matyeni and a customary union was entered into between Magojela and Ntombintombi.

Magojela died and his widow, Ntombintombi, fell in love with the defendant and she went and lived with him as man and wife without a customary union being entered into.

Plaintiff is the eldest son and heir of Magojela but by a different wife.

While Ntombintombi lived with the defendant she bore five children of whom four are still alive and the plaintiff as heir to the late Magojela, now sues the defendant for a declaration of rights in respect of the four children Ntombintombi bore while she lived with the defendant.

In his plea the defendant avers that he was joined in a customary union with Ntombintombi and that the children of such customary union are legitimate. He filed an alternative plea to the effect that should the Court find that there was no customary union complying with the necessary formalities of law, then the plaintiff's acquiescence in a relationship amounting to a customary union between defendant and Ntombintombi, amounted to a waiver of his right to payment of *lobolo* and to the custody and property rights of the offspring.

The Native Commissioner gave judgment for plaintiff with costs and declared that plaintiff is entitled to custody of and property rights in the children as claimed.

A An appeal has been noted to this Court on the following grounds:—

"1. That the judgment is against the weight of evidence.

B 2. That in particular the learned Native Commissioner erred in finding that there had not been a waiver on plaintiff's part of his rights to payment of any *lobolo* and also a waiver of his claims to the custody and property rights of the offspring of the relationship between the defendant and the Native female, Ntombintombi.

C 3. *Alternatively,* the learned Native Commissioner erred in not finding that in fact there had existed such a state of relationship between the defendant and Ntombintombi amounting to a customary union."

D The facts are more or less common cause and they are that during her widowhood the woman, Ntombintombi, went and lived with the defendant without any payment of *lobolo* being made. The defendant, however, testified that when the woman came to live with him he reported the matter to the plaintiff who E informed him that it had nothing to do with him as they (meaning plaintiff's father) had never paid *lobolo* for her. Defendant admitted that he went to the Nkosi's (that is the people to whom Ntombintombi had previously been married) and that he was there informed that they could not talk to him as their daughter F (meaning Ntombintombi) had gone to plaintiff's father and they first had to talk to the Nkonza's (meaning plaintiff).

In his evidence defendant suggested that the woman was never married to plaintiff's father but this cannot be accepted as this G Court cannot conceive of Ntombintombi's first husband's people taking up such an attitude if their daughter had not been joined in a customary union with plaintiff's father.

Plaintiff, in his evidence, states that when Ntombintombi went H to live with the defendant he actually approached defendant to pay *lobolo* but defendant refused to do so and said that he would act as "bull" for Ntombintombi. Plaintiff was then in the invidious position that the woman persisted in living with her lover, the defendant, who refused to pay *lobolo* and he had no I alternative but to leave matters as they were, knowing very well that any children born by her would belong to him and not to the man she was living with in concubinage. It is abundantly clear from the evidence that there was no valid customary union between Ntombintombi and defendant and there can be no J question that defendant acquired any rights to his children as a result of his "union" with that woman.

There remains the question of the contention that the plaintiff had waived his rights to the claim for *lobolo* and that in con- K sequence the children belonged to the defendant but there can be no doubt that the circumstances did not constitute a waiver.

It was argued that the plaintiff, by his conduct, was a party to an immoral arrangement and that he is therefore precluded from L profiting by it but here too there can be no question in the matter. The evidence shows quite clearly that plaintiff' did not accept the defendant as a "bull" and he did take steps to have the liaison between his stepmother and the defendant legalised. It was defendant who refused or neglected to do what was necessary.

M In the circumstances the appeal is dismissed with costs.

For Appellant: Mr. G. D. Havemann.

For Respondent: Mr. C. J. Uys of Messrs Bestall & Uys.

NORTH-EASTERN NATIVE APPEAL COURT.

KUMALO *v.* **DHLADHLA** d.a.

N.A.C. CASE No. 76 OF 1955.

PIETERMARITZBURG: 18th January, 1956. Before Steenkamp, President, Ashton and Rossler, Members of the Court.

NATIVE LAW AND CUSTOM.

Section 83 of Natal Native Code: Divorce—Maintenance of children—Costs.

Summary: Plaintiff and defendant were partners in a customary union which was dissolved. The minor child of the union was placed by the Court in the custody of the plaintiff (the wife) who in turn was placed in the custody of her father. The Court made no order as to the maintenance of the child and plaintiff who was properly assisted asked for an order for maintenance and for payment of arrear maintenance. The latter claim was abandoned.

Held:

1. That the provisions of sub-paragraph (*b*) of section 83 of the Natal Code of Native Law are imperative.
2. That as no order as to maintenance was made in its terms by the Court which granted the divorce it must be presumed that it considered that the mother, in whose custody it placed the child, was able and willing to maintain the child.
3. That plaintiff's remedy lay in an application to the Native Commissioner's Court for a variation of the order it made when granting the divorce.
4. That as the action was brought in the interests of the child of both parties no award as to costs in either Court was made.

Statutes, etc., referred to:

Section 83 of Natal Code of Native Law (Proclamation No. 168 of 1932).

Appeal from the Court of the Native Commissioner, Estcourt.

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

Plaintiff, assisted by her guardian sued the defendant from whom she had been divorced by the Native Commissioner, Estcourt, for an order of Court requiring the latter to pay maintenance to her in respect of their minor daughter, who had been placed in her custody, at the rate of £2 per month from the date of judgment until the child reached ten years of age.

The summons also contained a claim for £22 being past maintenance for the child but this claim was abandoned.

Defendant pleaded that plaintiff had no *locus standi in judicio* to claim maintenance for the child, denied liability for so long as plaintiff lived apart from him and contended that £2 per month was grossly excessive.

When the case came before the Assistant Native Commissioner he decided it would be heard under the Common Law and that Plaintiff had *locus standi in judicio.*

A After evidence was given by plaintiff and defendant had intimated that he was not leading evidence the Assistant Native Commissioner gave judgment on the 20th September, 1955, as follows:—

B "Defendant to pay plaintiff the amount of £1 per month for the maintenance of the child Tulupa Kumalo from the date of issue of summons and until the child reaches the age of 10 or whilst in custody of plaintiff. Payment to be made at the office of the Native Commissioner, Estcourt. The amount already due to be paid by the 31st October, C 1955."

Against that judgment defendant has appealed to this Court on the following grounds:—

"1. That the Assistant Native Commissioner erred in holding D that the action be decided by Common Law and that plaintiff has *locus standi in judicio* to claim maintenance for the child of the union, which judgment is contrary to the provisions of the Code of Native Law which provides for the payment of maintenance of children.

2. That plaintiff, having admitted in evidence that since the E dissolution of her customary union with defendant she has earned nothing and that her guardian had maintained the child, she is not entitled to claim maintenance for the past or future.

3. That being a minor, all her earnings would belong to her F guardian who alone would have *locus standi in judicio*, to claim.

4. The judgment is otherwise contrary to law and against the weight of evidence."

The main points taken by counsel when arguing the case in G this Court related to the decision that Common Law should be applied and whether an action such as this was in fact competent under civil as opposed to criminal or *quasi* criminal law. The validity of the order of the Assistant Native Commissionner as it stands was also discussed.

H The facts found proved by the Assistant Native Commissioner were:—

"1. Plaintiff and defendant were partners in a customary union which was dissolved in 1953.

2. The custody of a minor child Tulupa Kumalo, who was I born of the union, was awarded to plaintiff until the said child reaches the age of 10.

3. When dissolving the customary union the Court made no order regarding the maintenance of the child.

4. As legal custodian of the child plaintiff has *locus standi* J *in judicio* to claim maintenance for the support of the child from any person who is legally liable for such maintenance.

5. As father and natural guardian of the child defendant is liable for its support."

K To deal with the facts numbered (1), (2) and (3)—those numbered (4) and (5) are in the nature of legal points not facts—it is necessary at the outset to refer to the relative provisions of the Natal Native Code relating to the dissolution of customary unions and section 83 of Proclamation No. 168 of 1932 is here L set out:—

"83. When granting any decree of divorce the court shall give clear and explicit orders and directions as to the matters following:—

(*a*) That the woman shall be under the guardianship of her M father or protector and that she reside at such guardian's kraal or at such other place as the Court may direct;

(*b*) the custody of the young children of the union *and any necessary provision for their maintenance* (these words are stressed by the Court);

(*c*) the number of cattle, if any, to be returned by the woman's father or guardian to the husband." A

The provisions of sub-paragraph (*c*) are not germane to the issue before the Court and any statements which follow in regard to section 83 must be regarded as excluding that sub-paragraph. B

The provisions of the section are imperative and as the Native Commissioner, when granting the divorce, made no order regarding maintenance it can only be assumed that the circumstances were such that no order was necessary. If the child was taken out of her father's custody and placed in her mother's control and C the mother was ordered to reside with her father and was placed under the guardianship of her father the child had perforce to reside with her maternal grandfather. This does not mean that the maternal grandfather became as a consequence responsible for the child's maintenance by virtue of his position as her kraal head although if he did maintain the child, he would in due time D have a claim against her father for an *isondhlo* beast under Native Law. It was suggested in argument that because of this position defendant was not liable to pay maintenance for the child but there is no good legal reason for accepting this suggestion. E

The point is that the Native Commissioner having taken the child out of the custody of its legal guardian and having placed her in the kraal of a person not legally required to support her should have ordered the father to pay maintenance unless he considered that the mother was able and willing to maintain the F child. There is no evidence (before the Court below when the action now on appeal was heard) as to what the position was and it can only be assumed that the Native Commissioner expected the mother to support the child. But there is evidence now that she cannot do so and needs £2 a month from defendant to assist G her. There is also evidence that defendant was unwilling to support the child as no such order was made."

It seems then that plaintiff's only civil remedy was to apply—properly assisted—to the Native Commissioner, Estcourt, for a variation of the orders and directions he made under section 83 H of the Code when granting the divorce between plaintiff and defendant so as to provide for a suitable maintenance order against the father.

Having reached this conclusion it is not necessary to decide whether the case before the Assistant Native Commissioner should I have been decided under Common or Native Law or whether the order made by the Assistant Native Commissioner is valid or not.

In the result the appeal must be upheld and the judgment of the Assistant Native Commissioner must be set aside.

It is ordered that the appeal be and it is hereby allowed, the J judgment of the Assistant Native Commissioner is set aside and for it is substituted the words "The summons is dismissed".

No award as to costs in either Court is made, the action having been brought in the interests of the child of both parties.
Rider by Steenkamp (President):—

The legislature has seen fit to graft on to the Code of Native K Law [*vide* sub-section (*b*) of section 83] a provision which under basic Native Law was unknown and it must now be accepted that under Native Law as practised in Natal an order for maintenance is competent when added to an order for the dissolution of a customary union. L

This is apart from any other provisioins in other statutes for the maintenance of children in need of support and it would seem that the requisites (such as ability to pay, etc.), governing the granting of an order would be those necessary under the Common Law. M

For Appellant: Adv. O. A. Croft-Lever, instructed by J. M. K. Chadwick.

For Respondent: Adv. J. B. Talbot, instructed by Messrs. Hellett and de Waal.

A

NORTH-EASTERN NATIVE APPEAL COURT.

B

PUNGULA *v.* NGUBO.

N.A.C. CASE No. 84 OF 1955.

C PIETERMARITZBURG: 18th January, 1956. Before Steenkamp, President, Ashton and Rossler, Members of the Court.

PRACTICE AND PROCEDURE.

D *Ambiguous judgment.*

Summary: Plaintiff sued defendant in the Court of a Native Commissioner, but followed the procedure prescribed in Courts of Magistrates.

E The facts of the case are not necessary for the purposes of this report—the appeal on the merits was unsuccessful.

Held:

F 1. That the issue of summonses in Native Commissioners' Courts must follow the rules laid down for those Courts not those laid down for Magistrates' Courts.

2. That judgments must be unambiguous in their terms and this Court will of its own accord make them so.

G Appeal from the Court of the Native Commissioner, Pietermaritzburg. Excerpt from judgment of the Court delivered by Steenkamp, President.

H It is observed that the attorney who issued the summons erroneously followed the procedure prescribed in the Magistrate's Court and overlooked the fact that in the Native Commissioner's Court a different form of summons is prescribed. We specially wish to refer to the paragraph where it states in the summons:—

> "You are hereby summonsed that you do within four days of the service of this summons upon you enter or cause to be entered . . . ."

I

In the summons prescribed in the Native Commissioner's Court, the corresponding paragraph reads as follows:—

> "You are hereby summonsed that you do on or before ..... a.m. on ..... day, the ..... of

J 195...., enter or cause to be entered ....."

Practitioners in the Native Commissioner's Court should at least make themselves conversant with the rules and the forms prescribed and should realise that they were framed for com-

K pliance. Failure to comply with them will incur this Court's strong displeasure.

The Assistant Native Commissioner has given an ambiguous judgment; its wording does not make it clear whether judgment was one of absolution or one for defendant. It cannot stand as

L it is and as it would seem that it was the intention to grant an absolution judgment this Court will alter it to convey that intention.

In the result the appeal is dismissed with costs but the Native

M Commissioner's judgment is altered to read:—

> "Absolution from the instance with costs."

For Appellant: Adv. J. H. Niehaus, instructed by Jasper R. N. Swain & Co.

For Respondent: Mr. L. Simon of Leslie Simon & Co.

NORTH-EASTERN NATIVE APPEAL COURT.

DHLAMINI *v.* **NTSHAYINTSHAYI.**

N.A.C. CASE No. 65 OF 1955.

ESHOWE: 25th January, 1956. Before Steenkamp, President, Ashton and Oftebro, Members of the Court.

PRACTICE AND PROCEDURE.

Rules of Native Appeal Courts Nos. 5 and 7.

The facts of this case are not necessary for the purposes of this case.

Held:

1. That unless an appeal contains the grounds on which it is based it is not properly noted.
2. That where the grounds of an appeal were not filed within the time laid down, an application for an extension of time within which to appeal or for condonation of late noting should be timeously made.

Statutes, etc., referred to:—

Rules 5 and 7 of the Native Appeal Court Rules (Government Notice No. 2887 of 9th November, 1951).

Appeal from the Court of the Native Commissioner, Mahlabatini.

Steenkamp (President) delivering the judgment of the Court:

When the appeal was noted no grounds of appeal were filed but Counsel for appellant filed these the day before the appeal was set down for hearing.

It is manifest according to Rule 5 read with Rule 7 of the Native Appeal Court Rules that an appeal is not properly noted unless grounds of appeal are filed and if these are not filed within the prescribed period of 21 days then if an appellant wants to prosecute the appeal he should apply to the Court for a condonation of the late noting. This has not been done in the present appeal and it is consequently struck off the roll with costs.

For Appellant: Mr. H. H. Kent.

For Respondent: In person.

SOUTHERN NATIVE APPEAL COURT.

KABI *v.* **PUNGE.**

N.A.C. CASE No. 48 OF 1955.

BUTTERWORTH: 26th January, 1956. Before Balk, President, Warner and Zietsman, Members of the Court.

LAW OF PROCEDURE.

Practice and Procedure—Estoppel by record as determined by judgment in rem*—Judgment for return of wife of customary union cannot be regarded as a final decree of dissolution of such union.*

Summary: In an action arising out of the dissolution of a customary union plaintiff claimed from defendant nine head of cattle or their value. Judgment was given for plaintiff by the Native Commissioner's Court. Defendant appealed against

A the judgment on the ground that it was bad in law in that the Native Commissioner erred in holding that the judgment in a previous civil case (No. 248/1940) precluded and estopped defendant from calling further evidence to show when the customary union was actually dissolved.

B *Held:* That as it is clear that defendant (present appellant) was neither a party to Case No. 248/1940 nor a privy of either party thereto, the judgment therein cannot operate as an estoppel against him unless it is a judgment *in rem*.

C *Held further:* That a judgment for the return of the wife of a native customary union, or the restoration of the dowry cattle (or their value), cannot be regarded as a final decree of dissolution of the customary union.

Cases referred to:

D Nepgen, N.O. *v.* Van Dyk, N.O., 1940, E.D.L.D., 123.
Zenzile *v.* Tuntutwa, 4, N.A.C., 45.
Magwala *v.* Mbo, 5, N.A.C., 27.
Fitzgerald *v.* Green, 1911, E.D.L.D., 432.
E Rex *v.* Van der Merwe, 1952 (1) S.A. 647 (O.P.D.).
Union Government v. Vianini Ferro-Concrete Pipes (Pty.), Ltd., 1941, A.D., 43.
Zabulana *v.* Mpandla, 4, N.A.C., 103.
Mapekulu *v.* Zeka, 3, N.A.C., 6.
Ndlanya *v.* Mhashe, 1, N.A.C., 112.
F Chabane *v.* Sietse, 1946, N.A.C. (C. & O.F.S.), 53.
Matshingana *v.* Notenjana, 1947, N.A.C. (C. & O.), 42.
Mzizi *v.* Pamla, 1953, N.A.C., 71 (S).

Works of Reference:

G Phipson on Evidence (8th edition).
Halsbury's Laws of England (2nd edition), volume XIII.
Powell on Evidence (9th edition).

Appeal from the Court of the Native Commissioner, Willowvale.

H Balk President):—

This is an appeal from the judgment of a Native Commissioner's Court, given for the plaintiff (now respondent) for nine head of cattle or their value, £23 each, with costs, in an action in which he claimed them or their value, £225, from the defendant (present I appellant), averring in his particulars of claim that—

"(1) the plaintiff is the heir according to Native Custom of his father, the late Punge Matiloshe who had a daughter named Nobasaye;

J (2) the said Nobasaye in about 1931 was married according to Native Custom to the late Putumani Jingayo, who paid eight head of cattle for her as dowry to the late Punge Matiloshe and who named his said wife Nokolisile;

(3) shortly after the said marriage the said Nobasaye (*alias* Nokolisile), deserted the late Putumani but the customary K union was not dissolved by *Keta* until 1940 when Putumani sued Punge for the return of his said wife or the restoration of his eight dowry cattle. (Willowvale Civil Case 248/1940.);

(4) in the intervening years, prior to the dissolution, L Nobasaye *alias* Nokolisile had been living in adultery with the defendant who called her Nonayini, and as a result a girl named Nomapoco was born in about 1934;

(5) the girl, Nomapoco, has now married and defendant has received as dowry for her nine head of cattle, namely M black heifer, 4 red heifers, wasakazi cow, red ox and 2 young red oxen, each valued at £25;

(6) in 1953 the said late Putumani's heir, Mpucuza Putumani, sued defendant for delivery of this dowry, claiming to be entitled to it, and obtained judgment therefore. (Willowvale Civil Case 172/1953.);

(7) plaintiff, in that civil case, gave evidence stating that he was not making a claim to the girl Nomapoco. This he did as he verily believed that Mpucuza's claim was a legitimate one;

(8) the said judgment was, however, appealed against by defendant and the Native Appeal Court (Southern Division), upheld the appeal, altering the judgment to one of absolution as it found that *neither* Mpucuza Putumani or defendant were entitled to Nomapoco's dowry as the late Putumani had claimed the return of his full dowry in 1940 thus repudiating the adulterine child of the union (Nomapoco) and defendant had no right to an adulterine child;

(9) that being so, plaintiff, in his capacity as the heir of Punge, the guardian and dowry holder of Nomapoco's mother, is the person entitled to Nomapoco's dowry which defendant wrongfully neglects to deliver to him in spite of legal demand.

Wherefore plaintiff prays for judgment for the delivery to him of the nine head of cattle described in paragraph 5 or payment of their value, £225, with costs of suit."

The defendant pleaded—

"(1) that defendant admits the allegations of fact in paragraph 1 of plaintiff's particulars of claim;

(2) that defendant admits the said Nobasaye married the late Putumani by Native Custom in or about 1931, but says the said marriage was dissolved immediately thereafter as the said Nobasaye refused to live with the said late Putumani, and the said late Punge Matiloshe restored the dowry paid by word of mouth which arrangement the said late Putumani accepted and acquiesced in the subsequent marriage of the said Nobasaye to defendant by failing to take any action against the said defendant for adultery;

(3) that the said Nomapoco was born after the marriage and payment of dowry cattle for the said Nobasaye by defendant;

(4) that plaintiff solemnly renounced any claim he might have to the said Nomapoco when he gave evidence in Civil Case No. 172/1953;

(5) that the judgment being one of absolution from the instance the fact that certain facts were found proved on the evidence adduced in Case No. 172/53 is not relevant to the present case, wherefore defendant prays that the allegations in paragraph (8) and (9) of plaintiff's particulars of claim be deleted on the grounds that they are both irrelevant, and merely argumentative;

(6) that defendant admits nine head of cattle were paid as dowry for the said Nomapoco, the allegations in paragraph (6) of plaintiff's particulars of claim, legal demand and refusal to pay;

(7) that the taxed Bill of Costs in Case No. 172/53 has not yet been paid;

(8) that defendant denies the remaining allegations of fact in plaintiff's particulars of claim contained and puts plaintiff to the proof thereof.

Wherefore defendant prays that the judgment may be for defendant with costs."

The appeal is brought on the ground that the judgment is wrong in law in that the Assistant Native Commissioner erred in holding that the judgment in Civil Case No. 248/40, dated the 29th July, 1940, precluded and estopped defendant (now appellant) from calling further evidence to show that the marriage between Putumani Jingayo and Mobasaye (*alias* Nokolisile) was in fact dissolved prior to the 29th July, 1940.

A On the date of the hearing in the Court *a quo*, the following notes were recorded by the presiding Assistant Native Commissioner:—

" Counsel agree that pre-trial conference may beneficially
B be held.

It is agreed—

(1) the late Putumani married Nobasaye in 1931 and that she left Putumani within a period of months;

(2) that Nobasaye then went to live with defendant and
C has been living with him ever since;

(3) that the girl Nomapoco was born several years prior to the year 1940 but after Nobasaye left Putumani.

Mr. Wigley advances that defendant wishes to lead evidence that the union between Putumani and Mobasaye
D (Nokolisile also known as Nonayini), was dissolved prior to the birth of Nomapoco and prior to the date of judgment in Civil Case No. 248 of 1940, Native Commissioner's Court, Willowvale.

By consent record of Civil Case No. 172/53, Native Com-
E missioner's Court, Willowvale, handed in (Exhibit 'A') (includes record in Civil Case No. 248/40 and written judgment of Southern Native Appeal Court, dated 3rd November, 1954, in Case No. 172/53 (N.A.C. No. 4).

F Court holds that—

(1) the judgment in Native Commissioner's Court Case No. 248 of 1940 is final and binding, the date of this judgment is the date of dissolution of the union between Putumani Jingayo and Nobasaye and that
G no evidence can be led at this stage seeking to show that the marriage between Putumani and Nobasaye was dissolved prior to the judgment in question;

(2) that plaintiff's evidence in Case No. 172/1953 to the effect that 'I am making no claim to the child
H Nomapoco' does not debar him from bringing present action due to fact that position was not clarified until the Appeal Court's judgment in question and that such evidence did not constitute unequivocal renunciation of his rights.

I Parties agree that one of dowry animals paid for Nomapoco has died and that there has been one increase.

It is also agreed by parties that the value of the animals is fixed at £23 each."

Thereupon judgment appears to have been entered.

J There is nothing to indicate that the cases of the parties were closed or that their attorneys addressed the Court.

These omissions are not touched upon in the notice of appeal and are mentioned solely with a view to obviating their
K recurrence.

It is admitted that the plaintiff is the heir of his late father, Punge Matiloshe; that the latter's daughter, Mobasaye, contracted a customary union with one Putumani Jingayo (since deceased) in about the year 1931; that Nobasaye, who was known as
L Nokolisile after this union, left Putumani some months after it had been entered into and thereafter lived with the defendant; that Nokolisile had a daughter, Nomapoco, who was born some years prior to 1940 but after Nokolisile had left Putumani; that the defendant received nine head of cattle as dowry for Noma-
M poco; that this number of cattle still exists and that their value is £23 each.

The other material facts in the instant case emerge from the evidence in Case No. 172/53, the record of which was put in by consent, see the Assistant Native Commissioner's notes quoted above. But those notes do not specifically state that the record

was put in for the purpose of being used as evidence in the instant case; and it has been held that in the absence of agreement by the parties that the depositions at a proceeding should be used as evidence in a subsequent case in which the record of such proceeding is put in, then such depositions "can only be used for the purpose of refuting what a particular witness has said, by his own statement, but not to build up a case by the evidence of what other people have said in another Court in another trial", see Nepgen, N.O., *v.* Van Dyk, N.O., 1940, E.D.L.D. 123, at page 126. But here, as in that case, it seems clear that the record was in fact put in for the purpose of forming evidence, as was in fact conceded by counsel for both parties, for no other evidence was led for either party in the instant case and no object would have been served by putting in the record if not for the purpose of its being used as evidence since it could not in the absence of any other evidence be used for the purpose of refuting what a particular witness had said, by his own statement. It is true that the defendant's attorney intimated that he wished to lead evidence that the customary union between Putumani and Nokolisile was dissolved prior to the birth of Nomapoco and thus also prior to the date of the judgment in Case No. 248/40 which formed an exhibit in Case No. 172/53. But such evidence had not been led when the record of Case No. 172/53 was admitted so that there was nothing to refute at that stage.

It emerges from the notes of evidence contained in the record of Case No. 172/53 and from the exhibits therein, that on the 29th July, 1940, Putumani obtained judgment against Punge for the return to him of his wife, Nokolisile, or the restoration to him of the dowry of eight head of cattle which he had paid for her, or their value, £40; that the eight head of cattle constituted the full dowry paid by Putumani to Punge for Nokolisile; that Putumani recovered all eight of the cattle from Punge under a warrant of execution issued on the 29th July, 1940, thus dissolving his customary union with Nokolisile; that in the case in which Putumani obtained judgment for the return of his wife or the restoration of the eight head of dowry cattle or their value, £40 (Case No. 248/40), he did not claim Nomapoco but only the return of his wife or the full dowry paid for her; that the defendant was Nomapoco's natural father and that he had entered into a customary union with Nokolisile. There is nothing in the evidence indicating the date of the lastmentioned union.

It follows that as the full dowry paid by Putumani for Nokolisile was recovered by him, Nomapoco belonged to her mother's people; i.e. to the late Punge's heir, and Putumani's heir, Mpucuza, who was the plaintiff in Case No. 172/53, was not entitled to Nomapoco's dowry, see Zenzile *v.* Tuntutwa, 4, N.A.C., 45 and Magwala *v.* Mbo, 5, N.A.C., 27; and as Nomapoco was born to Nokolisile during the subsistence of the latter's customary union with Putumani, the defendant has no rights in Nomapoco and was therefore not entitled to the dowry paid for her, see Magwala's case (*supra*).

As is apparent from the Assistant Native Commissioner's notes quoted above, the defendant desired to lead evidence showing that the customary union between Putumani and Nokolisile, formerly known as Nobasaye, had been dissolved prior to the birth of Nomapoco and thus also prior to the date on which judgment was given in Case No. 248/40, i.e. prior to the 29th July, 1940. The Assistant Native Commissioner ruled against the admission of this evidence for the reason set out in his notes above and the appeal is against that ruling.

It is clear that the defendant in the instant case was neither a party to Case No. 248/40 nor a privy of either party thereto so that the judgment therein cannot operate as an estoppel against him unless it is a judgment *in rem*, see Fitzgerald *v.* Green, 1911, E.D.L.D., 432, at pages 449 to 452, Phipson on Evidence (8th

A edition) at pages 401 to 409 and 419 to 421, Halsbury's Laws of England (2nd edition), Volume XIII, paragraphs 459 to 463 at pages 405 to 408 and paragraph 756 at pages 686 and 687, and Powell on Evidence (9th edition) at pages 450 and 451. Here it should be mentioned that Fitzgerald's case (*supra*) at pages 449 B to 452 and Rex *v.* Van der Merwe, 1952 (1), S.A., 647 (O.P.D.), at page 649, indicate that estoppel by record has been accepted as part of our law. The case of Union Government *v.* Vianini Ferro-Concrete Pipes (Pty.), Ltd., 1941, A.D., 43, in which it is specifically laid down (at page 49) that the doctrine of estoppel C has been accepted as part of our law, and the authorities cited on that page, relate only to estoppel by representation.

The test to be applied in determining whether or not the judgment in Case No. 248/40 is one *in rem,* is that stated in D Fitzgerald's case (*supra*) at pages 449 and 450 and the text books referred to above, viz. whether it is an adjudication upon the status of ,some particular subject matter, or, in other words whether it determines the status of a person or thing or the disposition of a thing (as distinct from the particular interest in E it of a party to the litigation).

Now the judgment in Case No. 248/40 is for the return to Putumani of his wife, Nokolisile, or the restoration of the dowry of eight head of cattle which he paid to Punge for her or payment of their value, £40. Such a judgment cannot be regarded F as a final decree of dissolution of the customary union since it leaves it open to the defendant to return the plaintiff's wife to him and should he do so the judgment is satisfied and the customary union continues, see Zabulana *v.* Mpandla, 4, N.A.C., 103. Here it should be mentioned that the ruling in Mapekulu *v.* G Zeka, 3 N.A.C., 6, which was adopted by this Court in its judgment in Case No. 172/53 referred to above (not reported), that a judgment for the return of the wife or, failing her return, for the restoration of the dowry, constitutes a complete dissolution of the customary union as the order for the restoration of the H dowry is equivalent to its actual return in that it puts the plaintiff in a position to recover it by judicial attachment, has not been overlooked. That ruling, however, falls to be viewed in the light of the judgment in Ndlanya *v.* Mhashe, 1 N.A.C., 112, which was the authority relied upon in Mapekulu's case (*supra*) and from which it is clear that the opinion of the Native Assessors which I was accepted by the Court, was that it is only if the wife does not comply with the order to return that the customary union is dissolved. Viewed from this angle, the judgment in Case No. 248/40 cannot be regarded as a final decree dissolving the customary union and does not, therefore, affect the status of the J parties from this standpoint, see Chabane *v.* Sietse, 1946, N.A.C. (C. & O.F.S.), 53, at pages 55 and 56.

But this does not conclude the matter as judgments of the nature in question fall to be considered from another angle, viz., the portion of the judgment ordering the return of the wife falls K to be viewed from a standpoint of Native Law and Custom: and viewed from that standpoint the order for the return of the wife falls to be regarded as a decision on the face of it that the woman concerned is the customary wife of the plaintiff and is therefore equivalent to a declaration of rights in that respect, L i.e., that a customary union existed between the plaintiff and the woman at the time of the judgment, as was contended by counsel for respondent who cited Matshingana *v.* Notenjana, 1947, N.A.C. (C. & O.), 42. That being so, the judgment in Case No. 248/40 is a judgment *in rem* and the defendant in the instant case is estopped from denying the existence of the customary M union between Putumani and Nokolisile at the date of that judgment, i.e., the 29th July, 1940.

It follows that it is unnecessary to consider the judgment in Mzizi *v.* Pamla, 1953, N.A.C., 71 (S) in the instant case and that the appeal falls to be dismissed with costs.

H. W. Warner (Member): I concur.
V. R. Zietsman (Member): I concur.
For Appellant: Mr. Wigley, Willowvale.
For Respondent: Mr. Dold, Willowvale.

SOUTHERN NATIVE APPEAL COURT.

CIJISIWE *v.* CIJISIWE.

N.A.C. CASE No. 53 OF 1955.

PORT ST. JOHN'S: 30th January, 1956; Before Balk, President, Warner and Olivier, Members of the Court.

LAW OF PROCEDURE—NATIVE LAW.

Practice and Procedure—Judgment which tantamount to declaration of rights not premature—Native Law—heir in Native Law bound by deceased's contracts irrespective of whether he was a party to them.

Summary: In an action in a Native Commisioner's Court plaintiff alleged that he had advanced certain cash and stock in payment of his brother's dowry. This brother subsequently died and plaintiff claimed the equivalent of the dowry from defendant, the deceased's heir, or alternatively that he (plaintiff) be declared entitled to be refunded the dowry out of the dowry of the deceased's daughter when she married.

The Native Commissioner gave judgment for plaintiff in terms of the latter's alternative prayer.

Defendant appealed against this judgment on the grounds that plaintiff's alternative claim was premature, and that he (defendant) was not a party to the contract alleged to have been made in his absence.

Held: That the judgment of the Court cannot be said to be premature as it was tantamount to a declaration of rights.

Held further: That it is immaterial that defendant was not a party to the agreement made between plaintiff and the deceased because defendant is the heir of the deceased and in Native Law he is liable for payment of the deceased's debt's, irrespective of the amount of the inheritance.

Appeal from the Court of the Native Commissioner, Flagstaff.

Warner (Permanent Member).

The following facts are common cause:—

1. Plaintiff, Jamangile Cijisiwe and defendant were brothers in the same house, defendant being the eldest surviving.
2. Jamangile contracted a customary union with a woman named Marela, dowry being paid to her father Freddie Nombiba.
3. Jamangile died and Marela re-married, as a result of which Freddie Nombiba paid defendant, the heir of Jamangile, two head of cattle, being refund of dowry less usual deductions.
4. The late Jamangile left a daughter named Ntombiyake who is not yet married.

Plaintiff alleges that, when Jamangile contracted the customary union, defendant refused to assist him in paying dowry so he (plaintiff) provided £5 in cash, 6 cattle and 7 sheep plus £3 representing a further 3 sheep which were paid as dowry. He prayed that defendant be ordered to deliver to him £5 cash, 6 head of cattle or their value £8 and 10 sheep or their value

A £1 each; alternatively, that it be ordered that plaintiff is entitled to be paid and refunded the dowry mentioned out of the dowry of Ntombiyake when she married.

In his plea, defendant denied that plaintiff lent the late Jamangile any stock or money to pay dowry or for any other purpose. B He averred that the late Jamangile paid dowry from his own earnings and was assisted by defendant so that Jamangile did not have any obligations to plaintiff when he died.

After hearing evidence, the Assistant Native Commissioner C gave judgment for plaintiff as prayed in the alternative prayer with costs. In his reasons for judgment, under the heading "facts found proved" he states: "2. That for her (Marela) 7 cattle, 10 sheep and £5 cash was paid as dowry to Freddie Nombiba. 3. That plaintiff claims 6 cattle, 10 sheep, or their D alternative values, and £5 cash from defendant." He does not say that he found as a fact that plaintiff had established his claim but from his judgment and reasons I think that it can be assumed that he did.

Defendant has appealed against this judgment on the follow- E ing grounds:—

"(*a*) That the judgment is against the weight of evidence and the probabilities.

(*b*) That the judgment is bad in law in that—

F (1) the alternative claim on which the plaintiff succeeded with an order of costs against the defendant is as disclosed by evidence premature;

(2) that the defendant was not a party to the contract alleged to have been made in his absence."

G Plaintiff says that, when Jamangile wished to get married, he had nothing except a beast which he had lent to defendant. He asked defendant to assist him in paying dowry but the latter refused to do so. Jamangile then asked plaintiff to lend him stock to pay dowry and said that he would repay the loan from H his earnings but, if he did not do so, he would repay it from the dowry of any daughter born to his wife. Plaintiff reported to Vakele, the head of the family, who sent for defendant, but the latter refused to come. Vakele questioned Jamangile who repeated his promise in regard to repayment of the loan. Plaintiff was employed by a Mr. Hazell and used to travel about the I country buying stock, so he had placed his stock with different people. Plaintiff went with Vakele, James and Jama to Freddie Nombiba and negotiated the marriage. They offered a horse but it was rejected. Jamangile eloped with Marela and Freddie came to plaintiff's kraal and was paid £5 *vulamlomo*, six J head of cattle and ten sheep in the presence of Jama, Vakele and Nomtsheketshe, the cattle and sheep being paid by word of mouth. Later six head of cattle were delivered to Freddie. Plaintiff had seven sheep with his sister Pascina and he handed these to Freddie, paying him a sum of £3 in lieu of the balance K of three sheep. Plaintiff had three cattle at Nomtsheketshe's kraal, one at Mcetywa's kraal, one at Mhlahliswa's kraal and one at Mavela's kraal. He caused these cattle to be handed to Freddie and to be transferred to his name in the dipping register.

This evidence is supported by that of the dipping foreman, L Pascina Ngcobo, Nomtsheketshe and Vakele.

Defendant says that the three cattle transferred from Nomtsheketshe had been bought by Jamangile and placed with Nomtsheketshe under *sisa* custom, that one beast was bought from Dzeyi and transferred from him to Freddie, another beast was M bought from Dzeyi and placed with Mhlahliswa under *sisa* custom and then transferred to Freddie, another beast was bought from Mavela and transferred to Freddie (Jamangile paying for these cattle) and the sixth beast was contributed by him (defendant). He had inherited eight sheep from Dabulamanzi who had placed them with Pascina and these sheep were paid to

Freddie with £1 representing two sheep, to bring the number of sheep to ten. The £5 *vulamlomo* was paid by Jamangile from his own money.

Mhlahliswa says that the beast paid to Freddie from his kraal belonged to Jamangile and had been placed with him under *sisa* custom.

Freddie Nombiba says that defendant made the arrangements about his daughter's marriage to Jamangile.

Defendant and Freddie both deny that a beast was paid to the latter from Mcetywa's kraal but cannot explain why the dipping registers reflect such a transfer, which supports plaintiff's statement.

The Native Commissioner has accepted the evidence of plaintiff and his witnesses and it has not been shown that he was wrong in doing so, nor has any reason been suggested why defendant's sister Pascina, and the head of the family, Vakele, should give false evidence against him. I consider that paragraph (*a*) of the grounds of appeal must fail.

Defendant is heir of Jamangile and, in Native Law, he is liable for payment of his debts, irrespective of the amount of the inheritance. In giving judgment in terms of the alternative prayer, the Native Commissioner has, in effect decided that payment of plaintiff's claim should remain in abeyance until Jamangile's daughter is married. In other words, his judgment is, as submitted by counsel for respondent, tantamount to a declaration of rights which he was fully justified in seeking, seeing that the defendant had denied his indebtedness to the plaintiff for the restoration of the livestock in question prior to the institution of the procedings in the Court *a quo*. Consequently the judgment of that Court cannot be said to be premature and ground of appeal (*b*) (1) also fails as does the remaining ground since the defendant is, as pointed out above, liable as the late Jamangile's heir, so that it is immaterial that he was not a party to the agreement between plaintiff and the late Jamangile.

The appeal should be dismissed with costs.

Balk (President): I concur.

Olivier (Member): I concur.

For Appellant: Mr. Birkett, Port St. John's.

For Respondent: Mr. Stanford, Flagstaff.

NORTH-EASTERN NATIVE APPEAL COURT.

CELE *v.* XOLO.

N.A.C. CASE No. 52 OF 1955.

DURBAN: 2nd February, 1956. Before Steenkamp, President, Ashton and Ahrens, Members of the Court.

ZULU CUSTOMARY LAW.

Section 94 (1), *Natal Code of Native Law.*

Summary: Plaintiff sued defendant for eight head of cattle being the balance of *lobolo* due on the daughter of his uncle whose heir he was. Defendant proved that he had paid eight head of cattle and owed two but as his wife died childless within a year of the union he counterclaimed for half the number he had paid, viz., four head of cattle. The Native Commissioner found himself unable to decide the issue and granted absolution with no order as to costs. Plaintiff appealed against the judgment and surprisingly defendant did not counterclaim.

A *Held:*

1. That the method of calculation of the number of cattle returnable in the circumstances described in section 94 (1) of the Natal Code of Native Law is to ascertain first the half of the agreed *lobolo* and then—

B (*a*) if the full agreed *lobolo* has been delivered, the payee must refund half to the payer;

(*b*) if more than half the agreed *lobolo* has been delivered, the payee must refund to the payer all he has received over half;

C (*c*) if less than half the agreed *lobolo* has been delivered, the payer must pay the payee sufficient to bring the payee's number up to half the agreed *lobolo*.

D 2. Defendant paid eight head and owed two and the plaintiff should therefore have refunded three.

Quaere: Whether a Native Chief's Court may entertain a case based on the circumstances described in the said section 94 (1) in view of the words "in the discretion of the E Native Commissioner" contained in it, discussed but not decided.

Statutes, etc., referred to:

Section 94 (1), Natal Code of Native Law (Proclamation No. F 168 of 1932).

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

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

G In a Chief's Court plaintiff claimed eight head of cattle from defendant being the balance of *lobolo* due on Mzimkulu, the daughter of his uncle, whose heir he was. Defendant admitted he owed two head of cattle but he counterclaimed for the return of four head on the ground that Mzimkulu died without surviving H issue within one year of the marriage.

The Chief gave judgment for defendant for four head of cattle having found that defendant had paid eight head of cattle and was entitled to recover half of what he had paid (see section 94 (1) of the Natal Code of Native Law).

I Against this judgment the plaintiff appealed to the Native Commissioner and it is clear from his evidence that while he still maintained that the balance of unpaid *lobolo* was eight head he recognised the custom relating to a wife dying childless within a year of her marriage and he claimed he was entitled "to two J beasts plus the *ingqutu* beast to bring the *lobolo* up to five and the *ngqutu* beast".

The Native Commissioner found himself unable to decide the issue and he gave a judgment of absolution ordering each party to pay his own costs.

K Against that judgment plaintiff has appealed to this Court but there is no cross appeal by defendant.

It is clear from the evidence that defendant proved that he had paid eight head of *lobolo* and that a balance of two head was still due and it remains to be decided what number of cattle L would be recoverable by defendant in terms of the custom which became applicable because of the circumstances of Mzimkulu's death.

The Court called in the aid of Native Assessors—their opinions form an annexure to this judgment and it is clear that the method M of calculation is as follows:—

> The bridegroom paid eight head and owed two at the time of the bride's death; the bride's guardian received eight head; if the guardian returns three head he will retain five head; if the bridegroom gets back three he will have that number plus the two he should have paid but did not, that is, he

will also retain five head; each will then have half of the *lobolo* which is what the custom aimed at in the circumstances of the particular case, though it is clear that other circumstances may give rise to other solutions.

The Chief's judgment as delivered by him was wrong but as amended by the Native Commissioner it was also wrong.

It was gathered form the argument of counsel for the respondent that no cross appeal was entered because the plaintiff was protected by the provisions of section 116 of the Natal Code of Native Law and he quoted from plaintiff's evidence the following passage:—

> "I didn't inherit any stock from Maqili except the unpaid balance of *lobolo*. The horse in question later died. Should the Court find against me I contend that as heir I am not personally liable to make good any counterclaim of defendant."

It is not for this Court to decide this point because of the absence of a cross-appeal but it cannot refrain from expressing its doubt that such evidence is sufficient to afford an heir the protection of the section quoted and it is significant that this defence was not pleaded in either of the Courts below.

In all the circumstances this Court must refuse the appeal but cannot grant the successful respondent (defendant) the judgment which might have followed his success.

It is ordered that the appeal be and it is hereby dismissed with costs.

Questions put to Assessors by Court:—

Question: Do you know whether it is an old Zulu Custom if the wife of a customary union died within a year of such union without having had a child, for the father to come to the man's assistance?

Answer (Chief Langalake Ngcobo): If a woman died without having had a child within a year of her husband having *lobolaed* her, the husband comes to the father and says "Give me something, as I am grieved whereas I can comfort myself by seeing a child". The father pays back only half the cattle which were paid for *lobolo*.

(Chief Mpungwa Gwala): I agree with Chief Langalake Ngcobo.

(Chief Charles Hlengwa): I also agree that when a man reports to the father that he is grieved, half the cattle are refundable.

(Gilbert George Mkize): It is an old Zulu Custom when a man is grieved by the death of his wife, his father-in-law assists. If there is another daughter then according to Zulu Custom, that daughter should be taken to the place from where the *lobolo* cattle were paid. If there are no other daughters, half the *lobolo* must be paid back.

(Mdesheni Zulu): I agree, especially with what Mkize said.

Question: Can you give us any example that you can quote?

Answer (Gilbert George Mkize): There is the case of Bejana who married a wife by the name of Ngubese at Nqutu. She did not bear any children and so the younger sister was sent over to prop up the house and she bore him a child.

Question: Why do you say the half of the *lobolo* if there was not a sister?

Answer (Mdesheni Zulu): Half the *lobolo* is returned. They usually come to an agreement and something is returned.

Question: Is the father-in-law compelled by Native Law and Custom to return some of the cattle?

Answer (Chief Langalake Ngcobo): Yes. If this other girl will not agree to go and prop up the house the father-in-law is compelled to return some of the cattle.

All Assessors agree.

Question: If a man had not paid the full *lobolo* for his wife by the time she died, what is the position regarding the balance of the *lobolo*?

Answer (Chief Langalake Ngcobo): If he was still owing, you give him a little of what he has paid and he does not pay the balance.

Question: Is the number returnable reduced by the balance he is owing?

Answer (Chief Langalake Ngcobo): Yes, then he does not pay the balance he was still owing because the woman died without leaving a child.

(Chief Mpungwa Gwala): According to Native Custom, when my daughter dies without leaving issue and the son-in-law was still owing, I say to him: "We are both grieved, we will leave that debt". The son-in-law need not pay the balance of the *lobolo* cattle.

(Chief Charles Hlengwa): All the head of cattle that were paid or unpaid belong to the father-in-law. I must use my own discretion about the balance and how much I can return to him.

Question: You mean to say the father-in-law can claim the balance of the *lobolo* still owing?

Answer (Chief Charles Hlengwa): Yes. Then I will decide how many of the cattle I can pay back. If my daughter dies we are both grieved. When the daughter has died before the father had received all the *lobolo* cattle the balance cannot be claimed according to Native Custom.

Question: Out of the kindness of the father's heart he decides what is returnable?

Answer (Mdesheni Zulu): Yes, the balance is left with the son-in-law.

Question: If the *lobolo* agreed upon had been ten head of cattle and only eight had been paid and the woman died childless within a year of the marriage, what is the position?

Answer (Chief Langalake Ngcobo): Because he was still owing me two I would return two to him, that would be four and I would keep six, because there is a beast which is being slaughtered when the cattle are paid.

Question: You say you would keep six and return two?

Answer (Chief Langalake Ngcobo): Yes, he will have four and I will have six.

(Chief Mpungwa Gwala): I also say I will return two and the other property which I bought which is still in his kraal I cannot claim. If I was the father I would only return two.

Question: And yet you are the man who said you would return half?

Answer (Chief Mpungwa Gwala): It is half because there are some cattle owing and some other property which I bought, so that amounts to half.

(Chief Charles Hlengwa): According to Native Custom there is nothing that my daughter took over. I can only return three if he only paid eight.

(Gilbert George Mkize): I support what Hlengwa has said.

(Mdesheni Zulu): I support what Hlengwa has said.

Question: If one or more of the cattle paid for *lobolo* was slaughtered at the wedding, would that be taken into account when the cattle are returned?

Answer (Chief Langalake Ngcobo): No, I have given him that. I keep it amongst the six.

(Chief Mpungwa Gwala): I agree with Ngcobo.

(Chief Charles Hlengwa): I would return three, which means two that he owes plus three makes five and I keep five.

Question: But if during the course of this customary union you slaughtered certain cattle out of the *lobolo* which came to you, would you take that into account? Let us say you slaughtered two, would you still return three head of cattle? A

Answer (Chief Charles Hlengwa): Yes. That would be my loss as I was pleasing my daughter at the time of the marriage. I slaughter if I like and if I don't like I do not slaughter. B

(Gilbert George Mkize): I still support Hlengwa. Some rich people slaughter big oxen and some poor ones slaughter only a small goat. It does not come into account.

(Mdesheni Zulu): If I pay over to a Chief there are two cattle that I slaughter. There must be two slaughtered for the Chief because he is a rich man. Then there comes a third. That does not come into account. C

Question: If ten head were agreed upon and eight were paid and the woman died childless and the father of the girl is very grasping and he now sues the man for the balance of *lobolo* he owes him. He says to him: "You promised me ten, you only paid eight and I now want the other two". Can the son-in-law insist that certain cattle are returnable because she died childless within a year? D E

Answer (Chief Langalake Ngcobo): The old man should return some cattle.

He wants these two cattle. When your child is dead you cannot open the grave and ask for cattle. F

Question: You say you cannot claim payment of the balance of the *lobolo* if the woman died childless within a year?

Answer (Chief Langalake Ngcobo): No, they are all dead. You cannot claim.

(Chief Mpungwa Gwala): The father-in-law would not go and claim the two head of cattle. It would make it appear that he did not like his daughter by going to claim the balance of *lobolo* When my child dies I have no further wish to claim any further cattle. I forget it. G

(Chief Charles Hlengwa): When my daughter gets married and has a child my child is "alive" in that kraal. If my daughter dies before she completes a year then I am obliged not to ask for these cattle. That is if she dies within a year without a child. H

If she has a child within that year and dies I will claim the balance of *lobolo* because my daughter has done what was required of her in the house by giving birth to a child. I

(Gilbert George Mkize): It is such a heavy loss amongst the Zulus when the daughter dies within a year without leaving a child. It is impossible to go and claim the two head of cattle owing. That is according to Zulu Custom. Instead he should condone his son-in-law's debt. J

(Mdesheni Zulu): If the daughter died he cannot go and ask anything that was still owing.

Questions put to Assessors by Mr. de Villiers:—

If a person agrees to pay *lobolo* you look upon it as a binding contract of which you can claim the fulfilment at any time, except that the Native Code gives him a right to claim half back which he has paid? The contract is a binding one, either party can claim fulfilment? K

Answer (Chief Langalake Ngcobo): You are entitled to it if your daughter is still alive but you cannot claim after the death of your daughter. L

Question: The only time you can claim is under the Code which says if your daughter dies he can claim back half the *lobolo?*

(Chief Langalaka Ngcobo): Yes. M

Question put to the Assessors by Mr. Pullin:—

You have told us what you would do if the *lobolo* was ten and eight had been paid, leaving a debt of two. In Zulu Custom what would you do if the *lobolo* agreed upon was ten but only three

had been paid. Would you return any of the three or would you claim any of the balance of seven? Would you return one and keep two?

(Chief Langalake Ngcobo): My son-in-law should give me five and he can keep the other five. I would claim another two from him so that it would be equal.

All Assessors agree.

Court: You withdraw your previous replies that when there is a death you do not sue? You would still sue for two more?

Answer: The reason why is because this balance is too big and what we receive is too little so we should equalise it.

All Assessors agree.

For Appellant: Mr. E. R. de Villiers of Cowley & Cowley.
For Respondent: Mr. J. H. Pullin of Pullin & Law.

SOUTHERN NATIVE APPEAL COURT.

MCIMBI *v.* **MPONDWENI.**

N.A.C. CASE No. 57 OF 1955.

KOKSTAD: 9th February, 1956. Before Balk, President. Warner and Fenwick, Members of the Court.

LAW OF PROCEDURE.

Vindicatory action—Proof of ownership—Proof by clear and satisfactory evidence means proof on preponderence of probability—Acceptability of evidence of identification of cattle by deceased person—Declaration against interest.

Summary: Plaintiff sued defendant for the delivery of four head of cattle which plaintiff alleged he had placed with one, Mcitini, under the custom of *ngoma,* and which were subsequently attached by the Messenger of a Chief's Court at Mcitini's kraal in partial satisfaction of a judgment of the Chief's Court, in defendant's favour, against one, Gqongwe.

The Native Commissioner gave judgment for defendant and plaintiff appealed, *inter alia,* on the question of onus of proof.

Held: That the instant action falls to be regarded, not as being in the nature of an interpleader, but as a vindicatory action in which the onus of proof on the pleadings rested on the plaintiff.

Held further: That proof by clear and satisfactory evidence does not mean conclusive proof but proof on a preponderance of probability.

Held further: That the depositions made by plaintiff and his witnesses concerning Mcitini's identification of the cattle as plaintiff's property are properly receivable in evidence as proof that the cattle belonged to plaintiff since Mcitini was dead at the time the depositions were made, and the latter's identification of the cattle amounted to a declaration against interest.

Cases referred to:

K. & D. Motors *v.* Wessels, 1949 (1), S.A. 1 (A.D.)
Tedile *v.* Boboyi, 1941, N.A.C. (C. & O.F.S.) 22.
Zandberg *v.* Van Zyl, 1910, A.D. 302.
Ndude *v.* Nteyi, 1953, N.A.C. 88 (S.)
Ley *v.* Ley's Executors & Others, 1951 (3) S.A. 186 (A.D.)
Retief Bros. *v.* Estate Du Plessis, 1928, C.P.D. 387.
Pillay *v.* Krishna and Another, 1946, A.D. 946.
Estate Lala *v.* Mahomed, 1944, A.D. 324.
Gulani *v.* Gamkile, 1 N.A.C. (S.D.) 279.

Cases distinguished:

Greenfield N.O. *v.* Blignaut & Others, 1953 (3) S.A. 597 (S.R.)

Works of Reference:

Scoble's Law of Evidence (Second Edition).

Appeal from the Court of the Native Commissioner, Mount Ayliff.

Balk (President): (Dissentiente).

Ths is an appeal from the judgment of a Native Commissioner's Court, given for defendant (now respondent), with costs, in an action in which he was sued by the plaintiff (present appellant) for the delivery of certain four head of cattle or, in the event of the death of any of them or their disposal by the defendant, payment of their value at the rate of £10 per head. The plaintiff also sought an interim order of court restraining the defendant from disposing of these cattle, which was granted.

In his particulars of claim, the plaintiff averred that:—

"1. The parties hereto are Natives.

2. Plaintiff is the owner of certain four head of cattle, to wit: red cow, red young ox, red cow and its red bull calf which were placed with one Mcitini under the Custom of Nqoma and were registered in the latter's name in the Dipping Registers.

3. Just recently defendant obtained a judgment against one Gqongwe at Chief Gaulibaso's Court in the Mount Ayliff District and as a result of such judgment he and the Chief's messenger attached the said four head of cattle at the dipping tank, despite being told that the cattle did not belong to judgment debtor, and they have been placed in the possession of the defendant who is using them as though he owned them.

4. Despite verbal and legal demand on the defendant for the delivery to plaintiff of the said cattle he refuses to make such delivery and he has attempted to sell them.

5. Plaintiff values these cattle at £10 each.

Wherefore plaintiff prays for judgment against defendant for:—

1. The immediate delivery to him of the said four head of cattle alternatively, and only should any die or be disposed of from defendant's possession, payment of their value at £10 per head.

2. An order on defendant as from the date hereof that he shall refrain from dispossessing himself of the custody of these cattle to any third party or using them for his own benefit, until the termination of this action.

3. Costs of suit."

The defendant pleaded:—

"1. The defendant admits paragraph 1 of the particulars of claim.

2. The defendant denies each and every allegation contained in paragraph 2 of the particulars of claim and puts the plaintiff to the proof thereof.

3. Save that the defendant admits that he recently obtained a judgment against one Gqongwe at Chief Gaulibaso's Court in the District of Mount Ayliff and that he is now in possession of the said four head of cattle the defendant puts the plaintiff to the proof of the allegations contained in paragraph 3 of the particulars of claim.

4. The defendant admits the legal demand as alleged in paragraph 4 of the particulars of claim but denies that he has attempted to sell the cattle or that he is liable to plaintiff either as claimed or at all and puts the plaintiff to the proof thereof.

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

A The appeal is brought on the following grounds:—

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

2. That such judgment is bad in law in that the Presiding Judicial Officer placed the entire onus upon the plaintiff
B of proving that the animals in dispute belonged to him, which onus the plaintiff contends he discharged, and held that thereafter the onus did not shift to the defendant to rebut the evidence of the plaintiff and to show that the ownership of the animals had passed from
C plaintiff to the judgment debtor in the Chief's Court, namely one Gqongwe, but placed this action on all fours with an interpleader action wherein the animals in dispute had been attached in the possession of the judgment debtor."

D It is common cause that the four head of cattle in question were attached by the Messenger of a Chief's Court at the instance of the defendant in partial satisfaction of a judgment obtained by the latter against one, Gqongwe, in that Court and that, at the time of this attachment, these cattle were in possession of
E one, Mcitini.

It is also common cause that, whilst these cattle were being taken from the dipping tank after their attachment, Mcitini intervened and, as a result of injuries received by him in the
F ensuing fight, he died before the hearing of the instant case.

The plaintiff's version is that, amongst certain dowry cattle due to him for his sister, Macatala, there was a black heifer, which, together with the remainder of these cattle, was delivered to, and registered in the name of, his uncle, Gqongwe, at whose kraal the plaintiff was living at the time, owing to the death
G of the latter's father and on account of his youth. The black heifer was *nqomaed* to Mcitini at whose kraal it had two calves before it died. The first of these calves also died. The remaining calf, a reddish heifer, described as a *caba* heifer, is the first red cow mentioned in the summons. The red ox and the other
H red cow mentioned therein are progeny of the *caba* cow. The fourth beast claimed, viz: the red bull calf, is the progeny of the red cow which was the calf of the *caba* cow. These four head of cattle i.e. the two red cows, the red ox and the red bull calf, were identified to the plaintiff as his property by Mcitini.
I They were not earmarked. The plaintiff went to Mcitini's kraal in 1954 when he saw the four cattle there. Gqongwe then accompanied him. Prior to that the plaintiff had last seen his cattle at Mcitini's kraal in 1947. He did not go to Mcitini's kraal during his annual leave in the intervening years.

J The defendant disputed the plaintiff's claim to the four head of cattle and contended that they were his property by virtue of their attachment and delivery to him in pursuance of the judgment he had obtained against Gqongwe in the Chief's Court, as, according to his information, these cattle were the property of Gqongwe. Here it should be mentioned that from the parti-
K culars of claim and the testimony of the plaintiff's witness, Gqongwe, and that of Headman Sidumo Jojo, called by the defendant, it is manifest that the cattle in question were taken to this Headman's kraal after their attachment, that they were kept there for the recognised period of twenty-one days, that
L thereafter, on the instructions of the Chief, they were transferred to the defendant's name in the dipping records and delivered to the latter in partial satisfaction of his judgment debt against Gqongwe, and that the instant action was instituted some time after such delivery.

M Dealing with the question of the onus of proof raised in the second ground of appeal, there is nothing in the record to show that this point was taken in the Court *a quo*.

Counsel for appellant (plaintiff) contended that the principles enunciated in Greenfield N.O. *v.* Blignaut & Others, 1953 (3) S.A. 597 (S.R.) fell to be applied in the instant case so that if

it was held that the plaintiff had failed to prove that the cattle were his property, then at most the defendant should have been absolved from the instance by the Court *a quo* i.e. he (defendant), was not entitled to a final judgment as he had not established his title to the cattle. Counsel's main contention was that the plaintiff had in fact proved that the cattle were his property.

But Greenfield's case falls to be distinguished from the instant action; for there the parties claimed an animal in the possession of a third person whereas here the defendant already had juridicial possession of the cattle when the instant action was instituted by virtue of the fact that they had already been delivered to him some time before then in due course after their attachment in partial satisfaction of his judgment debt against Gqongwe.

It follows not only that Greenfield's case is not apposite here but also that the instant action falls to be regarded not as being in the nature of an interpleader—the plaintiff, as pointed out above, delayed too long in taking action for the proceedings to be so regarded—but as a vindicatory action in which the onus of proof on the pleadings rested on the plaintiff, see K. & D. Motors *v.* Wessels, 1949 (1), S.A. 1 (A.D.) at page 11. It follows that the Native Commissioner properly held accordingly.

It is manifest, however, from the Native Commissioner's reasons for judgment, that he misdirected himself in certain respects, viz: in holding, firstly, that the plaintiff must prove *conclusively* that he was the owner of the four head of cattle claimed by him and, secondly, that the depositions by the plaintiff and his witnesses in regard to the identification by Mcitini of these cattle as the property of the plaintiff, were not receivable as proof that the plaintiff was their owner as those depositions were hearsay.

In holding that the plaintiff must prove his case *conclusively*, the Native Commissioner relied upon Tedile *v.* Boboyi, 1941, N.A.C. (C. & O.F.S.) 22 at page 24, in which it was laid down, following Zandberg *v.* Van Zyl, 1910, A.D. 302, that the presumption of ownership of a movable raised by its possession, can only be rebutted by clear and satisfactory evidence. But apart from the fact that in Tedile's case, unlike the instant case, the cattle were attached at the judgment creditor's kraal so that a presumption of ownership in the latter raised by his possession arose there which does not obtain here, proof by clear and satisfactory evidence does not mean *conclusive* proof but proof *on a preponderance of probability,* see Ndude *v.* Nteyi, 1953, N.A.C. 88 (S) at page 89 and the authority there cited, viz; Ley *v.* Ley's Executors & Others, 1951 (3) S.A. 186 (A.D.) at pages 191 to 193.

Turning to the depositions by the plaintiff and his witnesses concerning Mcitini's identification of the cattle as the property of the plaintiff, it seems clear to me that those depositions are properly receivable in evidence as proof that the cattle belonged to the plaintiff since Mcitini was dead at the time that the depositions were made and the latter's identification of the cattle, whilst in his possession, as the property of the plaintiff, amounted to a declaration against interest, see Retief Bros *v.* Estate Du Plessis, 1928, C.P.D. 387 at pages 393 and 394. In this connection counsel for respondent (defendant) contended that declarations against interest by a deceased person were properly admissible in evidence only in cases in which his estate or a privy was a party to the action. But this contention is unsound, as it is clear from the judgment in Retief Bros. (*supra*) at page 393 that the ground upon which such declarations are received is the extreme improbability of their falsehood so that it is immaterial who the parties to the action are. That this is the position, is also borne out by paragraph 8 at page 242 of Scoble's Law of Evidence (Second Edition).

As regards the shifting of the onus referred to in the second ground of appeal, it must be pointed out that the "onus" in the true and original sense of this word, can never shift from

A the party upon whom it originally rested, that is, if the word "onus" is understood to mean "the duty which is cast on the particular litigant, in order to be successful, of finally satisfying the Court that he is entitled to succeed on his claim, or defence, as the case may be, and not in the sense merely of his duty to B adduce evidence to combat a *prima facie* case made by his opponent.", see Pillay *v.* Krishna and Another, 1946, A.D. 946, at pages 952 and 953.

It remains for this Court to consider the instant case afresh on C a proper basis, i.e., in the light of what has been stated above, and to determine for itself on the admissible evidence in the record before it whether the judgment of the Court *a quo* was or was not correct. That this is the correct approach, appears to me to be properly inferable from Estate Lala *v.* Mahomed, D 1944, A.D. 324 at pages 329 and 330.

The evidence for the plaintiff seems to me to be unreliable and against the probabilities. He admitted in cross-examination that he did not earmark the four head of cattle in question and that he did not know what earmarks they bore. The fact that E he did not earmark them, whilst not fatal to his case, nevertheless detracts from the merits thereof, see Gulani *v.* Gamkile, 1 N.A.C. (S.D.) 279 at page 280. But the fact that he admitted in cross-examination that he did not know what earmarks the cattle claimed by him bore, goes further and militates against the F success of his case, particularly in the light of his evidence that he inspected the cattle and that he did know the earmarks of the black heifer referred to above; for, viewed from the native eye, it is inconceivable in the circumstances that the plaintiff should not have known whether or not the cattle bore earmarks G if in fact they were his property.

The plaintiff's witness, Livingstone Gaga, confirms that he paid the black heifer as dowry for the plaintiff's sister, Macatala, and that it was delivered at Gqongwe's kraal and registered in the latter's name. He takes the case no further.

H Gqongwe, who gave evidence for the plaintiff acknowledged in cross-examination that he had accompanied him to Mcitini's kraal once to inspect the cattle but he stated that this was when the plaintiff returned from the mines, if he was not mistaken, which, according to the plaintiff's evidence, was in 1947. Then I Gqongwe stated that they had gone there before the plaintiff started working as an assistant to the telephone linesman. He added that he did not "remember well" whether it was after the plaintiff had started work as assistant to the linesman that they had gone to Mcitini's kraal to look at the cattle; and finally J he said that he did not remember whether they gone there in 1954. Here it should be mentioned that the plaintiff in his evidence stated that he had been assistant to the linesman for the last eight years. If this evidence and that of Gqongwe referred to above is borne in mind as well as the fact that the K plaintiff was definite in his testimony that he and Gqongwe went to Mcitini's kraal in 1954 to inspect the cattle, the unreliability of their evidence in this respect becomes glaringly apparent; and in this connection it is most significant that both the plaintiff and Gqongwe admitted in the course of their testimony that they would not have known that the cattle were the plaintiff's L property if Mcitini had not pointed them out to them. Again, Gqongwe denied the plaintiff's statement that the latter still had two head of cattle at the former's kraal. Gqongwe also said that he had inspected the cattle in question regularly. Later he stated that he had not seen the *caba* cow until after it had M calved. According to Gqongwe, only three head of cattle were pointed out to him and the plaintiff by Mcitini when they went to his kraal, viz: The two red cows and the red ox but not the red bull calf; whereas it is implicit in the plaintiff's testimony that all four of these cattle were pointed out to them by Mcitini at the time of their visit to his kraal.

The plaintiff's next witness, Sidleni Nqabana, a half-brother of the late Mcitini, stated that the latter had told him that the four head of cattle in question were *nqoma* cattle belonging to the plaintiff. Sidleni admitted, however, that he had instructed the plaintiff's attorneys in connection with this case before the plaintiff had returned home, and without being told by the latter or by Gqongwe to do so, which suggests that Sidleni had a personal interest in this case. Moreover, Sidleni stated that Mcitini had told him at the time that the black heifer first came to his (Mcitini's) kraal that it had been *nqomaed* to him *by the plaintiff*, which is most unlikely in the light of the plaintiff's testimony that he was a young boy living at Gqongwe's kraal at that time and that the black heifer was then registered in the latter's name.

The plaintiff's last witness, Zenyuse, a son of the late Mcitini confirmed that the four head of cattle were the progeny of the black heifer. He further stated that when these cattle were being taken from the dipping tank by the defendant and Headman Sidumu, Mcitini told them that they were the ones *nqomaed* to him by the plaintiff. But, according to the defendant's evidence, Mcitini at that time claimed that these cattle were his property and in this the defendant is supported by the Headman who appears to be a disinterested person not related to the parties, and, as such, an impartial witness. Again, Zenyuse stated that Gqongwe had told his father and him that the black heifer was the plaintiff's beast when they took delivery of it from Gqongwe. In cross-examination Zenyuse said that he knew that the black heifer was the plaintiff's beast—before Gqongwe had told them so. Thereafter he admitted that he only knew that the black heifer was a *nqoma* beast because his father had told him so. Whilst this discrepancy does not, standing alone, appear to be serious on the face of it, it falls to be regarded in a serious light in view of Zenyuse's close relationship to the plaintiff's witness, Sidleni, coupled with the fact that the foregoing analysis of the plaintiff's evidence and that of his other witnesses makes it difficult to escape the conclusion that their version is a fabrication.

It follows that the probabilities are against the plaintiff's version and that of his witnesses and that the plaintiff has not established that Mcitini identified the four head of cattle as his (plaintiff's) property or that these cattle are the progency of the black heifer paid as dowry for his sister, Macatala, and due to him; and as these elements form the basis of the plaintiff's claim, he has not discharged the onus resting on him. Not only is this so, but, as already pointed out, the plaintiff's version and that of his witnesses, make it difficult, in the light of what has been said above, to escape the conclusion that his case is a fabrication designed to defeat the defendant's right to the cattle. Here it should be added that the seeming discrepancy in the evidence for the defendant regarding the movements of Mcitini when the cattle were attached appears to be more apparent than real as it does not appear to serve any purpose.

In the circumstances, the judgment of the Court *a quo* for defendant cannot be said to be wrong and I am therefore of opinion that the appeal should be dismissed with costs and regret that I am unable to agree with the majority judgment of this Court.

Warner (Permanent Member):—

The legal aspects of this case are set out in the President's judgment and I am in agreement therewith.

As regards the facts of the case, the Native Commissioner has found that a black heifer, belonging to plaintiff, was placed with the late Mcitini, under the custom of *nqoma*.

The only question to be decided, therefore, is whether plaintiff has discharged the onus of proving that the cattle now in possession of defendant are the progeny of this black heifer.

Zenyuse, son of Mcitini, says that he was herding Mcitini's stock and was present when the black heifer was received from Gqongwe, the guardian of plaintiff. He says that he herded it and has described the calves born to it and their progeny and states that the four head of cattle claimed are the progeny of the offspring of the black heifer which has died. This evidence has not been challenged or contradicted.

Besides this, there is the evidence of plaintiff and his witnesses that Mcitini pointed out the cattle claimed as being the property of plaintiff.

Defendant has not brought any evidence to show that the cattle claimed are not the progeny of the black heifer which belonged to plaintiff and was placed with Mcitini.

I am of opinion, therefore, that, in spite of discrepancies in the evidence and plaintiff's failure to earmark the cattle, judgment should be granted in his favour.

I consider that the appeal should be allowed with costs and the judgment of the Court *a quo* altered to one for plaintiff as prayed with costs.

Fenwick (Member):—

Mr. Elliot has referred to the improbability of the correctness of certain of the evidence adduced in plaintiff's claim as to his ownership of the cattle mentioned in his summons. There is of course the possibility of plaintiff and his witnesses having connived to give false evidence. There are admittedly minor discrepancies in the evidence of these witnesses but is clear that the Native Commissioner has accepted plaintiff's statement as to the *nqoma* transaction in so far as the black heifer is concerned. He is silent on the evidence of the *quondam* herd boy, Zenyuse. This witness takes up the tale at the point when the original black heifer was *nqoma'd* and recounts the descent of the cattle in dispute from this heifer. He was cross-examined on the circumstances of the delivery of the black heifer to Mcitini's kraal and on his knowledge of the original *nqoma* agreement. It is evident that his explanation of these points was accepted by the Native Commissioner but he was not cross-examined on his evidence connecting the black heifer with the cattle in dispute and this stands unchallenged. In the case of Smal *v.* Smith, S.A.L.R. 1954 (3) at page 438, the learned judge states *inter alia* " . . . It is grossly unfair and improper to let a witness's evidence go unchallenged in cross-examination and afterwards argue that he must be disbelieved ".

Mention has also been made that plaintiff should have earmarked his stock or inspected them for earmarks but this Court has held in Bunzima *v.* Gulani, N.A.C. (S.D.) 1951, that the absence of earmarks does not vitiate the *nqoma* contract but makes it's existence more difficult to prove. I feel that plaintiff has overcome this difficulty and established his ownership of the cattle in defendant's possession. I agree that the appeal should be allowed and the Native Commissioner's judgment altered to read " for plaintiff with costs."

For Appellant: Mr. F. W. Zietsman, Kokstad.

For Respondent: Mr. W. L. D. Elliot, Kokstad.

SOUTHERN NATIVE APPEAL COURT.

SHATA *v.* SHATA.

N.A.C. CASE No. 61 OF 1955.

KOKSTAD: 9th February, 1956. Before Balk, President, Warner and Fenwick, Members of the Court.

LAW OF PERSONS.

Husband and wife—Custody of minor children of marriage—Children in almost continuous custody of father for lengthy period—Very strong reasons required for depriving father of custody.

Summary: In 1948 the Native Divorce Court granted a decree of divorce to plaintiff against her husband, the defendant, on the ground of desertion. No order in regard to the custody of the minor children of the marriage was made by the Divorce Court. The children had remained in the custody of their father, the defendant, almost continuously before and after the divorce.

In a subsequent action in the Native Commissioner's Court custody of the minor children of the marriage was awarded to the plaintiff.

Defendant appealed against this judgment on the grounds that the Native Commissioner's judgment was against the weight of evidence and that the children's interests would be better served by their custody being awarded to him.

Held: That very strong reasons would be required to justify the order that defendant should be deprived of the custody of the children.

Held further: That, as both parties are at fault, their moral character and the events which occurred prior to 1951 should be ignored and the interests of the children should be considered in the light of the manner in which defendant treated them whilst they were in his continuous custody.

Cases referred to:

Fletcher *v.* Fletcher, 1948 (1) S.A. 130 (A.D.).
Cook *v.* Cook, 1937 A.D. 154.
Goodrich *v.* Botha and Others, 1954 (2) S.A. 540 (A.D.).
Fortune *v.* Fortune, 1955 (3) S.A. 348.

Appeal from the Court of the Native Commissioner, Matatiele.

Balk (President) (Dissentiente):—

The summons in this case was issued on the 20th October, 1947, and the hearing in the Native Commissioner's Court commenced on the 13th April, 1948, when one Joel Mabutyana, an Interpreter-Clerk in the Magistrate's Office at Matatiele, and four other witnesses gave evidence for the plaintiff. Then the hearing was adjourned to a specified date and, after being again so adjourned, it was finally postponed *sine die* on the 7th April, 1949.

The hearing was resumed in the Native Commissioner's Court on the 23rd August, 1955, before another judicial officer, when certain correspondence and a decree of divorce granted by the Native Divorce Court on the 12th October, 1948, to the plaintiff in the instant case (now respondent) against her husband, the defendant in the present action (now appellant), on the ground of desertion, were put in by consent. The parties also then agreed that Joel Mabutyana's evidence, including the excerpt therein from the Magistrate's Complaints Record, was to stand. Thereupon further evidence was led for the plaintiff, followed by evidence for the defendant, and, after the conclusion of argument, the

Court *a quo* entered judgment for the plaintiff awarding her the custody of the three minor children of the marriage and ordering the defendant to contribute £5 per month towards their support, as prayed. The plaintiff was also awarded costs of suit.

There was a further claim but this Court is not concerned therewith as it is not covered by the notice of appeal. For the same reason this Court is not concerned with the question of whether the Court *a quo* properly awarded the whole of the costs to the plaintiff.

The appeal is brought on the grounds that the judgment of the Native Commissioner's Court awarding the custody of the children to the plaintiff is against the weight of the evidence and that the children's interest would be better served by their custody being awarded to the defendant.

Here it should be mentioned that no order for the custody of the children was made by the Native Divorce Court when it granted the decree of divorce referred to above.

It is common cause that there are three children of the marriage, viz.: two boys and a girl, and that their respective ages at the time of the resumed hearing were 13 years, 9 years and 10 years.

The plaintiff's version is that the defendant ill-treated her. She complained to the Magistrate, Matatiele, to whom the defendant stated that he did not want her any more. She was compelled to leave the defendant's kraal because he starved her. When she left, he had already placed the children of the marriage under the control of one O'Reilly, a coloured man residing at his (defendant's) kraal, so she could not take them with her. The plaintiff learnt for the first time at the initial hearing of the instant case, i.e. on the 13th April, 1948, that the children had disappeared from the defendant's kraal and it was not until August, 1954, that the defendant told her that they had been found.

In his evidence the defendant denied that he had starved the plaintiff. He alleged that she was conceited, had defied him, wished to be master of his kraal and did not want to carry out her domestic duties. He also alleged that the plaintiff was addicted to drink and that it was not until she instituted the divorce proceedings that he did not want her back. According to him, she had, on leaving his kraal, deliberately left the children of the marriage with certain woman living there, viz., O'Reilly's wife and a teacher named Ntuku. The defendant went on to say that on his return to his kraal from his place of employment, he found that the plaintiff and the children had gone. The other women living at his kraal and O'Reilly had also gone. It was not until the year 1951 that he found the children and brought them back to his kraal. He reported to the plaintiff in June, 1954, that he had found them.

It is manifest from the testimony of Joel Mabutyana, the interpreter-clerk in the Magistrate's Office at Matatiele, whose credibility was not attacked in cross-examination, that on the 30th May, 1947, the defendant came before the Magistrate in connection with the plaintiff's complaint that the defendant was ill-treating her and had told her to leave his kraal and that the defendant had then admitted before the magistrate that he had rejected the plaintiff. It is true that in cross-examination Joel stated that he could not recall whether the defendant had given any reason for rejecting the plaintiff. But this aspect is of little consequence since in cross-examination the defendant denied that he had ever appeared before the magistrate in regard to his estrangement from the plaintiff. In re-examination the defendant did admit that he had been before the magistrate and had then intimated that he had rejected the plaintiff but in the same breath he went on to say that he was not quite clear as to what had happened and did not remember being before the magistrate, a startling *volte face* if ever there was one.

The plaintiff's version that the defendant had ill-treated her and told her to leave his kraal is not only borne out by Joel's testimony, particularly in the light of the defendant's *volte face*

referred to above, but also receives support from the fact that the decree of divorce on the ground that the defendant had deserted the plaintiff, was granted at the latter's instance.

I have dealt at some length with the question of the defendant's treatment of the plaintiff, not so much with a view to showing that he was the guilty party in bringing the marriage to an end, but in an effort to arrive at a proper assessment of his character as the primary consideration in deciding which party should have the custody of the children is what is best in their interests, see Fletcher *v.* Fletcher, 1948 (1) S.A. 130 (A.D.).

From the evidence of Daniel, the eldest child of the marriage, who was called by the defendant, it emerges that the latter frequently visited him whilst he was with O'Reilly, so that the defendant's evidence that the children had disappeared was obviously perjured as found by the Court *a quo;* and, as also found by that Court, this fabrication was designed by the defendant to defeat the plaintiff's claim to the custody of the children in the instant action for as long as possible. That this is so, is evident from the defendant's testimony and the letters (Exhibits "E" and "F") from which it emerges that the defendant was the person who gave out that the children had disappeared and undertook to interview the magistrate so as to enlist the aid of the police in this matter and to advise the plaintiff through their attorneys as soon as the children were found; whereas, as pointed out above, according to his son, Daniel's evidence, he well knew where the children were, and on his own admission he did not communicate to the plaintiff that the children were at his kraal, until June, 1954. In this connection the plaintiff's uncontroverted evidence that the defendant asked her to remarry him when he told her he had found the children, is significant.

Here it is convenient to deal with the point raised in argument before this Court as to what steps the plaintiff had taken to find the children. In her evidence she stated that she had asked the authorities to look for them and in the letter addressed to her by her attorneys (Exhibit "E") she was advised that they had been informed by the defendant's attorneys that the defendant had been to see the magistrate about finding the children, that the utmost efforts would be made to do so and that she would be advised as soon as they were found. It is difficult to visualise what more the plaintiff could do in the circumstances particularly as, as pointed out by counsel for respondent (plaintiff), the police were unable to trace the children.

It also emerges from Daniel's evidence and that of his sister, Sylvia, also called by the defendant, that the latter poisoned their minds against the plaintiff.

The Court *a quo* does not appear to have found directly that the defendant committed adultery with Ntuku but it nevertheless seems to have held the circumstances of her stay at his kraal against him. To my mind this was not warranted since there was only the plaintiff's allegation that the defendant had misconducted himself with Ntuku which was denied on oath by the defendant, and the plaintiff gave no indication on what grounds her allegation rested. It is true that the defendant admitted that Ntuku had remained on at his kraal after the children and other persons living there had gone, leaving him and Ntuku alone there and he could offer no reason for her doing so after first falsely stating that she had remained to look after the children. But these circumstances, standing alone, whilst undoubtedly giving rise to suspicion, do not seem to me to be sufficient to prove adultery. The position would have been different if it had been shown that the defendant and Ntuku had shared a hut or other circumstances from which intimacy could properly be inferred, were present.

It also seems to me that the testimony of the plaintiff's father at the resumed hearing on the 23rd August, 1955, that her illegitimate twin children were then about seven years of age, is not sufficiently definite to allow of a finding of adultery on her part

A if it is borne in mind that the decree of divorce was granted on the 12th October, 1948, and the testimony of the plaintiff's father as to the age of the twins was merely approximate.

It is not disputed that both the plaintiff and the defendant are in a financial position to support the children adequately. That B the plaintiff's father is a man of means and a fit and proper person to be entrusted with the care of the children and that he and his wife are prepared to do so whilst the plaintiff remains in employment, emerges from his uncontroverted evidence. The plaintiff has not remarried and apart from the fact that she has borne C illegitimate children since her divorce, viz., the twins and one other child, the Court *a quo* found that her character was blameless.

It was submitted in argument, both in this Court and in the D Court below, that the stigma which, amongst Europeans, attaches to a woman who has illegitimate children does not obtain amongst Natives. In general that is so, but we are here dealing with the custody of the children of a civil marriage, a matter which falls to be determined according to the Common Law and, E therefore, in accordance with the relevant Common Law principles, so that cognisance has to be taken of the fact that plaintiff has illegitimate children in assessing her character to determine her fitness to have the custody of the children of the marriage.

Here the defendant's allegation that the plaintiff was addicted F to drink may conveniently be dealt with. The Court *a quo* found, and, to my mind properly, that there is no substance in this charge; for, as pointed out by the Assistant Native Commissioner in his reasons for judgment, the defendant was an unreliable witness, having perjured himself in regard to the whereabouts of the G children after the plaintiff's departure from his kraal and also in other respects, i.e. as regards the reason for Ntuku staying on at his kraal and in regard to his admission before the magistrate that he had rejected the plaintiff. The Assistant Native Commissioner also commented on the hedging and hesitant manner in which the defendant gave his evidence and contrasted therewith H the demeanour of the plaintiff who, he stated, gave her evidence in a straightforward, truthful and convincing manner even when she admitted facts adverse to herself, so that he accepted her denial that she drank excessively. Turning to the two witnesses called by the defendant to substantiate his allegation that the I plaintiff was addicted to drink, viz., that of John Mokoatle and Kainote Dawite, the former's falls to be treated with reserve as it emerges from his cross-examination that, before the resumed hearing, the defendant questioned him for no apparent reason as to whether he had seen the plaintiff intoxicated; and in any J event, as pointed out by counsel for respondent (plaintiff), John's evidence is confined to the plaintiff's alleged indulgence in drink on a single occasion. Kainote's replies in cross-examination indicate clearly that her testimony is quite unreliable; for they reveal that, although she claimed that she had often gone to the defen- K dant's kraal whilst the plaintiff was still there, she was unaware of the other persons who, as is common cause, were living there at the time, viz., the O'Reilly's and Ntuku.

It is clear from the Assistant Native Commissioner's reasons for judgment which, in my view, are both well-considered and L comprehensive, that he carefully weighed the various factors pertinent to the enquiry and closely observed the parties in an endeavour properly to assess their characters. Moreover his findings in the main are in accordance with the evidence. Of the defendant he states: "Since the commencement of this action in 1947 he (defendant) has continuously placed his own interests M before those of the children. In causing the children to disappear during this action he used them as mere pawns in his quarrel with plaintiff, at a time when the youngest was only 1 year old and the eldest no more than 5 years of age. In placing them with O'Reilly he utterly disregarded their interests by removing them from their natural environment and placing them with coloured persons

where they were unhappy and badly treated. The move could only have been detrimental to the children yet the defendant left them with O'Reilly for at least 4 years. In Court the defendant perjured himself. The disappearance of the children during the hearing of the action and the defendant's subsequent failure to notify the plaintiff that the children had been "found" could only have been for the purpose of obstructing the Court by either avoiding or defeating a judgment. Here, also, he again ignored the interests of the children since, at that stage, the question of what was in the best interests of the children was one for judicial decision. It is also clear from the evidence of Daniel and Sylvia Shata that defendant is poisoning the minds of the children against their mother by telling them that she is "not a nice person" and that she left them when they were still very young. It would, of course, be argued that the defendant's attitude is largely due to a natural desire to retain the custody of the children but, even if this is so, the facts must be taken against him (Fletcher *v.* Fletcher, 1948 (1) S.A.L.R. 137 and Milstein *v.* Milstein, 1943 T.P.D. 227). I also observed the defendant's behaviour while giving evidence and particularly noticed that he did not appear at all concerned at giving false testimony or contradicting himself.

I came to the conclusion that the character of the defendant was such that it would not be in the best interests of the children if their moral and spiritual well being were placed in his hands. I also had the opportunity of observing the defendant's present wife in the witness box and I cannot say that she possesses even an average personality. I do not think that, if the children were awarded to the defendant, his wife would have any softening influence as far as the impact of the defendant's character on the children is concerned."

The Assistant Native Commissioner's impression of the plaintiff is set out in the following excerpts from his reasons for judgment:—

> "I now turn to examine the suitability of the plaintiff to have the custody of the children. As far as her character is concerned, she has admitted that she has twice given birth to children out of wedlock since the dissolution of the marriage. For the rest, her character is blameless.
>
> As I have said before, I was impressed by the honest and straight forward manner in which the plaintiff gave her evidence and in weighing her character against that of the defendant I was left in no doubt that she is far better fitted than the defendant to care for the moral and spiritual well being of the children.
>
> The plaintiff has stated that the children will live with her parents if she is awarded their custody. Her father, Josiah Mohksetha, who have evidence, is employed by the Paris Mission at Morija in Basutoland and is a man of means. He is, moreover, willing to have the children and struck me as a man to whom the actual care of the children could be entrusted with confidence. His suitability as custodian of the children was not questioned in cross-examination which was almost exclusively directed to the defendant's rights to claim dowry for the girl, Sylvia, in the event of the plaintiff being awarded her custody."

The Assistant Native Commissioner also gave due consideration to the question of whether it is wise at this stage to change the children's environment, particularly as they have been with the defendant since the year 1951 and according to their testimony for him, have been happy with him. The extent to which this factor calls for consideration is set out in the judgment in *Fletcher's* case (*supra*) at pages 136 and 137.

The following passages from the Assistant Native Commissioner's reasons for judgment have reference to this factor:—

> "I also had to take account of the fact that the children had been living with their father since 1951 and to consider to what extent they would be affected by being removed

again from the surroundings to which they have become accustomed. The present situation was created by the defendant who caused their earlier disappearance and failed to notify the mother of their "recovery" in 1951. In 1947 the defendant uprooted the children from their normal surroundings and placed them with people of a different race with whom they remained for 4 years after which they returned to their father's kraal. There can be no doubt that to transplant the children once more to a strange surroundings would not, in normal circumstances, be desirable. But, apart from what I have already said in regard to the defendant's character, the manner in which he has been shown to have dealt with the children to further his own ends did not give me any confidence as regards their future security should they be left with the defendant.

I had, therefore, to weigh the moral and spiritual advantages of awarding the custody of the children to the mother against the disadvantages contingent on the removal of the children from their present home. In Cook *v.* Cook (1937, A.D. 154) the children, aged nine years and eight years, had been living with their grandparents for over seven years; in awarding the custody of the children to the father, the Court had regard to the fact that the award involved "a break in their (the children's lives, a transfer to conditions of less material comfort and much uncertainty as to future movements owing to the nature of the father's occupation". In the present case the award of the custody of the children does not involve a transfer to conditions of less material comfort and they would be going to a permanent home. The award in Fletcher *v.* Fletcher (*supra*) entailed the removal of two children, aged respectively 8½ and 7 years, from the home in which they had been living for over 4 years. The children in the present case are older than the children in both Cook's and Fletcher's cases, being 13, 10 and 9 years, respectively. They have been living with their father for the past 4 years but it cannot be said that their circumstances were particularly settled at their father's kraal since, during the past 9 years, they lived for more than 4 years with the coloured O'Reilly.

I have seen the three children in Court; they appear to be normal children and no reason was shown or suggested why a break in their present lives would, to any of the children concerned, be more adverse than is normally to be expected in these circumstances. In considering this aspect I took due regard of the fact that there had already been a disruption of their established associations some 8 years previously."

The Assistant Native Commissioner sums up as follows:—

"The final conclusion at which I arrived was that the removal of the children from the influence of the father to that of the mother and the maternal grandparents and the healthier environment and better moral and spiritual preparations for their future that they will derive from the latter influence greatly outweighed the disadvantages of another break in their lives and that, in the best interests of the children, I should award their custody to their mother.

I accordingly awarded the custody of all three children of the marriage to the plaintiff."

The Assistant Native Commissioner had a discretion in deciding to which party to award the children and in the circumstances outlined above it seems clear to me that he exercised that discretion judicially so that this Court would not be justified in interfering with his judgment; for, as has been laid down by the Appellate Division of the Supreme Court, the Court of first instance is able not only to estimate the credibility of the parties but to judge their temperament and character as it has the advantage of seeing and hearing them, an advantage which a Court of Appeal, such as this Court, does not have; and it must, therefore, be careful not to interfere with the decision of the

Court *a quo* unless it is certain, on firm grounds, that that Court was wrong, see Cook *v.* Cook, 1937 A.D. 154 at pages 166 and 168, Fletcher's case (*supra*) at pages 138, 140 and 148, Goodrich *v.* Botha & Others, 1954 (2) S.A. 540 (A.D.) at page 546 and Fortune *v.* Fortune, 1955 (3) S.A. 348 at page 355.

It should be added that counsel for appellant (defendant) contended that two factors not dealt with in the Assistant Native Commissioner's reasons for judgment called for consideration, viz. firstly, the fact that the award of the children's custody to the plaintiff entailed their removal from the Union to Basutoland, a foreign territory, and secondly, the children's preference for the defendant. It was not shown that the children's removal to Basutoland would make it unduly difficult for the defendant to avail himself of his right of reasonable access to them, see Fortune's case (*supra*) at pages 352, 354 and 355 or otherwise adversely affect his rights in regard to the children; and it seems to me that, as contended by counsel for respondent (plaintiff), the children are too young to exercise a proper discretion in the matter of who should be their custodian.

In the result I am of opinion that the appeal should be dismissed, with costs, and regret that I am unable to agree with the majority decision of this Court.

Warner (Permanent Member):—

In argument before this Court, it has been agreed, correctly, that, in accordance with decided cases, the interests of the children are of paramount importance.

Except for a break of four years, the children have been in the custody of their father, the defendant, all their lives and have been in his custody continuously for the last four or five years. The children have stated in Court that they are happy with defendant and do not wish to live with their maternal grandparents in Basutoland where plaintiff proposes to place them on their custody being vested in her.

Mr. Zietsman has conceded that, while the children are in the custody of defendant, plaintiff, who is employed as a nurse at Qacha's Nek, will have easy means of access to the children and will be able to visit them whenever she pleases, at very little trouble and expense, whereas, if they are placed with their grandparents at Morija in Basutoland, both parties will experience difficulty in visiting the children so that the latter will seldom see their parents.

I consider that, in these circumstances, very strong reasons would be required to justify the order that defendant should be deprived of the custody of the children and that they should be placed in the custody of plaintiff.

In his reasons for judgment, the Native Commissioner states that defendant kept an unmarried woman at his kraal for four years. But plaintiff's moral character is also not above reproach. The Native Commissioner also states that defendant placed the children with a Coloured family and did not notify plaintiff when they returned to his kraal. But then plaintiff does not appear to have made very strenuous efforts to trace the whereabouts of the children.

In my opinion, as both parties are at fault, their moral character and the events which occurred prior to 1951 should be ignored and the interests of the children should be considered in the light of the manner in which defendant has treated them during the last four or five years.

Mr. Zietsman has argued that defendant is a man of bad character and, if the children are left with him, he will exert an evil influence over them so that they will also develop bad characters.

The statement that defendant is a man of bad character is not based on evidence to that effect but on the impression formed by the Native Commissioner when hearing the case.

A It seems to me that, if defendant will cause the children to develop bad characters, signs of this should, by this time, have become manifest but plaintiff has not brought the evidence of the children's teachers or those people with whom they associate to show that they are developing undesirable traits in their B characters.

The Native Commissioner states that defendant is poisoning the minds of the children against their mother by telling them that she is not a "nice" person, plaintiff, however, states that she has visited the children at defendant's kraal and she does not C complain of the manner in which they received her. In fact, she says that the girl Sylvia complained to her that sometimes they go to school without having received food that morning. Sylvia is unlikely to have confided in her mother in this manner if she had feelings of antipathy towards her.

D Defendant says that he wishes to give his children a good education. Plaintiff has not shown that, if they are placed in her custody, they will receive an education as good as, or better than, that which they will receive if they remain in the custody E of defendant. As the eldest child is about 13 or 14 years of age, this, to my mind, is an important factor to be considered.

For these reasons, I feel convinced that the Native Commissioner was wrong in coming to the conclusion that, on the evidence adduced, it has been shown that it would be in the F interests of the children if they were placed in the custody of plaintiff.

I am of the opinion that the appeal should be allowed with costs and the judgment of the Court *a quo* altered to one of absolution from the instance with costs.

G Fenwick (member:—

If the appeal be dismissed it seems that the children's maternal grandparents will have their custody and not the plaintiff. Plaintiff's status as a divorced woman in the society in which she lives is such that little or no stigma attaches to her in the event of her H bearing illegimate children. In fact to use her own word she has "picked up" three such children since the divorce was granted. It also seems probable that whilst she was mourning the loss of her children she actually conceived to another man. The three children which she has borne since her divorce are now I living with her parents and the circumstances of their birth are presumably notorious in the community in which they live. There is nothing to indicate that the atmosphere in defendant's home at the present time leaves anything to be desired in comparison with other homes. Plaintiff now proposes to transport these children from defendant's home to the home of her parents, who J are presumably aged, where they will be brought up with their illegitimate half-brothers or half-sisters and, no doubt, acquire a little of the colour of their vicarious birth. Furthermore, the close relationship between a Native father and his son will be severed.

K I feel that the all important issue of the children's welfare has been clouded by defendant's past and his uneo-operative attitude in the Court *a quo*. If the plaintiff at some future time is able to demonstrate that the allegedly baneful effect of defendant's character on the children's lives is so marked as to justify L a change of their environment at defendant's home then there is nothing to prevent plaintiff from bringing such evidence to Court. In the present action, however, I feel that she has brought no evidence to justify any interference with the existing circumstances of the children's home life.

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

For Appellant: Mr. I. M. S. Grant, Kokstad.

For Respondent: Mr. F. W. Zietsman, Kokstad.

SOUTHERN NATIVE APPEAL COURT.

NAMBA *v.* NAMBA.

N.A.C. CASE No. 54 OF 1955.

UMTATA: 15th February, 1956. Before Balk, President, Warner and Bates, Members of the Court.

TEMBU LAW AND CUSTOM.

Succession—no male issue in Great House—Second and third customary unions contracted before dissolution of customary union with Great House wife—Eldest son in qadi *to Great House is heir to Great House—Opinions of Native Assessors.*

Summary: The late Batayi Namba married three wives by customary union in the following order: (1) Nohefile, (2) No-Alam, and (3) Notwinika. Nohefile had three daughters but no sons. No-Alam's eldest surviving son is defendant (appellant) and Notwinika's eldest son is plaintiff (respondent). Nohefile's marriage was dissolved by return of dowry during the lifetime of the late Batayi.

In the Native Commissioner's Court, plaintiff, who claimed that he was the eldest son to the *qadi* of the Great House, was declared to be the heir in the Great House. The Native Commissioner confirmed that the union with No-Alam was contracted before the union with Nohefile was dissolved, so that the former became the wife of the Right-hand House.

Defendant appealed against the judgment contending, *inter alia,* that on the dissolution of the customary union with Nohefile (the Great House Wife), her house became defunct for want of male issue, and that the next wife, No-Alam, became the Great House Wife.

Held: That as the customary union with Nohefile (Great House) was still in force when the union with No-Alam was contracted, the latter became the wife of the Right-hand House and consequently plaintiff, as eldest son of the third wife, i.e. of the *qadi* to the Great House, is the heir of the Great House in the absence of male issue in that house.

Cases referred to:

Maqukanya *v.* Kobesi, 1 N.A.C. 128.
Gcanga *v.* Gcanga and Another, 1 N.A.C. (S.D.), 137.
Mapekane *v.* Mnyendeki, 1 N.A.C. (S.D.), 316.
Maneli *v.* Mlonyeni, 6 N.A.C., 41.
Ngwenya *v.* Gungubele, 1 N.A.C. (S.D.), 198.

Appeal from the Court of the Native Commissioner, Mqanduli.

Warner (Permanent Member):—

This is an appeal against a judgment of a Native Commissioner dismissing, with costs, an appeal against the judgment of the duly constituted Court of Chief Bazindlovu Holomisa, declaring plaintiff to be the heir in the Great House of the late Batayi Namba.

It is common cause that the late Batayi Namba married three wives by customary union in the following order: (1) Nohefile, (2) No-Alam, and (3) Notwinika. Nohefile had three daughters but no sons. No-Alam's eldest surviving son is defendant and Notwinika's eldest son is plaintiff. It is also common cause that Nohefile's marriage was dissolved by return of dowry during the lifetime of Batayi.

Plaintiff claims that, as eldest son to the *qadi* of the Great House, he is the heir to the property of the Great House in which there was no male issue.

A Defendant submits that No-Alam was married after Nohefile's union had been dissolved so that No-Alam took the place of Nohefile as wife of the Great House and he (defendant) as eldest son of No-Alam, is heir to the property of the Great House.

The Native Commissioner confirmed the finding of the Chief's B Court that the union with No-Alam was contracted before the union with Nohefile was dissolved so that she (No-Alam) became the wife of the Right-hand House and defendant has appealed on the following grounds:—

C "1. The judgment is bad in law in that on the dissolution of the customary union of Nohefile, the Great Wife of the said Batayi Namba, her house became defunct for want of male issue, and the next woman married by Batayi *ipso facto* became his Great Wife, as indeed No-Alam was.

D 2. The judgment is bad in law in that it does not follow as course that the second woman married becomes the Right-hand Wife and the third the *qadi* to the Great House, the status of the second and third woman depending in Native Law and custom on the question as to E whether there is at the time of the marriage of the second and/or third woman a Great House that is extant.

3. The judgment is against the weight of evidence and probabilities in the case."

F A man named Bolilitye Ngwane gave evidence for plaintiff. He says that he is not related to the parties, is 75 years of age, is an evangelist of the Methodist Church, and, at one time, resided near the kraal of Batayi. He says that he was friendly with Batayi and helped with the affairs of his kraal during his G absence. This witness states positively that No-Alam was married before Nohefile's union with Batayi was dissolved and that both wives lived at Batayi's kraal at the same time.

Dze Kiwa is the senior male relative of the parties, being a brother of Batayi in a senior house. This witness also says that H No-Alam was married before the dissolution of Nohefile's union and the two wives lived together at Batayi's kraal. In fact, this witness says that, when Nohefile left, No-Alam had already borne children.

Defendant has not given any reason why there witnesses should I give false evidence against him and the Native Commissioner says that he was impressed with the manner in which they gave their evidence. Defendant has not adduced any evidence which can be regarded as a serious contradiction of their testimony. His witnesses state that Batayi told them that No-Alam was the J wife of the Great House, but this statement is irrelevant. Batayi had no right to nominate his Great Wife, the status of each wife being fixed according to the order of her marriage.

I consider that the Native Commissioner was justified in coming to the conclusion that plaintiff had established that Nohefile K was Batayi's first wife and her marriage was still in force when he contracted a union with No-Alam, who became the wife of the Right-hand House. This being the case, it is unnecessary to consider what the position would have been if No-Alam had been married after the union with Nohefile had been dissolved.

L As eldest son of the third wife, the *qadi* to the Great House, plaintiff is entitled to succeed to the property of the Great House, in the absence of male issue in that house, and the appeal should be dismissed with costs.

Balk (President):—

M The facts emerge from the Permanent Member's judgment which I have had the benefit of reading and with which I am in agreement.

The plaintiff's witnesses, Bolilitye Ngwane and Dze Kiwa, were contemporaries of the late Batayi Namba (hereinafter referred to as "the deceased") and have first hand knowledge of the

customary unions contracted by the deceased, Bolilitye, as pointed out by the Permanent Member in his judgment, having been a neighbour of the Namba family, and Dze being the senior surviving male relative of both parties to this action.

The Court *a quo* accepted the evidence of these two witnesses and there appears to be nothing in the record indicating that the favourable impression gained by that Court of these witnesses was not justified.

Turning to the evidence for the defendant, it is manifest from the admissions of his witnesses that their testimony in regard to the deceased's customary unions is hearsay, except in the case of Nontume Swelingubo whose evidence, however, cannot be regarded as reliable as is apparent from the following extract therefrom:—

> "I belong to Batayi's Right-hand House. My mother was a sister of Batayi. I do not belong to Namba's family nor Batayi's family. I was at my mother's home there. I am an outsider there because that is my mother's home. I as a female and an outsider was called to take part in the affairs of Namba and Batayi. A niece can be called to take part. Batayi conducted his affairs with woman as well as men. Women are not called when there are discussions."

Again, the evidence for the defendant in regard to the letters (Exhibits "C" and "D") handed in at his instance, makes it difficult to escape the conclusion that his version that he is the heir of the deceased's Great House, is a fabrication. In these letters the plaintiff is said to be the heir of the deceased Right-hand House and according to the defendant's testimony the letter (Exhibit "C") was written in his presence by Zion Mzazi on the instruction given to the latter by the deceased personally and the letter (Exhibit "D") was written by the plaintiff; whereas, according to Zion Mzazi, who testified for the defendant, he wrote both these letters on the instructions of the defendant in the deceased's absence.

Again the admission by the defendant's witness, Bedi Kolisi, in cross-examination that the hut of the deceased's second wife, No-Alam, was located on the left-hand side facing the stock kraal and that the hut of the deceased's third wife, Notwinika, was on the right-hand side facing the stock kraal, leaves little room for doubt but that No-Alarm was the deceased's Right-hand Wife and Notwinika the *Qadi* to the deceased's Great House.

According to the witnesses, Bolilitye and Dze whose evidence was accepted by the Court *a quo* and properly so for the reasons given by it and those appearing above, the customary union between the deceased and his first wife, Nohefile, still subsisted when he contracted the customary union with his second wife, No-Alam, so that the deceased, being a commoner, and in the absence of proof that No-Alam was instituted as a seed bearer to Nohefile, she (No-Alam) must be regarded as the deceased's Right-hand Wife as contended by the plaintiff and not as the deceased's wife in his Great House as contended by the defendant.

It follows that the deceased's third wife, Notwinika, was the *qadi* to the deceased's Great House as claimed by the plaintiff and, as it is common cause that there are no sons in the deceased's Great House and that the plaintiff is the eldest son of the deceased by Notwinika, i.e. the eldest son in the deceased's *qadi* to the Great House, the plaintiff is the heir of the deceased's Great House in accordance with Tembu Law and Custom, see Maqukanya *v.* Kobesi 1 N.A.C. 128 at page 129, Gcanga *v.* Gcanga and Another 1 N.A.C. (S.D.) 137 and Mapekane *v.* Mnyendeki 1 N.A.C. (S.D.) 316 at page 317

The finding of the Court *a quo* to this effect is, therefore, correct and the appeal to this Court falls to be dismissed with costs.

Here it should be mentioned that counsel for appellant conceded, and, properly so in the light of what has been said above, that he was unable to press the appeal on the facts and, therefore, also not on the legal grounds specified in the notice of appeal.

A The Native Assessors were consulted in regard to the issue raised by the defendant viz: as to the status of the second wife of a Tembu commoner, the customary union with whom was contracted after the dissolution of his customary union with his first wife, by the return of her dowry, and there being only B daughters of his first customary union. The assessors' replies in this connection are appended and receive confirmattion from the judgment in Maneli *v.* Mlonyeni 6 N.A.C. 41.

It must be added that this Court does not accept the Tembu Assessors' view that a commoner has the right to determine the C status of his wives; for it has ben laid down by a long series of decisions of this Court that this right is the prerogative solely of Chiefs, see Ngwenya *v.* Gungubele 1 N.A.C. (S.D.) 198; and in the case of others, the status of the wives is determined automatically by the order in which their cusomary unions are con- D tracted viz. the first wife is the Great Wife, the second wife is the Right-hand Wife, the third wife is the *qadi* to the Great House, the fourth wife is the *qadi* to the Right-hand House and so on, unless of course similar circumstances to those in *Maneli's* case (*supra*) obtain or the question of the institution of a seed E bearer or *qadi* arises, see *Gcanga's* case (*supra*).

OPINIONS OF NATIVE ASSESSORS.

Assessors in attendance:

1. Aaron Mgudlwa, Tembu Assessor from St. Marks District.
F 2. Edwin Chalmers Bam, Pondomise Assessor from Tsolo District.
3. George Bokleni Dalasile, Tembu Assessor from Engcobo District.
4. Charles Mananga, Pondomise Assessor from Qumbu District.
G 5. Maize Sangoni, Tembu Assessor from Umtata District.

Question by President: A Tembu commoner contracts a customary union which is his first one. The wife of this union dies leaving only daughters. Thereafter he enters into a second customary union. What is the status of his second wife according H to Tembu Law and Custom?

Reply by M. Sangoni: The second wife is married to revive the Great House. She has no house of her own.

All the other Assessors agree.

By President: Is this status of the second wife determined I automatically or is any formality required in connection therewith?

Reply by A. Mgudlwa: The widower invariably calls his relatives and tells them that he is reviving his Great House by marrying a second wife and that her son will be the heir of his Great House.

J All the other Assessors agree.

By President: What if this is not done?

Reply by M. Sangoni: When the husband marries the second wife he is obliged by Custom to say that he is reviving his Great House.

K *By President:* Can the husband not appoint the second wife as the wife of his Right-hand House?

Reply by E. C. Bam: The husband may not appoint the second wife as the wife of his Right-hand House. He must first revive his Great House by means of the second wife, and then he can L marry a third wife to constitute his Right-hand House.

All the other Assessors agree.

By President: If the customary union with the first wife is dissolved by the return of the dowry instead of by her death, is the position the same?

Reply by M. Sangoni: The position is the same.

M All the other Assessors agree.

Question by Permanent Member: A commoner marries his first wife by whom she has daughters only. This union is dissolved by the return of the dowry. He then marries a second wife and thereafter a third wife, both of whom have sons. Who is the heir of his Great House?

Reply by E. C. Bam: The son of the second wife is the heir of the Great House. This is automatic. The status of the wives is known when they are married. The second wife automatically revives the Great House. The relatives are consulted consonant with custom and told of the position so that they should know it.

All the other Assessors agree.

By Permanent Member: A commoner marries two wives. After the second wife has been married the union with the first wife is dissolved. The second wife has a son. Thereafter the husband marries a third wife who also has a son. Who is the heir of the husband's Great House?

Reply by E. C. Bam: The son of the third wife is the heir of the Great House as he is the son of the *qadi*.

Reply by A. Mgudlwa: If the third wife is given the status of *qadi* by her husband when he marries her, her son will be the heir.

G. B. Dalasile and M. Sangoni agree with A. Mgudlwa.

C. Mananga agrees with E. C. Bam.

Question by Attorney Vabaza: If the status of a wife of a commoner is not declared by her husband on her marriage, has she no status?

Reply by G B. Dalasile: If a man dies without declaring the status of his wives, their status is declared by his relatives after his death.

Bates (Member): I concur in the aforegoing judgments.
For Appellant: Mr. F G. Airey: Umtata.
For Respondent: Mr. J. G. S. Vabaza: Libode.

SOUTHERN NATIVE APPEAL COURT.

MATSHAMBA *v.* MBUNDU.

N.A.C. CASE No. 68 OF 1955.

UMTATA: 15th February, 1956. Before Balk, President. Warner and Bates, Members of the Court.

LAW OF PROCEDURE.

Practice and Procedure—Action for damages for seduction and pregnancy—Chief's Court empowered to try cases arising out of Native Custom only—Common Law principles cannot be applied.

Summary: In an action in the Chief's Court plaintiff was awarded five head of cattle or their value as damages for the seduction and pregnancy of his daughter by defendant. Defendant appealed to the Native Commissioner's Court against the Chief's judgment, but the appeal was dismissed with costs.

In his reasons for judgment the Native Commissioner stated that the principles of Common Law were applied in the case.

Held: That a Chief is empowered to try cases arising out of Native Custom only, so that the case had to be decided according to that system of law. Under Common Law, plaintiff could not bring an action in his own right for damages in respect of the seduction of his daughter.

Cases referred to:

Mkize *v.* Mnguni, 1952 (4) N.A.C. 242 (N.E.)
Yeni *v.* Jaca, 1953 (1) N.A.C. 31 (N.E.)
Cebekulu *v.* Shandu, 1952 (3) N.A.C. 196 (N.E.)
Mokhesi, N.O. *v.* Demas, 1951 (2) S.A. 502 (T).

A Appeal from the Court of the Native Commissioner, Mqanduli.

Warner (Permanent Member): (Dissentiente):—

This is an appeal against a judgment of the Native Commissioner dismissing, with costs, an appeal against a judgment of B the Court of Chief Sabata Mtirara awarding plaintiff five head of cattle or their value £50 as damages for the seduction and pregnancy of his daughter Olga by defendant. The appeal is brought on the ground that the judgment is against the weight C of evidence, the probabilities of the case and the proved facts.

Defendant is principal of the Bacela School in the District of Mqanduli. Olga was a pupil at that school until the end of the school-year of 1954. It is not disputed that Olga gave birth on 23rd August, 1955, so that conception would normally D have taken place about November, 1954.

Olga says that defendant began to propose love to her in 1953 and she accepted him in September, 1954. She says that, by arrangement with defendant, when school closed, she hid herself E among some trees near the school, and, when the others had left, defendant opened the window of the class-room and called her, that she went to him and he helped her to climb through the window into the class-room where they had sexual intercourse. She mentions another occasion in November, 1954, F when, she says, she was called by a girl named Nonzwakazi and she went out and met defendant and they went beyond the garden at her kraal and had intercourse. Nonzwakazi says that, while she was playing near the cattle-kraal one evening, defendant came and told her to call Olga which she did.

G Defendant denies that he has ever been intimate with Olga. He suggests that she was made pregnant by a man named Coldean Madolo who is related to her, and, to avoid the disgrace of admitting that Coldean has made her pregnant, she has falsely accused defendant.

H Olga admits that she used to *metsha* with Coldean. She says, however, that he went to work and returned home at the end of November, 1954, that he subsequently told her that he had heard rumours that she was in love with defendant and I took her to a doctor who found that she was pregnant. She denies that she was intimate with Coldean after he returned from work.

A boy named Edwin Joko gave evidence on behalf of defendant. He says that Coldean told him that he had made Olga J pregnant and asked him to persuade Olga to go with him to Port Elizabeth where they could be married, that he spoke to Olga and she admitted that Coldean had made her pregnant and agreed to go with him to Port Elizabeth. It is not explained, however, why they did not carry out this plan. I consider that K the Native Commissioner was correct in rejecting this evidence.

From the reasons for judgment furnished by the Chief, it is apparent that he gave the case careful consideration even going to the extent of holding an inspection in *loco* and testing Olga's statement that she was able to hide herself among the trees near L the school.

The Native Commissioner says that the two girls, Olga and Nonzwakazi, were subjected to severe cross-examination but they both made a favourable impression on him and he was satisfied that they were telling the truth. I consider that this Court would M not be justified in holding that the Native Commissioner was wrong and that the evidence of these two girls was a fabrication.

At the beginning of her cross-examination, Olga stated: "He (Coldean Madolo) had no intercourse with me since he returned from the mines. He only *metshaed* with me during December,

1954". Afterwards she said: "I did not *metsha* or have intercourse with him in December. I never *metshaed* with him from the time he returned until he took me to the doctor." I do not consider that this apparent contradiction would justify a conclusion that she gave false evidence. The Native Commissioner says that questions were hurled at her in quick succession so that she became confused. From her evidence, it seems that Coldean Madolo was her sweetheart before he went to the mintes but, when he returned, he heard that she was in love with defendant and to avoid the possibility of being saddled with the responsibility for a pregnancy caused by someone else, he took her to a doctor to be examined before resuming the relationship of sweetheart with her. I am of opinion that it cannot be said that the Native Commissioner and Chief were wrong in holding that this was a reasonable story and did not support the defence evidence that Coldean was responsible for Olga's pregnancy.

The Chief and Native Commissioner had the witnesses before them and they both came to the same conclusion, namely, that plaintiff's witnesses were telling the truth and defendant and his witnesses were not worthy of belief. It has not been shown that this conclusion was wrong.

The Native Commissioner says that the principles of Common Law were applied in the case. This is obviously incorrect. The chief is empowered to try cases arising out of Native Custom only, so that the case had to be decided according to that system of law. (See cases of Mkize *v.* Mnguni, 1952 (4), N.A.C. 242 (N.E.), Yeni *v.* Jaca, 1953 (1) N.A.C. 31 (N.E.) and Cebekulu *v.* Shandu, 1952 (3) N.A.C. 196 (N.E.)], and under Common Law, plaintiff could not bring an action in his own right for damages in respect of the seduction of his daughter. (See case of Mokhesi, N.O. *v.* Demas, 1951 (2) S.A. 502 (T)]. The action is based on Native Law but this does not affect the judgment.

I consider that the appeal should be dismissed with costs.

Balk (President): The issue involved emerges from the Permanent Member's judgment with which I regret I am unable to agree except in so far as his views in regard to the legal aspects, which are set out in the penultimate paragraph of his judgment, are concerned, in which I concur.

It seems to me that the Court *a quo* misdirected itself in accepting Olga's evidence and that of the child, Nonzwakazi, who lives at the same kraal as Olga, i.e. at the latter's parents' kraal, and in finding therein that the defendant had seduced Olga and was responsible for her pregnancy. That this is so will be apparent from what follows.

In the first place, as pointed out by Counsel for appellant (defendant), Olga contradicted herself as regards when she *metshaed* with Coldean Madolo; for in her evidence-in-chief she stated that she used to *metsha* with Coldean before he went to work. In cross-examination she first said that he had *metshaed* with her during December, 1954. Thereafter she denied that she had *metshaed* with him during that month and added that she had never *metshaed* with him since he returned form work which she said was at the end of November, 1954, a date called into question by the defence evidence in which it was alleged that Coldean had already returned from work at the beginning of November, 1954. Then she admitted the Coldean had slept at their kraal once during December, 1954. It is true that in re-examination she stated that they had then slept in separate huts but she did not explain why Coldean should have slept there that night.

The inconsistency dealt with above becomes important if it be borne in mind that Olga stated that she missed her periods for the first time in November, 1954, and that her child was born on the 23rd August, 1955.

Again, as also pointed out by counsel for appellant (defendant), Olga was also inconsistent in her cross-examination as regards the number of times she was taken to the doctor. Not only is this so, but she admitted that it was Coldean who had taken her to the doctor for the first time and that he had done so unbeknown to her parents and without their consent in February, 1955. The reason she gave for his having done so, is that he had heard that she was in love with the defendant. But she admitted that when Coldean took her to the doctor, she had not told him that she was pregnant and that at that time no person other than the defendant and, of course, she herself, was aware of her condition. From this evidence, it is, to my mind, difficult to escape the conclusion that Coldean, who on her own admission *metshaed* with her, had intercourse with her about the period when she conceived; for the reason which she gave for his having taken her to the doctor, is obviously untenable, particularly in the light of her testimony that he was then unaware of her condition and that she was then only in her fourth month of pregnancy when her condition would hardly have been noticeable.

Turning to Nonzwakazi's evidence, she contradicted herself in cross-examination as to the number of occasions that the defendant had sent her to call Olga; and of the occasion on which it was alleged by Olga in her evidence that Nonzwakazi had called her at the instance of the defendant so that he could arrange to have sexual intercourse with her (Olga) immediately, Nonzwakazi stated in cross-examination that it was still light when the defendant came to their kraal, that Olga's parents were at home at the time and that the defendant had openly shouted to her from the gate which was about 40 paces from the spot at which she was playing. Bearing in mind that the defendant is the principal teacher of the school in the locality concerned and that, as emerges from the evidence, he lays himself open to disciplinary action at the hands of the authorities for misconduct of the nature in question, it seems to me to be unlikely in the extreme that he would so openly have made an appointment with Olga on the evening in question for the purpose of having sexual intercourse with her immediately thereafter.

This allegation was denied by the defendant on oath and there appears to be no evidence to indicate that this denial was false other than that of Olga and Nonzwakazi, both of whom must be regarded as unreliable witnesses for the reasons given above.

Admittedly there are also unsatisfactory features in the evidence for defendant but, to my mind, these do not serve to bear out Olga's allegation that he seduced and rendered her pregnant; nor does any of the other evidence appear to do so.

It follows that the Native Commissioner erred in finding that the plaintiff had discharged the onus resting on him on the pleadings to prove that the defendant was responsible for Olga's seduction and pregnancy.

In my opinion, therefore, the appeal to this Court should be allowed, with costs, and the judgment of the Court *a quo* altered to read "The appeal from the Chief's Court is allowed, with costs, and its judgment is altered to one of absolution from the instance, with costs".

Bates (Member): I concur in the President's judgment.

For Appellant: Mr. R. Knopf, Umtata.

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

CENTRAL NATIVE APPEAL COURT.

LOUIS SACHS, N.O., and MARIA MALOPE *v.* JOHN MDHLULI.

N.A.C. CASE No. 5 OF 1956.

JOHANNESBURG: 23rd February, 1956. Before Wronsky, President, Menge and Smithers, Members.

PRACTICE AND PROCEDURE.

Claim by deceased estate represented by a non-Native—Jurisdiction—Meaning of "Native"—Sections ten (1) *and section* thirty-five, *Act No.* 38 *of* 1927*—Jurisdiction as to costs.*

Summary: In an ejectment suit brought by the non-Native representative of a deceased Native's estate as first plaintiff and the deceased's widow as second plaintiff the Native Commissioner had decreed absolution from the instance on the merits. On appeal, the Court having *meru motu* raised the question of jurisdiction.

Held: As the definition of "Native" in section *thirty-five* of the Act is based on race, only persons who are Natives in fact can sue in a Court of Native Commissioner, and not a purely legal *persona* which is not at the same time a person in fact.

Held further: A Court of Native Commissioner has jurisdiction to award costs against a party against whom the jurisdiction of the Court has been successfully challenged.

Held further: The respondent, having succeeded on the merits in the Court below should not be deprived of his costs merely because he did not except to the jurisdiction.

Cases referred to:

Gumede *v.* Bandhla Vukani Bakithi, Ltd., 1950 (4) S.A. 560.
Haarhof's Executor *v.* De Wet's Executor, 1939, C.P.D. 271.
Lotter *v.* Salaman, 19 Sc. 158.
Texas Co. (S.A.), Ltd., *v.* Cape Town Municipality, 1926 A.D. 467.

Statutes referred to:

Act No. 38 of 1927, sections *ten* (1), as amended, and *thirty-five*.

Appeal from the Court of the Native Commissioner, Johannesburg.

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

This is an appeal in an ejectment suit in which the Native Commissioner, after hearing evidence for both sides, granted absolution from the instance with costs. (The Native Commissioner's judgment also records that on the alternative claim the summons is dismissed. This is wrong. There was no alternative claim; merely an alternative cause of action in support of one and the same claim.)

The notice of appeal cites a number of grounds of appeal but it is not necessary to deal with them, for in our view the appeal must fail for a reason which does not appear to have occurred to either of the parties nor to the Native Commissioner—namely that the Court had no jurisdiction to try the matter. We raised this point *meru motu* and thereupon Mr. Franks, on behalf of the appellant, argued that the first plaintiff appeared only in his representative capacity and not as Louis Sachs and that consequently his racial characteristics are not relevant.

We do not agree with this contention. In terms of section *ten* (1) of Act No. 38 of 1927, as amended, the Native Commissioner's Court has jurisdiction only in matters between Native and Native.

In section *thirty-five* of the Act the word "Native" is defined as including "any person who is a member of any aboriginal race or tribe of Africa; provided that any person residing under the same conditions as a Native" (in certain Native areas) "shall be regarded as a Native for the purposes of this Act".

Now, Louis Sachs is admittedly not a Native as so defined. The allegation is, however, that he sues *nomine officio* in his capacity as the duly authorised representative in the estate of one Mrupe or Malope, who is stated to have been a Native. But that does not make the action one between Native and Native.

In Gumede *v.* Bandhla Vukani Bakithi Limited, 1950 (4) S.A. 560, it was decided that in regard to the definition of "Native" the test to be applied is one of race. The first plaintiff falls outside that definition; and the fact that he sues as the legal representative of a person who during his lifetime was a Native does not remedy this, for a deceased estate is not a legal *persona* which can sue or be sued (see Haarhof's Executor *v.* de Wet's Executor, 1939 C.P.D. 271 and Hughes Estate *v.* Fouche cited therein.) In order to be able to sue in a Court of Native Commissioner the plaintiff must be a Native in fact. A purely legal *persona* is not a *persona* in fact and cannot therefore be a Native. In *Salmond on Jurisprudence* (Eighth Edition, page 330), it is stated thus: "Natural persons are persons in fact as well as in law; legal persons are persons in law but not in fact".

It follows, therefore, that the first plaintiff has no *locus standi* to sue in the Court of the Native Commissioner and the Native Commissioner had no jurisdiction to try the case. The Native Commissioner did, however, try the case and thereupon granted absolution from the instance with costs holding that the plaintiff had failed to prove his case. Whether or not the Native Commissioner is correct in that contention is of no importance now. Since he had no jurisdiction to try the case no final judgment was possible; but only a decree of absolution from the instance.

The Native Commissioner awarded the defendant costs. In the case of Trimmer v. Saacks, 1912, C.P.D. 317, there is a suggestion made *obiter* that a court is unable to make even an order as to costs in a matter in which it has no jurisdiction. On the other hand, there are numerous cases where costs were awarded in such cases, e.g. Lotter *v.* Salaman 19 Sc. 158 and other cases which are cited in Anders and Ellson's *The Law of Costs in South Africa* at page 12 in support of the proposition (as they put it) that "it is an outcome of the principle which allots costs to the successful party that the litigant who successfully raises the question of jurisdiction should get costs". The position seems to be that jurisdiction as to costs is not dependent on jurisdiction in the main cause, but flows from the mere fact that the procedure of the Court has been set in motion. In Texas Co., (S.A.) Ltd., *v.* Cape Town Municipality, 1926 A.D. 467, Innes C. J., said (at page 488): "Now costs are awarded to a successful party in order to indemnify him for the expense to which he has been put through having been unjustly compelled either to iniate or to defend litigation as the case may be". Applying this definition to the case now before us, there seems to be no reason why the defendant should not have been awarded his costs. The rule is that costs should go to the successful party; and a defendant who is absolved from the instance is the successful party just as much if the plaintiff cannot show that the Court has jurisdiction as if he fails to prove his case. Indeed, Mr. Franks did not question the right of the Court *a quo* to award costs, but he contended that costs should not have been awarded as the point of jurisdiction was not taken in the Court below. We do not agree. The defendant chose to set up a defence on the merits and won his case. He was not obliged to set up any other defence.

The appeal is dismissed with costs.

For Appellant: Adv. C. Franks, instructed by Messrs. Maltz & Mendelow.

For Respondent: Mr. R. I. Michel of Messrs. Helman & Michel.

CENTRAL NATIVE APPEAL COURT.

SEDIKWE *v.* TLAPU.

N.A.C. CASE No. 9 OF 1956.

JOHANNESBURG: 24th February, 1956. Before Wronsky, President, Menge and Smithers, Members of the Court.

PRACTICE AND PROCEDURE.

Consent for leave to appeal to the Appellate Division of the Supreme Court in the matter dealt with under Common Law.

Summary: On the 21st August, 1955, the Central Native Appeal Court in a unanimous decision reversed the judgment of the Native Commissioner, Rustenburg, in a matter dealt with under Common Law and purely on questions of fact. On an application for consent to appeal further, the merits of the case having been argued:—

Held: Refusing consent for leave to appeal (the Permanent Member dissenting): That on the facts of the case a reasonable prospect of success was not disclosed and that, therefore, the application should be refused.

Cases referred to:

Rangata *v.* Mabuza, 1954 (2), N.A.C., 82.
Chaikin *v.* Rex, 1940, N.P.D., 133.
Rex *v.* Baloi, 1949 (1), S.A., 523.

Statutes referred to:

Section *eighteen* (1) of Act No. 38 of 1927.

Application for consent to apply for leave to appeal.

Wronsky (President):—

In this action defendant was sued in the Native Commissioner's Court, Rustenburg, for the return of certain articles enumerated on Annexure "A" to the summons or their wholesale value of £1,129. 16s. 10d. and costs of suit. Defendant counterclaimed for an amount of £104.

The Native Commissioner entered judgment—

(1) for plaintiff in convention as prayed with costs;
(2) for plaintiff in reconvention for £24.

Against this whole judgment Defendant noted an appeal on the grounds that the judgment was bad in law and against the evidence and the weight of evidence. No details were furnished to indicate in what manner the Native Commissioner erred as alleged.

At the hearing of the appeal on the 21st October, 1955, and after careful consideration of the record the Native Appeal Court in a unanimous written judgment set aside the Native Commissioner's judgment and the following judgment was substituted:—

1. Claim in Convention: Judgment for plaintiff for the return of the articles listed by defendant in the annexure to the further and better particulars to his plea or payment of their value, namely £50. 12s. 4d. with costs.
2. Claim in Reconvention: Dismissed with costs.

On the 6th February, 1956, respondent brought the present application seeking this Court's consent to appeal to the Appellate Division of the Supreme Court of South Africa, in terms of section *eighteen* (1) of the Native Administration Act, No. 38 of 1927. The petition sets out the grounds on which consent is sought and indicates that it is desired to appeal only against the first portion of the judgment of the Native Appeal Court and not against the judgment with regard to the claim in reconvention.

A Coming now to the actual merits of the application we find the following grounds mentioned in the application as "points to be stated":—

(*a*) That the Native Appeal Court erred in not finding that the petitioner (respondent in appeal) has proved his damages
B adequately on a balance of probabilities in the Native Commissioner's Court or alternatively.

(*b*) If the Native Appeal Court was correct in its finding, the order made by the Native Appeal Court was wrong and that the order should have been one of absolution from
C the instance and the case referred back to the Native Commissioner's Court.

(*c*) That the judgment of the Native Appeal Court was against the evidence and the weight of the evidence.

D A prayer is also contained in the petition for the condonation of the noting of the late application. The Court granted this application.

In regard to point (*a*) above, it is a fact that the Native Appeal Court unanimously found that the petitioner had not proved his
E damages adequately. None of the witnesses called could state with any degree of accuracy what stock or the value thereof was left in the premises at the date of the closure and the Court expressed its view that it would be most dangerous to accept the indirect evidence tendered as proof of the amount of stock
F and its value claimed. To quote but one example to bear out this contention Mokalaki Monedi in evidence in chief indicates that there were only 1½ bags of sugar beans in the store. In the schedule attached to the summons on which plaintiff bases his claim, 3 bags of sugar beans are claimed at a value of £16. 10s.
G It was argued by advocate Meyerson that as the Native Commissioner rejected the evidence of the defendant and his witnesses, the evidence tendered by plaintiff and his witnesses should be accepted. It is submitted that it was still necessary for plaintiff to prove his claim.

H No effort was made to produce any evidence in regard to stock lists, no invoices or books were produced. The plaintiff largely relied on cursory estimates made by witnesses such as a traveller, and a policeman to substantiate his claim. It is significant that the schedule attached to the summons in the majority of instances
I quotes full bags, cartons or cases of commodities. This being the case it is difficult to appreciate how anybody, even an expert, could testity as to quantity and value without a careful examination of the goods. In the circumstances the Court unhesitatingly disallowed the amount claimed over and above the sum of
J £50. 12s. 4d. which was admitted by the plaintiff.

In regard to (*b*) the defendant admitted that there was stock to the value of £50. 12s. 4d. in the store and the Court had to take cognizance of this and accordingly granted judgment for this amount in favour of plaintiff. It would seem in the circumstances that an absolution judgment would not have been competent.
K Advocate Meyerson conceded this point and indicated that he would not pursue it.

In regard to (*c*) as indicated under (*a*) the Court was not satisfied that the plaintiff produced sufficient evidence to substantiate his
L full claim.

In summing up the evidence tendered was considered vague, amounting at most only to an estimation of the quantity of goods and their value at dates prior to the closure of the premises.

There are no points which the Native Appeal Court found
M difficult in deciding by reason of obscurity of law or conflict of fact.

It is true that the amount involved is substantial and that the matter in dispite is one of real importance to the respondent but the Court is satisfied that there is not a reasonable prospect of success on an appeal to a higher tribunal.

We are unable to give our consent for leave to appeal to the Appellate Division and the application is accordingly refused with costs.

Smithers (Member):—

I concur in the judgment of the learned President.

The only principle to be considered in this application is if there is a reasonable prospect of the higher Court taking a different view of the issue, which issue is limited to the question of the sufficiency or otherwise of the evidence adduced in the Native Commissioner's Court regarding the value and identity of the stock left in the shop or store at the given date.

It was urged in support of the application that the evidence in this respect stood uncontradicted, and that whatever the defects, should be accepted until rebutted; paragraph 9 of the petition avers that the balance of probabilities is in favour of the plaintiff, or alternatively, in paragraph 10, that the judgment should be one of absolution from the instance.

The question is therefore one of fact, and the same issue was clearly considered on this basis by the Court in its appeal judgment of the 21st October, 1955. The arguments on the present application amount largely to a repetition of those appropriate in the previous appeal but it is nevertheless necessary for this Court to consider if at least a reasonable prospect exists of another Court coming to a different conclusion. Being a vindicatory action, in which the delivery of identical articles or their value, £1,129. 16s. 10d. was claimed, the best evidence which should have been produced at the trial would have been an inventory, stock-sheets, or the relative invoices; such evidence was apparently not available, and plaintiff sought to substitute it by estimates of quantities or values given by witnesses based on a different approach in each instance. This evidence was unanimously rejected by the Court of Appeal, and it is unnecessary to re-iterate the reasons for arriving at the same decision on the present application. As distinct from a substantial conflict of fact, the issue is the lack of proof of essential facts to establish the claim except in so far as it is admitted and I agree that there is no reasonable prospect of another Court coming to a decision more favourable to the plaintiff.

Menge (Permanent Member (dissentiente):—

In my opinion consent should be granted. My views on this subject are set out in the case of Rangata *v.* Mabuza, 1954 (2), N.A.C., 82. That judgment is, as far as I am aware, the only endeavour ever made to deal with the subject on a scientific basis. The matter before us is also on all fours with that of Makaqa *v.* Tshabangu, heard in this Court on the 15th December, 1955. The tests applied in that case correspond roughly to those formulated by me in Rangata's case and to those which counsel on behalf of the applicant has urged us to adopt. The test in Makaqa's case was whether the amount involved is sufficiently substantial and whether the matter is arguable. There the amount involved was £215. In the present case it is over £1,000. As to whether the matter is arguable this expression was held in Chaikin *v.* Rex, 1940, N.P.D., 133, to mean whether there is a reasonable possibility of the Court above taking a different view; and in Rex *v.* Baloi, 1949 (1), S.A., 523, A.D. Centlivres, J. A. (as he then was) said: "there are very few cases which are not arguable in the wide meaning of that word". Having regard to these dicta and the fact that this case was argued at length by counsel on appeal and again by counsel on the present application, it would be absurd to hold, as Mr. Helman on respondent's behalf urged us to do, that the case is not arguable.

For Applicant: Adv. E. A. Meyerson, instructed by Mr. B. H. Berman.

For Respondent: Mr. H. Helman of Messrs. Helman & Michel.

SOUTHERN NATIVE APPEAL COURT.

SGATYA & ANO. *v.* MBANE.

N.A.C. CASE No. 47 OF 1955.

KING WILLIAM'S TOWN: 16th March, 1956. Before Balk, President, Pike and Crossman, Members of the Court.

NATIVE LAW AND CUSTOM.

Damages for seduction and pregnancy—proof of damages not required in seduction cases—no corroboration of woman's testimony required where defendant does not give evidence—kraalhead not liable when seducer not an inmate of his kraal at time of seduction.

Summary: Plaintiff sued first defendant and his son, second defendant, for damages for the seduction and pregnancy of his daughter. The Native Commissioner gave judgment for plaintiff, and defendants appealed against the judgment on the grounds, *inter alia,* that (1) the summons disclosed no cause of action against the defendants, (2) there was no evidence to prove that plaintiff had suffered any damages, and (3) the Native Commissioner erred in finding that the evidence of plaintiff's daughter was corroborated by the refusal of second defendant to give evidence.

Held: That as second defendant was not an inmate of first defendant's kraal at the time of the seduction, the latter cannot be held liable for the damages claimed.

Held further: That, under Native Law, proof of damages is not required in seduction cases as, under that system of law, damages flow automatically in accordance with a recognised scale, on proof of the seduction.

Held further: That as second defendant did not give evidence, plaintiff's daughter's testimony does not require corroboration.

Cases referred to:

Thomson *v.* Thomson, 1949 (1), S.A. 445 (A.D.).
Komani *v.* Tyesi, 1 N.A.C. (S.D.), 77.
Dolo *v.* Mbewa, 1 N.A.C. (S.D.), 168.
Mbongwana *v.* Ngolozela and Gila, 3 N.A.C., 256.
Ntebongwana *v.* Mlauli, 1942 N.A.C. (C. & O.F.S.), 52.
Nkosiyane *v.* Jange, 1945 N.A.C. (C. & O.), 75.
Kekane *v.* Mokgoko N.O., 1953 N.A.C., 93 (N.E.).
Rosenblatt *v.* Dempers and De Greeff, 1923 C.P.D., 552.
Motseoa *v.* Qungane, 1 N.A.C. (S.D.), 16.
Makoro & Another *v.* Seemane, 1 N.A.C. (S.D.), 60.
Mhlokonyelwa *v.* Ngoma, 1 N.A.C. (S.D.), 197.

Statutes, etc., referred to:

Government Notice No. 2886 of 1951 (sections 45 (8) and 44 (1)].

Appeal from the Court of the Native Commissioner, Sterkspruit.

Balk (President):—

This is an appeal from the judgment of a Native Commissioner's Court, given for the plaintiff (now respondent) as prayed, with costs, in an action in which he sued the two defendants (present appellants) for six head of cattle or their value, £30, as damages for the seduction and pregnancy of his daughter, Adelaide.

In his particulars of claim the plaintiff averred that:—

"1. Plaintiff is a Native residing at Lower Telle Location, in the District of Herschel.

2. Defendant No. 1 is a Native male, residing at Voyizana School, in Kromspruit Location, Herschel District.

3. Defendant No. 2 is a Native male, residing at Gcina School, in Rooiwal Location, Herschel District.
4. All parties are Natives and adhered to Native Custom.
5. During or about the month of May, 1954, defendant No. 2, the son of defendant No. 1, rendered plaintiff's daughter Adelaide Mbane pregnant and as a result the said Adelaide Mbane gave birth to a baby boy.
6. In the premises, plaintiff suffered and claimed six head of cattle or their value, £30, from the defendants for the said pregnancy, but defendants neglected or refused to satisfy plaintiff's claim.

Wherefore plaintiff prays this Honourable Court for the judgment against both defendants, one praying the other to be absolved for payment of six head of cattle or their value, £30, alternative relief and cost of suit."

The defendants pleaded:—

"Defendants admit paragraph 1, 2, 3 and 4 of the summons.

Both defendants No. 1 and No. 2 deny paragraph 5 stating that defendant No. 2 was not at home in May, 1954, as alleged in the summons to have seduced plaintiff's daughter in May, 1954, as defendant No. 2 was at school in St. Mathews College during that period. Defendant No. 2 states that he left home for St. Mathews College in Keiskama Hoek at the end of January, 1954, until the 24th June, 1954, and defendant No. 1 confirms this.

Further defendant No. 1 states that he and plaintiff's representatives came to an agreement that if defendant No. 2 had seduced plaintiff's daughter, a child should be born in September, 1954, as it was alleged that May, 1954, was the fifth month after the said pregnancy had taken place.

Defendant No. 1 states that he got the information that a child was born in November, 1954, from the doctor who treated plaintiff's daughter.

Wherefore defendants Nos. 1 and 2 pray that plaintiff's summons be dismissed with costs."

The plaintiff's replication reads as follows:—

"Plaintiff states that during May, 1954, his daughter Adelaide Mbane got sick and he took her to the doctor who told him the said girl was 4 months pregnant.

Plaintiff states that as he was going back to his employment in Johannesburg, he sent his brother William Mbane to report the pregnancy of his daughter to defendant No. 1 who is the father and guardian of defendant No. 2, as his daughter told him that she was rendered pregnant by defendant No. 2.

In paragraph 3 of defendant's plea, plaintiff states that the month of May, 1954, is the time when he as the father of the said Adelaide got the report that his daughter was pregnant, not that she was seduced in May.

Wherefore plaintiff prays this Honourable Court for the judgment against both defendants, one praying the other to be absolved for payment of six head of cattle or their value, £30. Alternative relief and costs of suit."

The appeal is brought on the following grounds:—

"1. The judgment is against the weight of evidence and against the balance of probabilities.
2. The summons discloses no cause of action against defendant No. 1.
3. No evidence was given to indicate that defendant No. 1 was responsible for the alleged seduction of plaintiff's daughter.
4. There was no evidence to prove that plaintiff suffered any damages, nor the quantum of such damages.
5. The summons discloses no cause of action against defendant No. 2 as it was not alleged that the plaintiff's daughter was a virgin at the time of the alleged seduction.

A 6. The Honourable Native Commissioner erred in finding that the plaintiff's daughter was a virgin at the time of the alleged seduction, as there was no evidence to substantiate such a conclusion.

7. (*a*) The Honourable Native Commissioner erred in finding
B that defendant No. 2 seduced Adelaide Mbane and was the father of Adelaide Mbane's child, because evidence of Adelaide Mbane was uncorroborated.

(*b*) The Honourable Native Commissioner erred in finding that the evidence of Adelaide Mbane was corroborated
C by the refusal of defendant No. 2 to give evidence.

8. There was no evidence that defendant No. 2 had sexual intercourse with Adelaide Mbane during May, 1954, as alleged in paragraph 5 of the summons."

The plaintiff's version, according to his evidence, is that during
D May, 1954, on noticing that his daughter Adelaide, was having morning sickness, he sent her to a doctor and on her return she made a report to him. As he was leaving for work at Johannesburg, he arranged with his eldest brother, William Mbane, for a report to be made to the first defendant that
E the latter's son, the second defendant, had rendered Adelaide pregnant. On his return from work to his home in the Herschel District on the 31st May, 1955, he found Adelaide suckling a baby boy.

F William Mbane in his testimony for the plaintiff, confirms that the latter instructed him to deal with the matter of Adelaide's pregnancy and that during May, 1954, he sent one Langa Mbane to report Adelaide's pregnancy to the first defendant, from whom he received a letter dated the 31st August, 1954 (Exhibit "A"),
G stating that he (first defendant) would discuss the matter on his return home in September when the school closed. On the 1st November, 1954, Adelaide gave birth to a boy and he advised the first defendant accordingly. The latter then denied liability for damages for the pregnancy on the ground that the second defendant could not have been responsible therefor as the date
H of the birth of Adelaide's child and the time of her conception as reported to him (first defendant) by the plaintiff's people, did not correspond, regard being had to the normal period of gestation. Thereupon he (William) advised the plaintiff of the first defendant's attitude in the matter and the plaintiff then returned
I home and brought the instant action.

In his evidence for the plaintiff, Langa Mbane confirms that, at the instance of William Mbane, he reported to the first defendant in May, 1954, that Adelaide had been rendered pregnant by the second defendant during the previous December holidays.

J Adelaide, the remaining witness for the plaintiff, testified that the second defendant first had sexual intercourse with her on the 25th December, 1953, and then again twice during January, 1954. She remembered the date of the first occasion as it was Christmas Day. She could not recollect the dates in January of the two
K subsequent occasions. She last menstruated in January, 1954, prior to having intercourse with the second defendant during that month. The second defendant is the father of her child born on the 1st November, 1954.

The first defendant's evidence is to the effect that Langa Mbane
L reported to him in May, 1954, that his (first defendant's) son, the second defendant, had renderd the plaintiff's daughter, Adelaide, pregnant during December 1953. He (first defendant) considered that as the second defendant had left for school on the 20th January, 1954, and as Adelaide's child was born after October,
M 1954, the second defendant could not be the father of this child and he, therefore, denied liability for damages for her pregnancy.

The only other witness for the defendants, viz. Sachariah Tlwatini, did not take the case further.

The second defendant in reply to the Court *a quo* stated that he did not wish to give evidence.

The Assistant Native Commissioner states in his reasons for judgment that Adelaide appeared to him to be a witness worthy of credence and this view gains support from the notes of her evidence which strikes me as being particularly clear and straightforward and bearing the impress of truth and sincerity. It is true that the report to the first defendant, at the instance of the plaintiff, was that Adelaide had been rendered pregnant in December, 1953; and, as it is manifest from her testimony, that that was the first occasion on which the second defendant had sexual intercourse with her and that she last menstruated in January, 1954, before he had connection with her that month, it is strange that the plaintiff should have relied on the first occasion instead of on the subsequent occasions. However, this aspect was not put to him or his witnesses in cross-examination and, as this was not done and he or they may have given a good explanation for their reliance on the first occasion in the report to the first defendant, I do not think that it detracts materially from the probabilities in the plaintiff's favour, particularly in view of the fact that the second defendant declined to give evidence, in connection with which see Thomson *v.* Thomson 1949 (1) S.A. 445 (A.D.). It is also true that in paragraph 5 of his particulars of claim, the plaintiff averred that the second defendant had made Adelaide pregnant during or about May, 1954; but he corrected this averment in his replication and, apart from the fact that he and his witnesses were not questioned about this aspect in cross-examination, the first defendant admits in his evidence that in the report to him at the instance of the plaintiff, Adelaide was alleged to have been rendered pregnant during December, 1953, so that the point is of no importance and there is no substance in the eighth ground of appeal which accordingly fails.

As the second defendant did not give evidence, Adelaide's testimony does not require corroboration see Komani *v.* Tyesi, 1 N.A.C. (S.D.), 77, at page 78 and Dolo *v.* Mbewa, 1 N.A.C. (S.D.), 168, at page 169. That being so and as, for the reasons given above, the probabilities favour the plaintiff's case in so far as the second defendant is concerned the first and seventh grounds of appeal also fail.

Coming to the fourth ground of appeal, it is, as was conceded by counsel for appellant, trite Native Law that proof of damages is not required in seduction cases in that under that system of law, such damages flow automatically in accordance with a recognised scale on proof of the seduction, and are dictated by the lower dowry value of the girl in a subsequent customary union. In other words, Native Law recognises that the father or guardian of a seduced girl obtains less dowry for her on her entering into a customary union than he would have received had she not been seduced; and damages for the seduction and pregnancy are fixed by Custom to cover this loss and may be imposed by the trial Court as a matter of course in accordance with the recognized scale of the tribe concerned once the seduction and pregnancy are proved, see Mbongwana *v.* Ngolozela and Gila 3 N.A.C. 256 at page 257.

Turning to the question of proof of the *quantum* of damages, which is also covered by the fourth ground of appeal, the plaintiff averred in his particulars of claim that the damages amounted to six head of cattle or their value, £30; and as this averment is not inconsistent with the defendant's plea, it must be taken to have been admitted by them in terms of Sub-Rule 45 (8) of the Rules for Native Commissioners' Courts, published under Government Notice No. 2886 of 1951, as amended.

It follows that the fourth ground of appeal also fails.

Counsel for appellant did not press the fifth and sixth grounds of appeal and properly so, as will be apparent from what follows. In terms of Sub-Rule 44 (1) of the above-mentioned Rules, the defendants should, if they desired to rely on the point in question, have excepted to the summons in the Court *a quo* by means of a plea on the ground that it disclosed no cause of action since it was

not averred thercin that Adelaide was a virgin at the time of the alleged seduction. The defendants did not do so and have brought this exception for the first time on appeal. They did not in any way dispute that Adelaide was a virgin at the time in question in their pleadings or evidence; nor did they touch upon this question in their cross-examination of the plaintiff and his witesses. That being so and as it is implicit in the evidence that Adelaide is a spinster, the presumption that she was a virgin at the time of her seduction by the second defendant, stands and the finding of the Court *a quo* accordingly is correct, see Ntobongwana *v.* Mlauli 1942 N.A.C. (C. & O.F.S.) 52 at page 53 and the authorities cited on that page, and Nkosiyane *v.* Jange 1945 N.A.C. (C. & O.) 75 at page 76.

It also follows that the omission from the summons of an averment that Adelaide was a virgin at the time of the alleged seduction, has not resulted in any prejudice to the defendants and the exception that the summons does not disclose a cause of action on account of that omission is, at this stage, no more than a mere technicality which cannot be entertained, see Kekane *v.* Mokgoko N.O. 1953 N.A.C. 93 (N.E.) at page 95 and Rosenblatt *v.* Dempers and De Greeff 1923 C.P.D. 552 at pages 554 and 555. The fifth and sixth grounds of appeal, therefore, also fail.

Turning to the remaining grounds of appeal, viz. the second and third grounds, counsel for appellant submitted that the only reasonable import thereof was that the summons disclosed no cause of action against the first defendant and that there was no evidence that he was liable for damages for Adelaide's seduction in that there was nothing to show that at the time of the seduction the second defendant was an inmate of his kraal. The Court accepted this submission and heard argument on that basis.

As pointed out by counsel for appellant, it emerges neither from the pleadings nor from the evidence that the second defendant was an inmate of the first defendant's kraal at the time of seduction, nor that for any other reason he had become liable and, as the first defendant's liability for damages for the seduction is contingent upon these factors, the appeal succeeds in so far as the first defendant is concerned, see Motseoa *v.* Qungane 1 N.A.C. (S.D.) 16 at page 17, Makoro & Another *v.* Seemane 1 N.A.C. (S.D.) 60 at pages 61 and 62 and Mhlokonyelwa *v.* Ngoma 1 N.A.C. (S.D.) 197. Here it should be mentioned that the Assistant Native Commissioner's view in his reasons for judgment that the ante penultimate paragraph of the defendants' plea indicates that the first defendant accepted liability, jointly with the second defendant for damages for the seduction, is, to my mind, wrong in that such an undertaking cannot properly be inferred from the wording of that paragraph.

In the result I am of opinion that the appeal by the first defendant should be allowed, with costs, that the appeal by the second defendant should be dismissed, with costs, and that the judgment of the Court *a quo* should be altered to read "For plaintiff for six head of cattle or their value, £30, with costs, against the second defendant. The first defendant is absolved from the instance and awarded costs".

J. G. Pike (Member): I concur.

K. Crossman (Member): I concur.

For Appellant: Mr. B. Barnes.

For Respondent: No appearance.

SOUTHERN NATIVE APPEAL COURT.

DAYILE *v.* MQULO.

N.A.C. CASE No. 30 OF 1955.

KING WILLIAM'S TOWN: 19th March, 1956: Before Balk, President, Pike and Crossman, Members of the Court.

LAW OF DELICT.

Land transaction—misrepresentation—eviction from property—claim for damages—no data available to enable damages to be assessed—contumelia not proved.

Summary: Plaintiff purchased a certain Builidng Lot from defendant and received transfer thereof. Subsequent to the transaction defendant pointed out to plaintiff a certain Building lot as being the one purchased, and plaintifl in due course erected certain improvements, including buildings, on the lot. Some years later defendant claimed the building lot as his property, ejected plaintiff, and demolished some of the improvements thereon.

Plaintiff thereupon sued defendant for £90 damages, being £40 value of improvements and £50 general damages for inconvenience and *contumelia,* contending that defendant had wilfully pointed out the wrong building lot to him in the first instance.

Held: That as there are no data in this case for arriving at the cost of erecting structures exactly similar in type, size and materials to those that were in existence at the time of the plaintiff's eviction, no reasonable man could on the evidence for the plaintiff assess damages in his favour.

Held further: That the defendant's action in pointing out the wrong building lot to the plaintiff appears to have been negligent rather than intentional, and in the absence of *animus injuriandi* on the part of defendant the proof of *contumelia* is lacking.

Cases referred to:

R. *v.* Bezuidenhout, 1954, (3) S.A. 188 (A.D.).
Lambrechts *v.* African Guarantee & Indemnity Co. Ltd., 1955, (3) S.A. 459 (A.D.).
Thomson *v.* Thomson, 1949 (1) S.A. 445 (A.D.).
Jockie *v.* Meyer, 1945, (A.D.), 354.
Bredell *v.* Pienaar, 1924, (C.P.D.), 203.
O'Keeffe *v.* Argus Printing & Publishing Co. Ltd., and Another, 1954, (3) S.A. 244 (C.P.D.).
Western Alarm System (Pty.), Ltd. *v.* Coini & Co., 1944, (C.P.D.), 271.
Caxton Printing Works (Pty.), Ltd., *v.* Transvaal Advertising Contractors Ltd., 1936, (T.P.D.), 209.
Lazarus *v.* Rand Steam Laundries (1946) (Pty.), Ltd., 1952 (3) S.A. 49 (T.P.D.).

Appeal from the Court of the Native Commissioner, King William's Town.

Balk (President):—

In this case the plaintiff (now respondent) sued the defendant (present appellant) in a Native Commissioner's Court for damages in the sum of £90, averring in his particulars of claim that:—

"1. The parties hereto are Natives as defined by Act No. 38 of 1927.

2. That on or about 31st March, 1945, and at Balasi Location, King William's Town, plaintiff purchased from defendant certain Building Lot No. 10, Block D, Balasi Location, King William's Town, which lot was duly transferred to the plaintiff by defendant.

3. That subsequent to the purchase and sale transaction aforementioned, defendant pointed out to plaintiff certain Building Lot at Balasi Location, which lot defendant wrongfully and unlawfully held out to be Lot No. 10, whereas in truth and in fact defendant well knew that said lot was Building Lot No. 7.
4. That as plaintiff's original place of residence was Middle Drift, he (plaintiff) believed defendant's misrepresentation herein.
5. That about June 1945 and as a result of defendant's misrepresentation aforementioned, plaintiff, believing this to be Lot No. 10, erected certain improvements on Lot No. 7, to wit, 1 average sized hut, 1 small hut, 1 square building, 1 cattle-pen, and 1 sheep-fold.
6. That the current value of said improvements is £40.
7. That during or about April, 1955, defendant claimed Lot No. 7 as his property, ejected plaintiff, and demolished some of plaintiff's improvements thereon.
8. That by reason of defendant's acts in paragraphs 3 and 7 herein plaintiff has suffered damages to the extent of £90, being £40 value of improvements, and £50 general damages for inconvenience and *contumelia*.
9. That despite demand made defendant neglects and/or refuses to pay said amount of £90.

The defendant pleaded:—

"*Ad paras.* 1 *and* 2.—Defendant admits the allegations as herein contained.

Ad para. 3.—Defendant denies the allegation as herein contained and puts plaintiff to the proof thereof. Defendant states further that it was in fact Lot No. 10 which was pointed out to plaintiff.

Ad para. 4.—Defendant denies the allegation as herein contained and puts plaintiff to the proof thereof. Defendant states further that when Lot No. 10 was pointed out to plaintiff, plaintiff was already an inmate of Giddy Dayile's kraal in Balasi Location.

Ad para. 5.—Defendant denies the allegations as herein contained and puts plaintiff to the proof thereof. Defendant states that the improvements as herein referred to were made by Giddy Dayile.

Ad para. 6.—Defendant denies that the current value of the said improvements is £40 and puts plaintiff to the proof thereof.

Ad para. 7.—Defendant admits that he ejected plaintiff from Lot No. 7 but pleads that he was legally entitled to do so as defendant is the legal holder thereof. Defendant also admits that he demolished certain portions of the improvements but only so much as to enable him to erect a fence.

Ad para. 8.—Defendant denies that plaintiff has suffered damages in the sum of £90 or in any sum at all and puts plaintiff to the proof thereof.

Ad para 9.—Defendant admits the allegations as herein contained but pleads that he is not legally liable to plaintiff in the sum of £90 or in any sum at all.

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

The Court *a quo* found for the plaintiff in the sum of £45, made up of £30 value of the improvements and £15, general damages, with costs.

The appeal is brought on the following grounds:—

"1. That the judgment is against the weight of evidence.
2. That the judgment is bad in law in that the learned Assistant Native Commissioner erred in finding that the plaintiff had discharged the onus resting upon him.
3. That the judgment is bad in law as on the balance of probabilities the learned Assistant Native Commissioner should have given judgment for defendant.

Alternatively, should the above Honourable Court hold that the appeal must fail on grounds (1), (2) and (3) then defendant appeals on the following additional grounds:—

4. That the judgment is bad in law in that the learned Assistant Native Commissioner erred in finding that plaintiff had proved that he has suffered damages in the sum of forty five pounds (£45) as plaintiff failed to adduce any evidence to support such a finding. In the premises the learned Assistant Native Commissioner should have given judgment of absolution from the instance".

The plaintiff's version is that in about the year 1945 he moved from the Middledrift District to Balasi Location in the District of King William's Town, where he took up his residence with his farther-in-law, Giddy Dayile, who is also the defendant's father. Early in that year the plaintiff purchased Building Lot No. 10 in Balasi Location from the defendant personally. This land was transferred to the plaintiff in the relative Deeds Office. The defendant pointed it out to the plaintiff. Thereafter the plaintiff dug a trench for the foundations of a rondavel but did not erect the rondavel there, as the defendant had told him that he had not pointed out the correct place to him. The plaintiff then asked the defendant where the correct site was, and the defendant thereupon pointed out a second site to him. The plaintiff believed that the second site was Building Lot No. 10, which he had purchased from the defendant, and erected the rondavel thereon. When the second site was pointed out to the plaintiff by the defendant, the former had been resident at Giddy Dayile's kraal for some three months. The defendant assisted the plaintiff in erecting the rondavel by working himself. Giddy also assisted, i.e. with the making of the bricks and by the loan of transport oxen. Subsequently, the plaintiff erected other buildings, viz. a square house and a second rondavel on the same site. He also constructed a cattle kraal and a sheep fold thereon. Apart from the oxen lent to the plaintiff by Giddy Dayile, the former erected the dwellings and other structures with his own means. The plaintiff lived undisturbed from 1945 to 1955 on the site on which he had erected the dwellings and other structures. At all material times the defendant was aware of the position. In about April, 1955, the defendant told the plaintiff that the latter had built on his (defendant's) Lot No. 7 instead of on Lot No. 10, and ejected him therefrom. Thereupon the defendant demolished the cattle kraal, burnt the sheep fold and removed bricks from the first rondavel constructed by the plaintiff, i.e. the larger one. Allowing for depreciation, the value of the dwellings and other structures in question was £40. The plaintiff claimed this sum plus a further £50, as damages, from the defendant as the latter was responsible for his (plaintiff's) having erected the dwellings and other structures on the wrong site.

The defendant did not give evidence. According to his only witness, viz. his father, Giddy Dayile, the plaintiff got Lot No. 10 as a present from him because he married his daughter. He (Giddy) himself pointed the site out to the plaintiff. Lot No. 10 was never registered in Giddy's name. He bought it from someone else and gave it to the plaintiff. At that stage Lot No. 7 belonged to one Mpahla. He never pointed out Lot No. 7 to the plaintiff. That lot was registered in the defendant's name in June, 1946, when both the plaintiff and defendant were residing with him (Giddy). Subsequently, on Giddy's arrival at his kraal one day, he found that the plaintiff had been assaulted by the defendant. Giddy then decided that the defendant must leave his (Giddy's) kraal and go to Lot No. 7. The defendant did not go to that lot. The plaintiff then said that it would not be right for the defendant who was Giddy's son, to leave and that he (plaintiff) would go to Lot No. 7. Giddy consulted the defendant, who intimated that there would be no trouble after

A his (Giddy's) death if the plaintiff were allowed to live on Lot No. 7. The plaintiff moved to Lot No. 7, where there were dwellings which had been erected by Giddy. These dwellings consisted of one rondavel and a square hut. Giddy also constructed the cattle kraal and the sheep fold. He paid for all the B material, and was assisted by the defendant in erecting both the dwellings and the kraal and fold. The plaintiff did not assist in any way therein. Giddy paid for all the improvements on Lot No. 7, which was the property of the defendant because he (Giddy) was the kraal head. The defendant is still living at C Giddy's kraal.

In his reasons for judgment the Assistant Native Commissioner states that the plaintiff gave his evidence in a straightforward and convincing manner, and impressed the Court as being a reliable and honest witness. The impression he gained of the only other D witness for plaintiff, viz. his father, Samuel Mqalo, who supported the plaintiff's version, was that he was a genuine and truthful witness and the Assistant Native Commissioner therefore accepted his evidence.

There appears to be nothing in the record to indicate that the E favourable impression gained by the Court *a quo* of these witnesses was not justified.

Of the only witness for defendant, viz. his father, Giddy Dayile, the Assistant Native Commissioner states that his demeanour in the witness box under cross-examination was not favourable; and F this impression gains support from the record.

It would appear from the Assistant Native Commissioner's reasons for judgment that he drew an inference adverse to the defendant from the latter's failure to give evidence himself; and, to my mind, he was fully justified in so doing; for, according to G the plaintiff's evidence, the defendant pointed out Lot No. 7 to him (plaintiff) as Lot No. 10, i.e. as being the land which the latter had purchased from him; and the testimony of the only witness for defendant, viz. that of his father, Giddy, was obviously unacceptable in view of the blatant inconsistencies therein on H material points. For example, Giddy maintained throughout his evidence that he had given Lot No. 10 to the plaintiff as a gift on the latter's marrying his daughter; whereas, not only is it manifest from the title deed to this land (Exhibit "A") that the plaintiff purchased it from the defendant, but the defendant admitted in his plea that the plaintiff did so. In this connection I the following evasive replies by Giddy to the Court speak for themselves:—

> Q. According to you, you gave Lot No. 10 to plaintiff. A. Yes.
>
> Q. According to Exhibit "A" there was a sale and that J plaintiff paid £40 for Lot No. 10. A. That is so.
>
> Q. How do you account for discrepancy in your evidence. A. I got information for plaintiff.
>
> Q. According to your evidence therefore the Title Deed to Lot No. 10 is faulty. A. I don't know that.".

K Then Giddy contradicted himself as regards whether there were any dwellings on Lot No. 7 at the time that the defendant assaulted the plaintiff.

Again there is Giddy's complete vagueness as to the identity of the land on which the foundation trench had been dug, which is significient in the light of his evidence that he himself was L responsible for digging it; and there is also his evasion when asked in cross-examination why he had refrained from proceeding with the building at that spot.

As pointed out at page 197 of the report of the judgment in R. *v.* Bezuidenhout, 1954, (3) S.A. 188 (A.D.), failure by a party to M an action to give evidence himself provides even a stronger foundation for an inference against him, than his failure to call other witnesses. "For it is after all his own case, which he may be expected to support with all the resources which he can himself provide, if he believes in its merits; and his knowledge of what he himself can and will say in evidence must be more certain

than his knowledge of what even the most closely associated and apparently favourable witness may say on his behalf." And this is the position, particularly in this case, in which the evidence of the only witness for defendant was, for the reasons given above, wholly unacceptable. In this connection see also Lambrechts *v.* African Guarantee & Indemnity Co. Ltd., 1955, (3) S.A. 459 (A.D.), at pages 467 and 468, and Thomson *v.* Thomson, 1949, (1) S.A. 445 (A.D.), at pages 454 and 455.

As regards the probabilities, it is most unlikely that the plaintiff would have left Giddy's kraal and gone to live on Lot No. 7, which was owned by the defendant, in view of the latter's assault on him and particularly as the plaintiff had then already acquired Building Lot No. 10. And it is equally unlikely that Giddy would, in the circumstances, have erected dwellings for the plaintiff's use on Lot No. 7. It should be added that, although Giddy stated in his evidence-in-chief that there were already houses on Lot No. 7 at the time that the defendant assaulted the plaintiff, he admitted in cross-examination that there were no dwellings on this lot at that time.

According to his evidence, the plaintiff commenced erecting the dwellings in question immediately after the transfer to him of Lot No. 10 on the 31st March, 1945, and as Lot No. 7 was not registered in the defendant's name until the 19th June, 1946, there would at first sight appear to have been no object in the defendant's pointing out Lot No. 7 as Lot No. 10 to the plaintiff as alleged by the latter. But it becomes apparent that there is little substance in this view if it be brought to mind that, according to the relative Title Deed (Exhibit "A"), the defendant obtained the Chief Native Commissioner's permission as far back as the 1st August, 1945, for the transfer of Lot No. 7 to him, and it is quite possible that he purchased this lot some time before then. Moreover, it seems to me that, according to the evidence, the defendant's action in pointing out Lot No. 7 as Lot No. 10 to the plaintiff was due to negligence rather than intentional. That this is so gains support from the plaintiff's evidence that the defendant twice pointed out wrong land to him and from the fact that, as is common cause, the defendant took no steps for the removal of the plaintiff from Lot No. 7 for a number of years, i.e. until the year 1955, thus indicating that it was not until then that the defendant was certain that the lot pointed out by him to the plaintiff as Lot No. 10 was, in fact, Lot No. 7.

It follows that, on a balance of probability, the plaintiff discharged the onus of proof resting on him on the pleadings and the Court *a quo's* finding in favour of the plaintiff's version cannot, therefore, be said to be wrong. Accordingly, the main grounds of appeal fail.

Turning to the alternative ground of appeal, it is apparent from the wording of the judgment of the Court *a quo* that it awarded £30 to the plaintiff in respect of the value of the structures in question, plus £15 general damages. The Assistant Native Commissioner does not indicate in his reasons for judgment on what score these general damages were awarded, but bearing in mind the particulars of claim, it is manifest that they could only have been awarded for inconvenience and/or *contumelia*.

It seems clear that the plaintiff's claim is not founded on a breach of contract, as the misrepresentation on which the claim is based, viz. the pointing out by the defendant to the plaintiff of Lot No. 7 as Lot No. 10, took place after the conclusion of the sale, so that the exclusion of damages for *contumelia* as laid down in Jockie *v.* Meyer, 1945, (A.D.). 354, has no application in the instant case. Moreover, here damages for *contumelia* were actually claimed, whereas in Jockie's case there was no such claim which, as is clear from pages 363, 364 and 368 of the report of that case, was a *ratio decidendi* there. However that may be, there appears to be no proof of *contumelia* in the instant case; for, as pointed out above, the defendant's action in pointing out Lot No. 7 as Lot No. 10, to the plaintiff does not,

A according to evidence, appear to have been intentional but rather due to negligence, so that it cannot be said that the defendant, in making the misrepresentation, was actuated by *animus injuriandi*, see Bredell *v.* Pienaar, 1924, (C.P.D.), 203 at page 210 and O'Keeffe *v.* Argus Printing & Publishing Co. Ltd. and B Another, 1954, (3) S.A. 244 (C.P.D.) at page 247. Moreover, the defendant's action in ejecting the plaintiff from Lot No. 7 was not a wrongful but a lawful act, as that lot was the former's property; see Bredell's and O'Keeffe's cases (*supra*).

In the instant case the plaintiff is entitled to be put in the C same position as he would have been but for the defendant's wrongful act in pointing out to him Lot No. 7 as Lot No. 10 as it is manifest from the evidence for the plaintiff, which, for the reasons given above, falls to be accepted, that the negligent misrepresentation here was made by the defendant to the plaintiff D with the knowledge that it would be acted upon by the latter to whom defendant owed a duty of care arising from contract, i.e. from the sale of Lot No. 10 by the defendant to the plaintiff, see Western Alarm System (Pty.), Ltd. *v.* Coini & Co., 1944, (C.P.D.), 271 at pages 275 to 278 and Caxton Printing Works E (Pty.), Ltd. *v.* Transvaal Advertising Contractors Ltd., 1936, (T.P.D.) 209 at page 215. The plaintiff is therefore entitled to recover from the defendant an amount equivalent to the cost of erecting two rondavels, a square house, a cattle kraal and a sheep fold, exactly similar in type, size and materials to those F in existence at the time of the plaintiff's eviction by the defendant from Lot No. 7, subject, of course, to this qualification that, should any of the structures in question have been in a worthless condition at that time, no damages are recoverable therefor.

G

Apart from the fact that the evidence is not clear as to the condition of the structures then, there is, as contended by counsel for appellant, no evidence on which to determine the extent of the damages suffered by the plaintiff on the basis indicated above; for the plaintiff's evidence in this respect amounts to no H more than that, allowing for their use, he valued the structures in question at £40 and that to put up a big rondavel would cost about £30 to-day. But according to his father, it would cost £40 to erect such a rondavel. There is nothing to indicate that the plaintiff is a qualified builder. It is true that, as pointed I out by the counsel for respondent, the plaintiff himself erected the structures in question on Lot No. 7 with the assistance of his father and others. But that took place some ten years prior to his giving evidence in the instant case; and, as is manifest from his testimony, he does not recollect the cost of the materials J then nor does he give any details of the cost thereof at the time of his eviction from Lot No. 7 and there is an equal paucity of evidence as regards the inconvenience to which he was put as a result of the defendant's misrepresentation. To my mind, therefore, there are no data in this case for arriving at the cost of erecting structures exactly similar in type, size and materials to K those that were in existence at the time of the plaintiff's eviction by the defendant from Lot No. 7 and no reasonable man could on the evidence for the plaintiff assess damages in his favour, see Lazarus *v.* Rand Steam Laundries (1946) (Pty.), Ltd., 1952, (3) S.A. 49 (T.P.D.); and, as pointed out above, there is a like L paucity of detail in so far as the inconvenience is concerned.

It follows that the appeal succeeds on the alternative ground, and that it should be allowed, with costs, and the judgment of the Court *a quo* altered to one of absolution from the instance with costs.

M

J. G. Pike (Member: I concur.

K. R. Crossman (Member): I concur.

For Appellant: Mr. E. M. Heathcote.

For Respondent: Mr. B. Barnes.

SOUTHERN NATIVE APPEAL COURT.

BOKANA *v.* MANCAM.

N.A.C. CASE No. 4 OF 1956.

KING WILLIAM'S TOWN: 19th March, 1956. Before Balk, President, Yates and Crossman, Members of the Court.

LAW OF PROCEDURE.

Application for condonation of late noting of appeal—Poverty of applicant not satisfactory excuse for delay in noting appeal—Applicant also no prospect of success on appeal.

Summary: The reason given by applicant for the delay in noting an appeal was that he was poor, was too old to work, and had insufficient means to engage the services of an attorney.

Held: That applicant's explanation cannot be regarded as satisfactory as he did not state why he had not taken advantage of the provisions of Rule 8 (*d*) of the Rules for Native Commissioners' Courts, published under Government Notice No. 2886 of 1951, and have the notice of appeal prepared timeously, at a cost of only 1s., by the Clerk of the Native Commissioner's Court.

Cases referred to:

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

Statutes, etc. referred to:

Government Notice No. 2886 of 1951—Section 8 (*d*).

Appeal from the Court of the Native Commissioner, East London.

Balk (President):—

This is an application for condonation of the late noting of an appeal from the judgment of a Native Commissioner's Court, given for plaintiff (now respondent) in an action in which he sued the defendant (present applicant) for the return to him of his customary wife, Nohombile, who, he alleged, had deserted him. The plaintiff also claimed the return of his children by Nohombile.

The reason given by the applicant for the delay in noting the appeal is that he is poor, did not work as he is 70 years of age, and that he had insufficient means to engage an attorney to represent him in the matter of the appeal until the 7th December, 1955, when the period allowed for noting it had already expired. But the applicant does not state why he did not take advantage of the provisions of Rule 8 (*d*) of the Rules for Native Commissioners' Courts, published under Government Notice No. 2886 of 1951, and have the notice of appeal prepared for him by the Clerk of the Native Commissioner's Court at a charge of only 1s., and lodge it timeously. His explanation cannot, therefore, be regarded as satisfactory.

Apart from this aspect, it is clear that the applicant has no prospect of success on appeal, as will be apparent from what follows, and that, therefore, in any event, the application fails, see De Villiers *v.* De Villiers, 1947 (1) S.A. 635 (A.D.).

A The appeal is brought on the following grounds:—

"A. That the summons does not disclose a cause of action against defendant now appellant in that:—

I. The defendant now appellant is not cited as the kraalhead or dowry holder of Nohombile.

B B. The plaintiff now respondent has not proved by competent evidence that:—

I. He had married Nohombile by customary union.

II. The six head of cattle had been paid as *lobolo* or
C that *lobolo* had been arranged.

III. The six head of cattle had not been delivered in respect of damages."

There is no necessity to cite the defendant as kraalhead in cases
D such as the instant one, since liability does not flow from his being kraalhead as in seduction cases in which the seducer is an inmate of the kraalhead's kraal at the time of the seduction. If the plaintiff desired to take the point that the summons disclosed no cause of action in that it was not averred therein
E that the defendant was the dowry-holder, he should have done so in the Court *a quo* by way of exception in terms of Sub-Rule 44 (1) of the above-mentioned Rules. He did not do so and wishes to bring this exception for the first time on appeal. In his amplified plea the defendant admitted that he had received
F the six head of cattle which the plaintiff averred he had paid as dowry for Nohombile. It follows that the omission from the summons of an averment that the defendant was the dowry-holder has not resulted in any prejudice to the defendant, and the exception that the summons does not disclose a cause of action
G on account of that omission is, at this stage, no more than a technicality which cannot be entertained, see Kekane *v.* Mokgoko, N.O., 1953 N.A.C. 93 (N.E.) on page 95, and Rosenblatt *v.* Dempers and De Greeff, 1923 (C.P.D.) 552 at pages 554 and 555.

H Turning to the remaining grounds of appeal, it is manifest from the defendant's amplified plea that he admitted that Nohombile had eloped with the plaintiff after the latter had rendered her pregnant, that the plaintiff paid six head of cattle to him for her, that he agreed to the plaintiff's paying the remaining two
I head for her at a later date and to her continuing to live with the plaintiff in the meantime, that she, in fact, continued to live with the plaintiff for several years and had three children by him, and that she has left the plaintiff. These factors postulate that a customary union between the plaintiff and Nohombile came into being and that the six head of cattle paid by him for her
J to the defendant fall to be regarded as dowry cattle and not as damages for her seduction and pregnancy, even though they may have been paid as such damages in the first instance; for as laid down in Mpantsha *v.* Ngolonkulu and Another, 1952. N.A.C. 40 (S.), at page 42, even if the stock are paid as damages for seduc-
K tion and pregnancy, such damages merge in the dowry as soon as the customary union is contracted, and there can be no doubt that such a union is contracted when the father or guardian of the girl accepts the stock paid for her by the seducer and allows her to remain with him; and the fact that the seducer did not pay the additional dowry due does not affect the position as all
L the essentials of a customary union are already then present.

In the result, I am of opinion that the application should be refused with costs.

M E. J. H. Yates (Member): I concur.

K. R. Crossman (Member): I concur.

For Appellant: Mr. E. M. Heathcote.

For Respondent: Mr. C. F. Silberbauer.

SOUTHERN NATIVE APPEAL COURT.

MANTSHI & ANO. *v.* NGQAQU.
TSENGIWE & ANO. *v.* XAPA.

N.A.C. CASES Nos. 62 OF 1955 AND 63 OF 1955.

KING WILLIAM'S TOWN: 20th March, 1956. Before Balk, President; Pike and Crossman, Members of the Court.

LAW OF PROCEDURE.

Application for condonation of late noting of appeal—Rule 14 of Native Appeal Court Rules peremptory and to be strictly complied with.

Summary: Applications for condonation of the late noting of the appeals were filed with the Registrar one hour before the commencement of the session of the Court.

Held: Rule 14 of the Native Appeal Court Rules published under Government Notice No. 2887 of 1951, which requires that any application shall be filed with the Registrar not less than 24 hours prior to the commencement of a session, is peremptory and must be strictly complied with.

Statutes, etc., referred to:

Government Notice No. 2887 of 1951—Section 14.

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

Balk (President):—

In both the above matters the appeals were, in terms of Rule 4 of the Rules of this Court, published under Government Notice No. 2887 of 1951, noted one day late.

Applications for condonation of their late noting under this Rule were filed with the Registrar at 9 a.m. on the 13th March, 1956, i.e. one hour before the commencement of this session of the Court. Rule 14 of the above-mentioned Rules requires that any application shall be filed, in triplicate, with the Registrar not less than 24 hours prior to commencement of a session.

This Rule is peremptory and must be strictly complied with.

The applications were therefore struck off the roll, with costs.

J. G. Pike (Member): I concur.
K. R. Crossman (Member): I concur.
For Appellants: Mr. W. M. Tsotsi, Lady Frere.
For Respondents: Mr. H. J. C. Kelly, Lady Frere.

SOUTHERN NATIVE APPEAL COURT.

BACELA *v.* MBONTSI.

N.A.C. CASE No. 65 OF 1955.

KING WILLIAM'S TOWN: 20th March, 1956. Before Balk, President, Pike and Crossman, Members of the Court.

TEMBU LAW AND CUSTOM.

Damages for seduction and pregnancy—Denial of paternity—Onus of proof on defendant—In absence of satisfactory evidence by defendant, woman's testimony preferred—Opinions of Native Assessors—Periods of gestation discussed—Essentials of customary union discussed—Necessity for stating grounds of appeal clearly and specifically.

A *Summary:* Plaintiff sued defendant for damages for the seduction and pregnancy of his ward, Nonti.

The evidence is to the effect that Nonti, after having had sexual intercourse with defendant, became pregnant. Defendant, believing that he was responsible therefor, paid the
B customary fine to plaintiff's uncle, and intimated that he desired to marry Nonti. He thereupon *twalaed* her, and paid a further beast which was accepted, and marriage negotiations were entered into. Whilst these negotiations were still in progress Nonti gave birth to a female child. Defendant then
C contended that, because the child was a full-time one, he could not be the father thereof and accordingly repudiated the customary union.

Held: That in view of defendant's admission of intercourse with Nonti in respect of a time other than that at which she
D conceived, the onus was on him to show by satisfactory evidence that he was not in fact the cause of her pregnancy. In other words, without such evidence, the woman's testimony is to be accepted in preference to that of the man, unless the Court finds that she is not worthy of credence.

E *Cases referred to:*

R. *v.* Lepile, 1953 (1), S.A., 225 (T.P.D.).
Mahlobo *v.* Luvuno, 1952, N.A.C., 45 (N.E.).
Van der Westhuizen *v.* Maritz, 1927, C.P.D., 108.
F Sontundu *v.* Damane and Damane, 3, N.A.C., 261.
Manakaza *v.* Mhaga, 1, N.A.C. (S.D.), 213.
Nojantsholo *v.* Nkosana and Godo, 1941, N.A.C. (C. & O.), 81.
Boyana *v.* Dyamani, 1946, N.A.C. (C. & O.), 74.
G Zabobeni *v.* Nduku and Another, 1, N.A.C. (S.D.), 129.
Piliso *v.* Gcwabe, 1, N.A.C. (S.D.), 123.
Macdonald *v.* Stander, 1935, A.D., 325.
Maphanga *v.* Koza and Another, 1, N.A.C. (S.D.), 204.
Mncube *v.* Mncube, 1, N.A.C. (N.E.D.), 229.
Memami *v.* Makaba, 1, N.A.C. (S.D.), 178.
H Mpantsha *v.* Ngolonkulu and Another, 1952, N.A.C., 40 (S.).
Ngcongolo *v.* Parkies, 1953, N.A.C., 103 (S).

Works of Reference:

Van den Heever's Breach of Promise and Seduction.
Maasdorp's Translation of Grotius.
I Taylor's Medical Jurisprudence, Volume II (6th edition).

Statutes, etc. referred to:

Government Notice No. 2887 of 1951, sections 7 (*b*), 14 and 16.

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

Balk (President):—

This is an appeal from the judgment of a Native Commissioner's Court given for plaintiff (now respondent) as prayed, with
K costs, in an action in which he claimed from the defendant (present appellant) five head of cattle or their value, £50, as damages for having seduced and rendered pregnant his ward, Nonti.

In his particulars of claim the plaintiff averred—

L "(1) that the parties hereto are Natives as defined by Act No. 38 of 1927 and both reside in Rodana Location, in the District of Glen Grey;

(2) that in or about the month of July, 1954, and during plaintiff's absence at work, defendant wrongfully and
M unlawfully seduced and rendered pregnant plaintiff's niece and ward, Nonti, in consequence whereof she gave birth to a female child of which defendant is the natural father;

(3) that as a result of the said seduction plaintiff has suffered damages to the extent of five head of cattle or £50, their value, which he now claims from the defendant;

(4) that upon the customary report being made defendant admitted liability and paid three head of cattle on account of the customary fine to plaintiff's uncle, Laughter Mbontsi;

(5) that thereafter defendant *twalaed* the said Nonti and paid a further beast to plaintiff's said uncle, intimating that he wanted to marry the said Nonti. The said beast was accepted on account of dowry and marriage negotiations were accordingly entered into;

(6) that in or about the month of March, 1955, and whilst marriage negotiations were still in progress and whilst she was still at the defendant's kraal the said Nonti gave birth to a female child;

(7) thereupon further discussions followed and defendant denied he was the father of the said child, returned the said Nonti to plaintiff's kraal, called off the marriage negotiations and demanded the return of the 4 head of cattle so far paid, from plaintiff's said uncle;

(8) without admitting that defendant was not the father of Nonti's child, but in order to stop talking and avoid being personally involved in litigation, plaintiff's said uncle himself drove the 4 head back to defendant's kraal and intimated that plaintiff himself would handle the case upon his return from work;

(9) legal demand notwithstanding defendant refuses and/or neglects to comply therewith."

The defendant pleaded as follows:—

"1. *Ad Paras.* 1 *and* 9.—Admits.

2. *Ad Para.* 2.—Defendant denies the allegations set out in this paragraph and puts plaintiff to the proof thereof. In amplification of his plea, defendant pleads and states that in January, 1955, one, Laughter Mbontsi, who represented that he was the father and/or guardian of the said Nonti, reported that the said Nonti was 4 months pregnant and accused defendant of being responsible for the said pregnancy. Defendant who bona fide and reasonably believed that he was in fact responsible, *twalaed* the said Nonti,, made her his customary wife and paid the dowry cattle.

Defendant says that he does not know plaintiff at all and that his name was never mentioned in the negotiations referred to above.

Further, defendant says that the said Nonti gave birth in March, 1955, to a full time child whereupon defendant found that he could not be the father of the said child and consequently defendant repudiated the customary union.

3. *Ad Para.* 3.—Denies.

4. *Ad Para.* 4.—Defendant says that 4 head of cattle were paid as dowry.

5. *Ad Paras. 5. 6 and* 7.—Defendant says that the said Nonti was his customary wife, but defendant repudiated the union and returned the said Nonti to Laughter Mbontsi.

6. *Ad Para.* 8.—Defendant pleads and says that the said Laughter admitted that defendant could not have been the father of Nonti's child and returned the dowry cattle thereby dissolving the union.

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

The appeal is brought on the following grounds:—

"1. That the judgment is against the weight of evidence and is not supported thereby.

2. That the Judicial Officer erred in holding that no customary union had been entered into between the defendant and the plaintiff's daughter, the said Nonti.

3. That alternatively and in any event the Judicial Officer erred in holding that the defendant was responsible for the seduction and pregnancy of the said Nonti."

A At first sight the second and third grounds of appeal appear to be bad for want of particularity. In other words, those grounds do not appear to comply with the requirements of Rule 7 (*b*) of the Rules of this Court, published under Government Notice No. 2887 of 1951, in that it is not specified why the findings in B question by the Court *a quo* are said to be wrong. But on a proper consideration of this aspect in the light of the judgment in R. *v.* Lepile. 1953 (1), S.A., 225 (T.P.D.), at page 230, it becomes apparent that the third ground of appeal can only mean that the Court *a quo* erred in holding that the defendant was C responsible for Nonti's seduction and pregnancy as the legal presumption as to paternity relied upon by it in arriving at that conclusion did not obtain in the instant action in that this case fell to be decided according to Tembu Law and Custom and not according to the Common Law. Similarly the meaning of the D second ground of appeal can only be that the Court below erred in holding that no customary union had been contracted by the defendant with Nonti in that it failed to take into account that, according to Tembu Law and Custom, the acceptance of dowry cattle for a girl coupled with her being allowed to remain at the E kraal of the man on whose behalf such cattle are paid, results in a customary union. Argument was heard on this basis.

Here I would add that the necessity for stating the grounds of appeal both clearly and specifically in all cases cannot be overemphasised, as failure to do so may result in the grounds F being disregarded in terms of the above-mentioned Rule read with Rules 16 and 14 of this Court.

In her evidence for the plaintiff, Nonti stated that she had met the defendant on the 7th July, 1954, at his kraal whilst a wedding was being celebrated there. In the evening of that day the G defendant took her to an empty hut at his kraal. They had sexual intercourse in that hut, as a result of which she became pregnant. They continued to have sexual intercourse on many occasions thereafter, including during July, 1954. At that time she was employed at a Mr. Sprenger's shop and slept at a nearby H kraal. She never went out with other men and was a virgin when the defendant seduced her. Her home was at the plaintiff's kraal. The defendant knew this. She told the defendant that she was pregnant when she missed her periods. In August, 1954, she menstruated for a short time. The following month she did not menstruate and she was then certain that she was pregnant. She I and the defendant started counting her pregnancy from that month, i.e. from September, 1954. The defendant continued to have sexual intercourse with her. Her pregnancy was discovered by her grandmother at the kraal of Laughter Mbontsi, the plaintiff's uncle. Thereafter, viz., in January, 1955, the defendant J *twalaed* her from the plaintiff's kraal. She then regarded herself as the defendant's wife. He continued to have sexual intercourse with her and never suggested that he was not responsible for her pregnancy. The plaintiff was away at Cape Town at the time. She gave birth to a full-term child at the defendant's kraal K on the 4th March, 1955. In May, 1955, the defendant drove her away from his kraal on the ground that he was not the father of her child.

The plaintiff's uncle, Laughter Mbontsi, stated in his evidence for the former, that Nonti's pregnancy came to his notice in L about August, 1955. When he discovered her condition he sent his son, Laurie, to the defendant's kraal to demand damages therefor. Nonti was then living at the plaintiff's kraal. The latter was then at Cape Town. The defendant knew the plaintiff's kraal. He (Laughter) never held himself out as the father or guardian of Nonti. He received four head of cattle for Nonti from the M defendant in two instalments, the first of three head and the next one head. When he received the three head, Nonti was living at the plaintiff's kraal. The defendant had already *twalaed* Nonti when he (Laughter) received the fourth beast for her from him. He accepted the four head of cattle for damages for Nonti's seduction and pregnancy although the defendant said they were

marrying her. He reported to the plaintiff at Cape Town. Thereafter the defendant rejected Nonti and demanded the return of his four head of cattle. He (Laughter) returned them to the defendant saying that the latter should await the plaintiff's return as he (plaintiff) was Nonti's guardian. In cross-examination Laughter admitted that he had received the fourth beast for dowry and that he had acted for the plaintiff.

The plaintiff's last witness, Laurie Mbontsi, confirmed that, at the instance of his father, he reported Nonti's pregnancy at the defendant's kraal where they admitted that they were responsible therefor. The defendant was at his kraal but did not attend the discussion. His people said that they were marrying Nonti and paid three head of cattle by word of mouth. Laughter sent him back to the defendant's kraal and he received the three head of cattle from the defendant's people on the understanding that they were marrying Nonti. Later he received another beast from them. They said that they were marrying Nonti but he accepted it as damages for the seduction. Nonti was *twalaed* by the defendant from the plaintiff's kraal. He did not tell the defendant's people that he was acting for the plaintiff as he assumed that they knew this, since Nonti was *twalaed* from the plaintiff's kraal.

The defendant's version is that he returned to his kraal in July, 1954, from Worcester where he had been working. On the 6th and 7th July, 1954, he was away from his kraal attending a wedding at Bolotwa. There had been a wedding at his kraal on the 5th July, 1954, at which he had seen Nonti, but he had not spoken to her as he was busy. He first had sexual intercourse with her at the end of August, 1954. He was not certain of the date of this intercourse. She told him in November, 1954, that she was pregnant. Laurie came to his kraal in January, 1955, to report Nonti's pregnancy. He (defendant) believed that he was responsible therefor and desired to marry Nonti. Later during the same month he *twalaed* her. He went away to work again and returned to his kraal in May, 1955. Then he asked Nonti why her child had been born before the time. She replied that she had given birth to the child within six months. He asked his elder brother, Richard, to report the matter to Nonti's kraal. He saw Laughter, who said he should bring the fifth and sixth cattle for *twalaing* Nonti. Laughter did not then admit that someone other than the defendant was responsible for Nonti's child. He (defendant) did not demand his cattle back. He took the matter to the Board Member's kraal where Nonti still maintained that he (defendant) was the father of her child. The matter was then referred to the Headman. On the way there he met Laughter bringing the four head of cattle. The latter said he was returning them as it was clear that Nonti was wrong in ascribing her pregnancy to the defendant. He (defendant) had not married but had only *twalaed* her. In cross-examination the defendant admitted that he had issued summons against Laughter for the transfer back to him of the four head of cattle (obviously meaning their transfer back to his name in the dipping records).

The defendant's mother in her evidence for him confirmed that Laughter had returned the four head of cattle as it was clear that, when the defendant returned to his kraal in July, 1954, from Worcester, Nonti was already pregnant. When Nonti was brought to their kraal in January, 1955, it was said that she was in her fifth month of pregnancy. In cross-examination the defendant's mother admitted that at the Board Member's place Laughter had stated that Nonti's guardian was in Cape Town and that the latter should deal with the matter.

The defendant's next witness, Riichard Bacela, confirmed that when Laughter returned the cattle he had stated that it was clear that when the defendant had returned from work in July, 1954, Nonti was already pregnant.

The defendant's last witness, Tom Dagale, also confirmed that when Laughter returned the cattle he had said that it was clear that Nonti had not been rendered pregnant by the defendant. In

A cross-examination he admitted that he had heard the plaintiff's name mentioned when the defendant's mother spoke to Laughter about the transfer back of the cattle to the defendant's name in the dipping records.

The Additional Assistant Native Commissioner *a quo* in finding B that the defendant had seduced and rendered Nonti pregnant relied on Mahlobo *v.* Luvuno, 1952 N.A.C. 45 (N.E.), in which it was laid down at page 46 that—

> "It is trite law that if a man admits having had connection with a girl, but denies he is the father of the child, the girl C will be believed as to the paternity, even though it be proved that other men have had connection with her, unless the man can show that from the date upon which he had connection with her and the other circumstances of the case, it is physically impossible for him to be the father, or unless the D Court is of opinion that the woman is not worthy of belief. (Maasdorp, Vol. IV, 5th edition, page 141.)"

This is the position at Common Law and it obtains even where it is admitted or proved that the defendant had sexual intercourses E with the plaintiff only one month or a year before her confinement, see *Van den Heever's Breach of Promice and Seduction*, at pages 60 and 61, the authorities there cited, and Van der Westhuizen *v.* Maritz, 1927 C.P.D., 108 which, at page 109, contains the following passage from *Christinaens* quoted in *Maasdorp's* F *Translation of Grotius*, at page 325, and giving the reason underlying the rule:—

> "If the man admits connection, the woman is to be believed in her identification of the father, and this holds even if he acknowledges that he had connection with her only G a month or a year before the confinement, because, the connection being in any way admitted, he is not believed as to the time he may fix upon in order to free himself."

It remains to examine what the position is under Tembu Law and Custom.

H

In Sontundu *v.* Damane and Damane, 3, N.A.C. 261, the Tembu Assessors stated:—

> "Under Native Custom, if intercourse is proved, the woman's statement as to the paternity is usually believed, I although more than one man may have visited (*metshaed*) her, but there are cases where if it is shown that these men all visited her about the time conception took place, then the case is postponed until the birth of the child, and the case goes against the man to whom it bears resemblance."

J In that case the Court found that intercourse had been proved and, consonant with the Assessors' opinion, it held that the girl's testimony that the first defendant was the father of her child fell to be accepted in preference to his evidence denying the paternity. Here it should be mentioned that the test of likeness K has not been accepted by our Courts, as it cannot be regarded as a satisfactory means of identification, in that one person will see a likeness where another person will find none, see *Mahlobo's* case (*supra*), at page 47, and Manakaza *v.* Mhaga 1 N.A.C. (S.D.), 213, at page 217.

L The decision in *Sontundu's* case (*supra*) was followed in Nojantsholo *v.* Nkosana and Godo, 1941, N.A.C. (C. & O.), 81, and Boyana *v.* Dyamani, 1946, N.A.C. (C. & O.), 74, in which it was laid down, at page 75, that there was no substantial difference between the position at Common Law and in Native Law, that M the girl's evidence was to be preferred to that of the man as regards paternity once it was proved or admitted that he had had sexual intercourse with her.

That this was the position appears to have been accepted in Zabobeni *v.* Nduku and Another, 1, N.A.C. (S.D.), 129, at page 130.

In none of these cases, i.e. Sontundu's, Nojantsholo's, Boyana's and Zabobeni's, did the question arise whether the same position obtained where the man's admission of intercourse with the woman or proof thereof, was in respect of a time other than that at which she conceived.

This question arose in Piliso *v.* Gcwabe, 1, N.A.C. (S.D.) 123, where it was held that the only onus on the defendant was to rebut the evidence of sexual intercourse at the time the woman said she had conceived. That case was followed by *Manakaza's* case (*supra*) in which the Court reached a similar conclusion, but set out the legal position in greater detail. That statement of the law appears at page 217 of the relative report and reads as follows:—

> "Having regard to the fact that the fine claimed is one for *pregnancy*, the onus in the first place rests on the plaintiff to prove that intercourse took place at a time when the defendant could have been the father. An admission by defendant of intercourse at that time casts the heavy onus upon him of proving that it was impossible for him to be the father. On the other hand an admission by the defendant of intercourse at a time when, having regard to the possible period of gestation, it was impossible for him to be the father amounts to a denial of intercourse which resulted in the pregnancy. The Court must then determine whether or not the defendant, in fact, had intercourse with the woman at or about the time she says she conceived and naturally the onus is on the plaintiff to prove the affirmative. The woman's evidence to this effect does not cast a special onus on the defendant to prove that he could not have been the father. He can escape liability by merely rebutting her evidence. If her evidence is so palpably false that no reasonable person would possibly believe her story, then defendant, notwithstanding his admission, may even be entitled to an absolution judgment at the close of the plaintiff's case. But it should not be overlooked that the admission is itself corroborative of the woman's testimony that they were lovers. Therefore, the evidence in rebuttal should be sufficiently strong to satisfy the Court that the evidence and the preponderance of probability favour him."

At page 215 of that report, i.e. the report of *Manakaza's* case, the following passage anent *Piliso's* case (*supra*) appears:—

> "In Piliso's case there was an admissioin of intimacy but prior to the date on which the girl said she conceived. In saying that in such circumstances the defendant need merely rebut the evidence of intimacy at the time she conceived I was expressing the Native Law on the point and had in mind the decision in Rossouw *v.* Chetty (1939 E.D.L.D. 277) which did not follow Stander *v.* MacDonald (reported in part in 1935 A.D. 325), and which appeared to be in harmony with Native Law."

With respect, it is clear that all that *Rossouw's* case, referred to in the aforegoing passage, decided, was that it was quite impossible to separate the issues of seduction and affiliation and, if the plaintiff was unworthy of credence, then it is not possible to accept her statement that she was a virgin when she first had carnal intercourse with the defendant, and to find that therefore she was entitled to damages for seduction, although she failed on the affiliation question. In other words, the Court was of the opinion that the woman was not worthy of credence and therefore did not believe her as to paternity or virginity, nothwithstanding the defendant's admission of intercourse with her. This accords with the position at Common Law, as indicated above. It is true that, at page 62 of *Van den Heever's Breach of Promise and Seduction*, it is submitted that the decisions, that the Court will not uphold the legal presumption as to paternity where it finds the woman is generally not worthy of belief, are wrong. It is

A also true that Van den Heever, J., as he then was, and Beyers, J. A., have questioned the correctness of those decisions, see Macdonald *v.* Stander, 1935 A.D. 325. But the question whether the rules concerned should be applied in modern times without qualification was left open in that case by the Appellate Division. B That being so, it is not clear to me that the decisions in question can properly be regarded as wrong and I have, therefore, assumed that the statement of the law in *Mahlobo's* case (*supra*), which is borne out by *Van der Westhuizen's, Rossouw's and Zabobeni's* cases (*supra*), is correct on the principle of *stare decisis.*

C It follows from what has been stated above that *Rossouw's* case is not an authority for the statement of the law in *Piliso's* case that the only onus on the defendant is to rebut the evidence of sexual intercourse at the time the woman said she had conceived. Moreover, in Maphanga *v.* Koza and Another, 1 N.A.C. D (S.D.) 204, in which the defendant's admission of intercourse was in respect of a time other than that at which the woman conceived, it was held that, in view of the admission, the onus was on the defendant to show by satisfactory evidence that he was not, in fact, the cause of the woman's pregnancy. In other words, E without such evidence, her testimony was to be accepted in preference to that of the defendant, unless, of course, the Court found that she was not worthy of credence. And the concluding passage at page 207 of the report of *Maphanga's* case appears to indicate that the legal position was wrongly stated in *Piliso's* case.

F That being so, and as this question does not appear to have been put to the Native Assessors previously, they were consulted thereanent in the instant case. Their opinion, with which I am in agreement, is appended. It will be seen therefrom that their view supports the statement of the law in Maphanga's case G (*supra*).

Applying this statement of the law in the instant case, it seems clear to me that the defendant has not discharged the onus resting on him as a result of his admission of intercourse with Nonti, to prove that he did not render her pregnant or, in other words, H that he is not the father of her child. That this is so, will be apparent from what follows.

The Additional Assistant Native Commissioner stated in his reasons for judgment that he had no reason to doubt Nonti's evidence and there appears to be nothing in the record indicating I that he was wrong in coming to this conclusion. It is true that counsel for appellant contended that Nonti was not worthy of belief, in that she had stated in her evidence that she had conceived on the 7th July, 1954 and given birth to a full-term child on the 4th March, 1955, i.e. after only 240 days from the J alleged date of conception, whereas the average period of gestation in the case of a full-term child is approximately 280 days. But this contention is unsound as a seven-months' infant can appear to be as fully developed as a nine-months' infant, at birth, see Mncube *v.* Mncube, 1 N.A.C. (N.E.D.) 229 and K *Taylor's Medical Jurisprudence,* Volume II (Sixth Edition), at pages 52 to 55.

The only evidence adduced by the defendant in support of his testimony that he did not render Nonti pregnant, is that Laughter had admitted that he (defendant) was not responsible for Nonti's L pregnancy. But it seems clear to me that, by this admission, Laughter did not bind the plaintiff so that it falls to be regarded merely as an expression of opinion by him. That this is so is apparent from the fact that, although Laughter made the admission in question when he returned the cattle paid for Nonti, to the defendant, he, as is manifest from the evidence as a whole, M refused to transfer the cattle from the plaintiff's to the defendant's name in the dipping records and said that this matter should await the plaintiff's return; and here it must be borne in mind that, in the eyes of the Natives, *though not, of course, in law,* the transfer of cattle in the dipping records betokens the final act in the passing of ownership.

In his reasons for judgment the Additional Assistant Native Commissioner stated that he had reason to doubt the defendant's evidence when the latter said in cross-examination that he did not notice that Nonti was far advanced in pregnancy when he slept with her in January, 1955, after he had *twalaed* her; for at that time Nonti was probably in her seventh month of pregnancy. But this adverse inference was not justified, as a woman's condition, even when far advanced in pregnancy, is not always apparent even to her husband when he sleeps with her, see *Taylor's Medical Jurisprudence* referred to above at page 56. This aspect, however, does not assist the defendant in discharging the onus of proving that he was not responsible for Nonti's pregnancy and it follows from what has been said above that he did not discharge this onus. Consequently the finding of the Court *a quo* that the defendant was responsible for Nonti's seduction and pregnancy cannot be said to be wrong.

Turning to the question of whether a customary union was contracted between the defendant and Nonti, the Additional Assistant Native Commissioner appears at first sight to have distinguished in his reasons for judgment between such a union being "consummated" and "entered into"; but it would seem, from what he states later in those reasons, that he, in fact, draws no such distinction and that by the words "no customary union was consummated" he means that no customary union came into being in the instant case or, for that matter, was contracted or entered into, as the matter had not gone beyond the engagement stage when the defendant terminated it.

In this finding, however, the Additional Assistant Native Commissioner is clearly wrong; for, as indicated above, Laughter admitted in cross-examination that he had received the fourth beast for Nonti as dowry after the defendant had *twalaed* her and, as is common cause, Laughter had thereafter permitted her to remain at the defendant's kraal. These factors clearly postulate that a customary union was contracted between the defendant and Nonti; for all the essentials of such a union are present here, viz. the consent thereto of Nonti's guardian and her being handed over, both of which are properly inferable from the acceptance of the dowry cattle for her and her being permitted to remain at the defendant's kraal thereafter, see Memami *v.* Makaba, 1 N.A.C. (S.D.) 178 at page 180, Mpantsha *v.* Ngolonkulu and Another, 1952, N.A.C. 40 (S.) at page 42 and Ngcongolo *v.* Parkies, 1953, N.A.C. 103 (S.) in which the essentials of a customary union are also summarised; and this position is not affected by the fact that the fifth and sixth dowry cattle for Nonti were not paid, see Mpantsha's case at page 42. It is true that the plaintiff was away at Cape Town, at the time, but it is manifest from his and Laughter's evidence that he authorised Laughter to represent him in the matter and that Laughter kept him fully informed of developments, including that the defendant had offered to enter into a customary union with Nonti, that he had *twalaed* her and then paid the fourth beast for her. That being so and as it is clear that the plaintiff took no action to have Nonti brought back from the defendant's kraal, he must be presumed to have consented to the customary union.

As regards the other essentials of a customary union, viz. the consent of both the bride and the bridegroom and the payment of the dowry, it is clear from Nonti's evidence that she consented to the union and, as pointed out above, Laughter admitted that he had accepted the fourth beast paid for Nonti by the defendant as dowry for her. Coming to the question of the bridegroom's consent, counsel for respondent submitted that, as the defendant had stated in his evidence that he had not married Nonti but only *twalaed* her, his consent to the customary union was lacking. This aspect was also relied upon by the Additional Assistant Native Commissioner in reaching the conclusion that no customary union had been contracted between the defendant and Nonti. But it is clear from the defendant's evidence as a whole and also from that of his witness, Richard Bacela, that what

he intended to convey thereby was that there had been no formal handing over of Nonti and that he had come by her by the *twala*.

It follows that, as stated above, a customary union was contracted between the defendant and Nonti. It also follows that the cattle paid as damages for Nonti's seduction and pregnancy merged in the dowry for her and that the plaintiff has no right to claim them in respect of damages for seduction and pregnancy, see Memami's case (*supra*) at page 181 and the authorities cited there.

In the result I am of opinion that the appeal should be allowed, with costs, and that the judgment of the Court *a quo* should be altered to one for defendant, as prayed, with costs.

OPINION OF NATIVE ASSESSORS.

Assessors in Attendance.

1. Archibald Mzazi, Tembu Assessor from Glen Grey District;
2. Stewart Zote, Tembu Assessor from Glen Grey District;
3. Elijah Qamata, Tembu Assessor Xalanga District;
4. Aaron Mgudlwa, Tembu Assessor from St. Mark's District;
5. John Ngcwabe, Tembu Assessor from St. Mark's District.

Question by President.—In Sontundu *v.* Damane and Damane, 3 N.A.C. 261, the Tembu Assessors stated: "Under Native Custom, if intercourse is proved, the woman's statement as to the paternity is usually believed, although more than one man may have visited *metshaed* her,"

This statement of Custom is accepted by this Court and it would also apply in cases in which the intercourse was admitted by the defendant. At Common Law it is immaterial whether, such admission is in respect of a period dating only one month or a year before the confinement. Is the Tembu Custom the same or not?

Reply by Elijah Qamata.—The Tembu Custom is the same as the Common Law. The woman is believed. The man must prove that he is not the father of the child.

All the other assessors agree.
J. G. Pike (Member): I concur.
K. R. Crossman (Member): I concur.
For Appellant: Mr. W. M. Tsotsi.
For Respondent: Mr. H. J. C. Kelly.

SOUTHERN NATIVE APPEAL COURT.

MBOTYA *v.* **MHLONTLO.**

N.A.C. CASE No. 69 OF 1955.

KING WILLIAM'S TOWN: 20th March, 1956. Before Balk, President, Pike and Crossman, Members of the Court.

LAW OF THINGS.

Land—Action for restitutio in integrum—*Relief limited to cases where claimant owns, or previously owned, the property concerned.*

Summary: Plaintiff sued defendant in a Native Commissioner's Court for *restitutio in integrum* in respect of a certain quitrent land, situate in a location falling within the purview of section *twenty-three* (2) of the Native Administration Act, 1927. Plaintiff also sought an order directing the Registrar of Deeds in a Native Deeds Office to transfer the land, in terms of section *twenty* of Act No. 47 of 1937, to plaintiff, and to make the necessary entry in the Deeds Registry.

At the close of plaintiff's case, absolution from the instance with costs, was decreed by the Court *a quo*.

Held: That the relief sought by way of *restitutio in integrum* is not applicable in this case in that this form of relief is limited to cases in which the plaintiff owns, or previously owned, the property, and in this case plaintiff did not, or had not, owned the property.

The order on the Registrar of Deeds sought by plaintiff was therefore also not competent.

Cases referred to:

Ndongeni *v.* Ngodwana, 1 N.A.C. (S.D.), 93.
Calder-Potts *v.* McMillan, 1956 (1), P.H., A 11 (E.D.L.D.).

Works of reference:

Lee and Honoré's Law of Obligations.

Statutes, etc., referred to:

Government Notice No. 2257 of 1928, Part II, section 2 (*a*).
Proclamation No. 43 of 1940 (read with Government Notice No. 1023 of 1940), section 10.

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

Balk (President):—

In this case the plaintiff (present appellant) sued the defendant (now respondent) in a Native Commissioner's Court for *restitutio in integrum* in respect of a certain quitrent land situate in a location and falling within the purview of section *twenty-three* (2) of the Native Administration Act, 1927. The plaintiff also sought an order directing the Registrar of Deeds in the Native Deeds Office at King William's Town to transfer the land, in terms of section *twenty* of Act No. 47 of 1937, as amended, to the plaintiff and to make the necessary entry and/or alteration in the Deeds Registry. In addition the plaintiff asked for alternative relief.

In his particulars of claim the plaintiff averred that:—

"1. The parties hereto are Natives as defined by Act No. 38 of 1927.

2. At all relevant times defendant was the Headman of Bengu Location, District Glen Grey.

3. Defendant is the registered holder of a quitrent allotment being Garden Lot No. 398, situate in the Bengu Location, Glen Grey District .

4. That the above said Garden Lot No. 398 was originally granted to Dayimani Mbotya who died after the Influenza Epidemic of 1918.

5. That the widow of the said Dayimani Mbotya utilized the said allotment until she died in or about 1950.

6. That it thereupon became the duty of the defendant in his capacity as Headman of Bengu Location to trace the heir of the said Dayimani Mbotya for the purpose of transference to him of the above-said allotment.

7. Notwithstanding his duty in this regard the defendant wrongfully, unlawfully and fraudulently applied for transfer of the allotment to himself falsely alleging that he was the nearest male relative of the late Dayimani Mbotya and therefore the person entitled to succeed to the said land. The allotment was accordingly transferred to defendant.

8 Plaintiff states that he is the nearest male descendant of the late Dayimani Mbotya and has a better title to succeed to Garden Lot No. 398, Bengu Location, than the defendant.

9. Plaintiff further states that he has never lived in the Glen Grey District but has always had relatives living there who are and were at all relevant times known to the defendant. Neither plaintiff nor his said relatives were aware of the notice calling upon the heirs of the late Dayimani Mbotya to lodge their claims to the above said land, at the time."

In response to a request by the defendant, the plaintiff furnished the names and addresses of the relatives mentioned in paragraph 9 of the aforementioned particulars.

The defendant pleaded as follows:—

"1. Defendant admits paragraphs 1, 2, 3, 4 and 5 of the plaintiff's summons, save that he says the widow died in or about 1948.

2. Defendant says he never knew the late Dayimani Mbotya.

3. As to paragraph 6 of the summons defendant says that as he was an applicant for the land, his duties as Headman were delegated to one Mzayifani Dyoldani.

4. Defendant denies that he acted wrongfully and unlawfully and fraudulently as alleged in paragraph 7 of the summons in applying for the land and puts plaintiff to the proof thereof. Defendant admits the land was transferred to him.

5. Defendant puts plaintiff to the proof of the allegations contained in paragraph 8 of the summons.

6. As to the allegations contained in paragraph 9 of the summons defendant says that he did not know there was such a person as plaintiff until he came forward to claim the land from him, nor was he aware that there were any relatives of plaintiff in this district.

Defendant puts plaintiff to the proof of his allegations in paragraph 9.

7. Defendant says that he acted bona fide in making application for the land and that to the best of his knowledge and belief the provision of the law relating to such matters was duly carried out by the officials in the office of the Native Commissioner at Lady Frere."

An amendment of the particulars of claim by the addition thereto of the following paragraph was allowed by the Court *a quo* at the commencement of the trial:—

"10. That in or about March, 1954, defendant offered to one Parafini Wokowa and to plaintiff's attorney to transfer the above said land to plaintiff and so avoid litigation because he alleged he was worried in his conscience about his manner of acquisition thereof. The above-said offer was acepted, but despite demand defendant neglected and/or refused to carry out his undertaking."

The defendant also denied this allegation.

At the close of the plaintiff's case absolution from the instance, with costs, was decreed by the Court *a quo* on the application of the defendant's attorney, and the apeal is against this decree on the ground that it was not justified on the evidence.

As absolution was decreed at the close of the plaintiff's case, without the defendant's having led evidence or closed his case, the test to be applied in determining whether the Court *a quo* was wrong or justified in so doing, is whether or not there is evidence upon which a reasonable man *might* find for the plaintiff, not ought to do so, see Ndongeni *v.* Ngodwana 1 N.A.C. (S.D.) 93.

According to the pleadings and evidence, Diamond Mbotya, who was the registered holder of the land prior to the defendant, died in the year 1918. His widow used the land until her death in the year 1950. Thercupon the defendant, who was the Headman of the location in which the land is situate, reported her death to the Land Clerk in the office of the Native Commissioner at Lady Frere and intimated that the land fell to be transferred. The defendant told the Land Clerk that the late Diamond had left no heirs and applied for the transfer of the land to him, stating that he was related to the late Diamond through a common female ancestor, viz., Nozimanga. As the defendant was the Headman of the location in which the land was situate and had applied for the transfer of the land to him, he was relieved of his duty as Headman in assisting with the transfer of the land to the late Diamond's heir, and that duty was assigned to Headman Jordan. A notice, apparently in terms of section 2 (*a*) of

Part II of the Regulations, published under Government Notice No. 2257 of 1928, was issued by the Native Commissioner, Lady Frere, on the 3rd March, as amended, 1950, calling upon any person claiming to be entitled to succeed to the land in terms of the Table of Succession, contained in the Schedule to those Regulations, to lodge his claim with the Native Commissioner within three months from the date of the notice. This notice was duly posted on the land. No claims were received by the Native Commissioner in response to the notice within the period specified therein. The land was thereupon regarded as having reverted to the South African Native Trust in terms of paragraph 9 of the Table of Succession, and transferred to the defendant on the authority of the Minister of Native Affairs, dated the 16th June, 1951 given apparently under section 6 of the Regulations referred to above, in response to the defendant's application in which he stated that he was related to the late Diamond through a common female ancestor. Here it should be mentioned that the defendant first applied for the land in writing (Exhibit D) on the 1st March, 1950, and again in writing on the 4th May, 1951, in the form of an affidavit (Exhibit C), the first application being unsworn. According to the evidence, the defendant's statement that he was related to the late Diamond through a common female ancestor is false as he was, in fact, in no way related to him.

One Yapi Hokoha, who represented the plaintiff at the trial, which he had been duly authorised to do under a power of attorney, admitted in his evidence that the plaintiff lived at Balfour and had never lived in the district of Glen Grey, and it was conceded by counsel for appellant that the defendant was unaware of the plaintiff's existence at the material time.

It also emerges from the evidence that Yapi and other male relatives of the late Diamond approached the defendant in the latter's capacity as Headman, with a view to obtaining transfer of the land, and that the defendant put them off and did not advise them that he had himself obtained transfer of the land.

It is also manifest from the evidence that Yapi himself had claimed the land as rightful heir, but had failed in this claim, that the plaintiff was the late Diamond's heir according to the Table of Succession, and that Yapi was financing the instant action with a view to obtaining the land.

Counsel for appellant contended that the defendant, in his capacity as Headman, remained under a duty to the plaintiff to make enquiries with a view to ascertaining the rightful heir to the land. But this contention is palpably unsound as it is manifest from the evidence that the defendant had been relieved of this duty, which had been assigned to Headman Jordan, as the defendant was an interested party. And since, as pointed out above, it is clear that the defendant did not know of the plaintiff's existence at the material time, the plaintiff has not made out a *prima facie* case on his averments contained in the first nine paragraphs of his particulars of claim.

In any event it is clear from the evidence that the plaintiff forfeited his rights as heir to the land as he did not apply timeously for its transfer to him in response to the notice referred to above; and there is no proof that, but for the defendant's misrepresentation, the land would have been transferred to the plaintiff by the Minister of Native Affairs. On the contrary, plaintiff appears to be a disinterested party since, for the reasons given above, it seems clear that it is Yapi who is bringing the instant action, under the cloak of the plaintiff's name.

Moreover, the relief sought by way of *restitutio in integrum* is not here applicable, in that this form of relief is limited to cases in which the plaintiff owns, or previously owned, the property, which is not the case here, see *Lee and Honoré's Law of Obligations* at pages 170 and 181. It follows that the order on the Registrar of Deeds sought by the plaintiff is also not competent here.

Turning to paragraph 10 of the particulars of claim, it seems clear to me that the evidence indicates that the defendant went no further than to express an intention to transfer the land to the plaintiff. In other words, there was no firm offer to transfer.

In any event, the plaintiff could not here sue for *restitutio in integrum* for the reason given above; nor for an order on the Registrar of Deeds concerned to transfer the land from the defendant to the plaintiff, as there is nothing to show that the Chief Native Commissioner's approval, in terms of section *ten* of Proclamation No. 43 of 1940, read with Government Notice No. 1023 of 1940, has been obtained in respect of the alienation involved. For this reason also, the other relief suggested by counsel for appellant, namely, an order on the defendant to transfer the land to the plaintiff, is not competent, see Calder-Potts *v.* McMillan, 1956 (1), P.H., A. 11 (E.D.L.D.); nor is relief by way of damages possible here, as none had been proved.

The appeal accordingly fails and falls to be dismissed, with costs.

J. G. Pike (Member): I concur.
K. R. Crossman (Member): I concur.
For Appellant: Mr. W. M. Tsotsi, Lady Frere.
For Respondent: Mr. H. J. C. Kelly, Lady Frere.

CENTRAL NATIVE DIVORCE COURT.

KOZA *v.* KOZA.

N.D.C. CASE No. 95 OF 1955.

JOHANNESBURG 19th March, 1956. Before W. O. H. Menge, President, "A" Division.

Divorce—Enforcement of orders as to custody.

Application for the enforcement of an order awarding custody of children. The facts appear from the judgment.

Held: That it is the duty of the father, as guardian, to ensure that a Court Order awarding custody is carried out; and that if he fails to do so the Native Divorce Court has the power to order that the Messenger of the Court take the necessary steps to place the children into the possession of the person to whom custody has been awarded, and that it will do so even if the child is outside the area of the Court's jurisdiction.

Cases referred to:

Kotze *v.* Kotze, 1953 (2) S.A. 184.
R. *v.* Ngunze, 1951 (4) S.A. 679.
Bam *v.* Bhadha (11), 1947 (1) S.A. 399.
Lutu *v.* Lutu and Nciweni, 1955, N.A.C. 101 (C).
Ngakane *v.* Maalaphi, 1955, N.A.C. 123 (C).

Menge (President):—

This is an application for the enforcement of a custody order made by this Court on the 17th January, 1955.

The applicant obtained a restitution order against her husband in terms of which the latter had to show cause, *inter alia*, "Why the custody of the minor children of the marriage should not be awarded to plaintiff with an order for their maintenance." On the return day, the 17th January, 1955, the parties executed an agreement in terms of which the husband withdrew his defence. In so far as the question of custody is concerned the agreement provided as follows:—

> "The custody of the oldest child, a boy named Aubrey, shall be awarded to the defendant. The custody of the two younger children, named Griffin and Sallie, shall be awarded to the plaintiff.

Each party shall have access at all reasonable times to the child or children in the custody of the other, with the right to have such children during at least one school holiday period during each year.

Defendant shall pay to plaintiff maintenance at the rate of £2 (two pounds) per month from the 1st day of February, 1955, for the two minor children Griffin and Sallie. All such payments shall be made at the offices of Messrs. B. A. S. Smits. 35 A.H.T. Building, Johannesburg."

A decree of divorce was granted on the 17th January, 1955, and the agreement was made an Order of Court.

At the time of the action both parties were resident in Johannesburg, where they are still residing; but the children concerned have at all relevant times been with the father's people in Natal where they still are.

The applicant now seeks an order as follows:—

"(*a*) An Order upon the respondent to hand over the said two children, Griffin and Sallie forthwith to your petitioner.

(*b*) Alternatively, an Order authorising and empowering the Messenger of the Court either at Dannhauser and/or at Johannesburg to take possession, charge and custody of the said two children from Elizabeth Koza or any other person or persons with whom they may be found or living and to hand same over to your petitioner.

(*c*) An Order upon the respondent to pay the costs of this application.

(*d*) And for such other or alternative relief as to this Honourable Court may seem meet."

In her affidavit the applicant alleges that the respondent is obliged in terms of the settlement to bring the two children from Natal and to hand them to her; and that he has refused to do so. Copies of correspondence are attached from which it appears that the defendant was shortly after the divorce willing to hand over the children, but did not have sufficient funds to go to fetch them.

In his replying affidavit the defendant, while not disputing this correspondence, maintains that he is not obliged to fetch the children.

Mr. Gordon, who appeared on the respondent's behalf, made three submissions: firstly, that a child cannot be attached by the Messenger of the Court; secondly, that this Court has no jurisdiction in any case to order the attachment of children in Natal, and, thirdly, that the respondent is under no obligation to fetch the children.

As to whether it is possible to order the messenger to take possession of the children and to hand them over to the applicant, it would appear that this is possible and indeed the practice in the Supreme Court—see Hahlo *The S.A. Law of Husband and Wife*, p.386, and the authorities there cited, especially Kotze *v.* Kotze, 1953 (2), S.A., 184 (C). In this case the Court granted an order that the child in question be returned within 14 days of the order; and "that in default authority be granted to the sheriff or deputy-sheriff to take the necessary steps to have the child returned to the applicant." True, in R. *v.* Ngunze, 1951 (4), S.A., 679, it was said that authority favours the view that there is no power, even in the Supreme Court, to issue a writ to attach human beings. This was an *obiter dictum*. The Natal case of Bam *v.* Bhadha (11), 1947 (1), S.A., 399, was cited in support; but, with respect, it hardly bears out that proposition. Bam's case does not decide that no such writ can ever be issued. It merely lays down that there has to be a proper order *ad factum praestandum* by the Court and that a writ can not follow upon a mere award of custody. In the case of Ngakane *v.* Maalaphi, heard in the Central Native Appeal Court on the 20th October, 1955, the Court expressed the opinion that a Native Commissioner is not empowered to order the attachment of a child as the rules

A of Native Commissioners' Courts do not provide machinery for carrying out such an order. But the Native Divorce Court is in a different position. It can issue any form of process in execution of its judgment—Rule 12 (1). In Lutu *v.* Lutu and Nciweni, heard in this Court on the 29th September, 1955, I B stated that the divorce jurisdiction vested in the Native Divorce Courts is similar to that of the Supreme Court. There is, therefore, no reason why this Court should not follow the procedure adopted in Kotze's case. I hold, therefore, that a writ such as is now applied for can be issued.

C Coming to the second point, whether this Court can order the attachment of children in Natal, Rules 12 and 43 provide that the process of this Court shall be executed by the Messenger of the Native Commissioner's Court; and under Rule 31 (15) of the Native Commissioner's Court Rules a writ issued in this D Court can be executed in Natal. The children concerned have no separate domicile from that of their parents. There seems to be no reason, therefore, why the Messenger of the Native Commissioner's Court at Dannhauser in Natal cannot be ordered to execute such a writ as is now applied for.

E In regard to the final contention of Mr. Gordon that the respondent is under no obligation to fetch the children, there is nothing in the papers before me to indicate that the two children should be given to the mother elsewhere than here where she resides. It is clear that the respondent intended this even after F the decree had been granted. Now, it seems that it is the duty of the respondent, as guardian of the children, to take steps to have the order of the Court carried out in so far as it affects the children. The order which was made does not give the mother custody, only the right to have custody. Until she obtains custody G the respondent is the custodian even if the children are with his relatives in Natal; and it is for him, the guardian, to take steps to have the custody transferred. There is no legal basis whatsoever for the contention that the applicant must go and fetch the children if she wants them, and that the respondent need not do H anything about it.

The application is granted and the following Order is made:

The respondent is ordered to hand over to the applicant the two minor children, Griffin and Sallie, on or before the 8th April, 1956, at her present residence or at such place as I may be arranged by agreement between the parties, failing which the Messenger of the Native Commissioner's Court at Dannhauser or his lawful deputy is hereby authorised and required to take the necessary steps to place the said children into the applicant's possession.

J The respondent is ordered to pay the costs of this application.

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

For Respondent: Mr. E. Gordon.

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