REPORTS

OF THE

BANTU APPEAL COURTS

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VERSLAE

VAN DIE

BANTOE-APPÈLHOWE

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NORTH-EASTERN BANTU APPEAL COURT.

MTEMBU *vs.* **KOZA.**

B.A.C. Case No. 7 of 1963.

ESHOWE: 14th August, 1963. Before Cowan, President, Craig and Ranwell, Members of the Court.

BANTU (ZULU) CUSTOM.

PRACTICE AND PROCEDURE IN CHIEFS' COURTS.

Damages: Liability and Joinder of Kraalhead of Tort-feasor.

Summary: Defendant attached certain cattle in satisfaction of a judgment he obtained in a Chief's court. In the matter which gave rise to the case Plaintiff's son David was the tort-feasor. Plaintiff sued for the return of the cattle claiming them to be his property. Defendant applied for and was granted an adjournment and then made application for the amendment of the Chief's written record "to reflect that Applicant had sued David Mtembu as 1st Defendant and Sofi Mtembu as 2nd Defendant jointly and severally the one paying the other to be absolved". The Bantu Affairs Commissioner granted the application for amendment and the Plaintiff brought that judgment on appeal.

Held: That the procedure followed in cases of this sort in Chief's Courts is as stated by the assessors and that as it was followed by the Chief in the original case in this series an amendement of the written record was not justified.

Appeal from the judgment of the Bantu Affairs Commissioner, Mtunzini.

Cowan (President):

This case originated in a chief's court, the written record of which reflects that the Defendant in the action was "David Mthembu (Father Sofi Mthembu)". Judgment was entered for four head of cattle and costs R3 and five head of cattle were subsequently attached by the tribal constable on behalf of the Plaintiff, the present Appellant. These cattle were claimed by the Respondent, Sofi Mthembu, to be his property and he brought an action against the Appellant in the court of the Bantu Affairs Commissioner for the return of the animals or their value on the ground that they had been wrongfully taken from his possession. In his plea the Respondent denied that he had wrongfully and unlawfully taken possession of the cattle and, alternatively, averred that the Appellant had voluntarily handed them over to him in satisfaction of the chief's judgment against his son, David.

On the day on which this case had been set down for hearing the Respondent applied for its postponement *sine die* "in order to apply for amendment of the Chief's judgment" and this application was granted. An application was then made to the Commissioner's court for the amendment of that judgment in the following terms:—

> "(*a*) The amendment of Record No. A158655 of Chief Lindelihle Mzimela's Court to reflect that Applicant had sued David Mtembu as 1st Defendant and Sofi Mtembu as 2nd Defendant, jointly and severally the one paying the other to be absolved."

The notice of this application was directed to the clerk of the court and to the Appellant's attorney.

At the hearing of the application, the Respondent himself gave evidence and then closed his case and after the Appellant had also given evidence the matter was postponed at the instance of the Respondent's attorney to enable the chief, who had heard the case in the first instance, to be called. The record discloses that the Appellant's attorney indicated that he had no objection to this being done and the chief was subsequently called and gave evidence.

Summarised, the evidence of the Respondent before the Commissioner was to the effect that he had sued Sofi before the chief and not David and that he had done so because it was Sofi with whom he had entered into an alleged prior arrangement about payment of lobolo. He said he understood that he had obtained judgment against Sofi. He went on to say that Sofi had pointed out a hut at his kraal which he had built for his daughter, who had borne David three children, and that he had claimed six head of cattle because she had been working for Sofi for the last ten years and he would not pay lobolo. The Appellant's evidence was, in brief, that he had received a message from the chief's court to report there with his son and that he did so, that it was never suggested to him that he was implicated in the matter and that the judgment was given against his son. He maintained that when the girl came to his son the latter was not staying at his (the Appellant's) kraal and he denied that he had ever negotiated with the Respondent about her dowry. Under cross-examination by the court, the chief said that the Respondent had sued David, that he satisfied himself that at the time of the commencement of the action David was staying at the Appellant's (his father) kraal, that the Appellant was present at the hearing and that this was done as the son was still staying at his father's kraal. Under examination by the Respondent's attorney he said that Sofi had stated that his son's lobolo would be paid by him (Sofi) and that he would obtain the cattle for this from lobolo paid for his daughter. He went on to say that he ordered Sofi to pay the "seduction fee" and added, "Sofi should have been cited as co-defendant as David, his son, was staying at his father's kraal. The girl, he said, had been staying at Sofi's kraal for one year. On being questioned by the Appellant's attorney he said, *inter alia,* "I instructed Sofi to attend court . . . Koza was the Plaintiff and David Mthembu was the Defendant. I had to call Sofi as his son was being sued. Plaintiff came to me and said he was suing Sofi. I advised him to sue the seducer. He did so. I called Sofi as Defendant was staying at his Kraal . . . The judgment was correctly registered."

On the evidence the Commissioner found that David was an inmate of Sofi's kraal at the time when the youngest child of the girl was born and that he and Sofi had attend the chief's court as Co-defendants. He granted the application for the amendment of the registration of the chief's judgment as prayed.

An appeal against this judgment has been brought on a number of grounds which it is not necessary to set out for the purposes of this judgment.

On the matter being put to the Assessors they stated unanimously that when a girl has been seduced by an unmarried son residing in his father's kraal any action for damages brought in a chief's court is one against the *tortfeasor* himself but that the father is required to attend the trial "for he should know the particulars of the case as eventually it comes upon him so that when the attachment is made it will be made at his kraal and it will then prevent him from saying that he knew nothing of the case because the boy's tort must be paid for by his father. Judgment is given against the boy but the actual amount will be paid by the father."

This court accepts that the practice and procedure in a case of this sort in a chief's court is as stated by the Assessors and it is clear from the chief's evidence that this was in fact the procedure followed by him. In view of this the amendment of the record was not justified. It follows that the appeal must be allowed with costs and the judgment of the Bantu Affairs Commissioner altered to one of "The application for the amendment of the chief's record is refused."

It is unnecessary for the purposes of this appeal to decide whether or not David was resident at Sofi's kraal at the time of the seduction of the girl nor was the Commissioner called on to give a decision on that point at the stage when he gave his ruling on the application. In finding as a fact that David was an inmate of Sofi's kraal "at the time when the youngest illegitimate child was born" the Commissioner may have prejudged what may well become an issue between the parties in the main action and this court will therefor direct that the further hearing of the case be before a different judicial officer.

For Appellant: Mr. W. E. White.

For Respondent: Mr. M. Schreiber (Davidson & Schreiber).

NORTH-EASTERN BANTU APPEAL COURT.

DUBE *vs.* **DUBE.**

B.A.C. CASE No. 22 OF 1963.

ESHOWE: 10th May, 1963. Before Cowan, President, Craig and Gentle, Members of the Court.

MAINTENANCE.

Maintenance—Act 10 *of* 1896 (*Natal*).

Summary: Plaintiff sued her husband for maintenance nine days after she left him alleging that he did not maintain her and her children.

Held: That her action was premature and her allegation of failure to maintain unfounded.

Statutes referred to:

Act No. 10 of 1896 (Natal).

Act No. 38 of 1927, Section 10 *bis*.

Cases referred to:

Letlatsi vs. Mokoteli, 1956 N.A.C. 142.

Sekgabi vs. Mahlangu, 1954 N.A.C. 164.

Appeal from judgment of Bantu Affairs Commissioner, Mahlabatini.

Cowan (President).

It appears from the evidence of the Respondent that in the main her complaint against the Appellant was that she and the children ate the same food as he did, this food did not agree with her after she had fallen pregnant, that beef and canned fish made her feel ill and that he refused to supply the special food which she asked for and that a climax was reached at the end of October when he failed to provide her with funds to consult the particular doctor she wanted and insisted that she should go to the Ceza hospital.

The Commissioner found that the Appellant had been " unreasonable towards complainant and that it was not unreasonable in the circumstances for her to leave him and decided that the Appellant 'had committed constructive desertion' ". While this court is prepared to agree that the evidence does disclose a measure of unkindness and inconsiderateness on the part of the Appellant towards his wife in the condition in which she was, we are unable on the evidence to agree that she was living under such conditions as to justify her leaving her house.

The Appellant's behaviour fell far short of constructive desertion in the sense in which such desertion is known in matrimonial actions and her house conditions were not so intolerable as to have justified her in seeking a judicial separation.

But even if the Commissioner was correct in finding that she was not unreasonable in leaving her house after their quarrel on the 3rd November the question also arises whether she was entitled to invoke the assistance of the Act at the stage when she did i.e. a matter of only some few days after she had left her husband. In this regard it must be borne in mind that he had already asked her to return to him and that the evidence by no means establishes that the breach was a final one and could not have been healed had the matter been discussed between the parties and their elders in accordance with the normal Native practice. There was no great urgency in the matter as she was staying with her brother and, it would seem, being well cared for and the most probable effect of the Bantu Affairs Commissioner holding the enquiry and making the order he did at such an early stage would be to harden the feelings of the parties and widen the breech between them.

For these reasons I feel the appeal must be allowed and the order for the payment of maintenance set aside. There will be no order as to costs which, very rightly, were not asked for by the Appellant's council.

It is ordered accordingly.

Gentle, Member, concurred.

Craig, Permanent Member:

I concur in the judgment of the learned President and add the following remarks:

Plaintiff instituted proceedings on 12th November, 1962, in terms of Section 2 of Act No. 10 of 1896 (Natal) read with Section 10 *bis* of Act No. 38 of 1927 against Defendant, her husband, claiming that " her husband Clement Dube refuses to provide necessary food and medical attention for herself and children so that she has been forced thereby to leave him and to seek support from her brother " and that " Defendant has not provided a home for her ".

On 17th November, 1962 the Bantu Affairs Commissioner gave a judgment as follows:—

" It is ordered that Clement Dube shall remit the sum of R26 per month for the support of his wife and two children through the office of the Bantu Affairs Commissioner, commencing not later than 24th November, 1962 and thereafter not later than the 7th of each succeeding month ".

It would seem that Plaintiff left Defendant's home on or about 3rd November, 1962 and instituted this action 9 days later. This, in itself, suggests that she acted prematurely in invoking the Act concerned. Mr. White, who appeared for the Appellant (Defendant), contended, and rightly so in my opinion, that Plaintiff's complaints were induced by " fads and fancies " which plague some women during pregnancy. There seems little doubt that she was provided with food but that it did not suit her taste.

This being so, it was not competent for the Bantu Affairs Commissioner to make an order as section 3 of Act No. 10 of 1896 (Natal) provides that he may do so, "if he be satisfied that the wife or child, as the case may be is in fact *without* means of support." (my underlining) They are apparently being supported presently by Plaintiff's brother.

The attention of the Presiding Officer is directed to *Letlatsi vs. Mokoteli*, 1956 NA.C 142 and the case to which it directs attention viz. *Sekgabi vs. Mahlangu* 1954 N.A.C. 164.

On the question of adequacy of maintenance there is nothing on record to show what would be regarded as adequate in regard to people living in a Bantu reserve and the Bantu Affairs Commissioner has made no finding on this except to place it at R26 on Defendant's statement that he supported his wife to that extent.

For Appellant: Mr. W. E. White (instructed by Messrs. A. C. Bestall & Uys).

For Respondent: Mr. B. Wynne (instructed by D. S. Maharaj & Co.).

NORTH-EASTERN BANTU APPEAL COURT.

MKWANAZI *vs.* **MKWANAZI.**

B.A.C. CASE No. 47 of 1963.

Eshowe: 16th August, 1963. Before Cowan, President, Craig and Gentle, Members of the Court.

JURISDICTION.

Summary: Plaintiff applied to the Court of a Bantu Affairs Commissioner to vary a custody order in respect of his six children granted by a Bantu Divorce Court.

Held: That the Bantu Affairs Commissioner's Court had no jurisdiction to entertain the application.

Cases referred to:

Nkwanyana vs. Nkwanyana 1945 N.A.C. (N. & T.) 115.

Dhlamini vs. Dhlamini 1947 N.A.C. (N. & T.) 22.

Eckard vs. Olyott 1962 (4) S.A. 189 (0).

Statutes referred to:

Act No. 9 of 1929.

Act No. 56 of 1949.

Act No. 23 of 1963.

Appeal from the judgment of the Bantu Affairs Commissioner, Mtubatuba.

Cowan, (President):

The marriage of the parties was dissolved by the Bantu Divorce Court in January, 1959, and the custody of the six minor children of the marriage was awarded to the Respondent, the Appellant being ordered to pay the sum of £4 maintenance per month in respect of the children.

This appeal arises out of an application made by the Appellant in the Court of a Bantu Affairs Commissioner for the custody of the six minor children of his marriage to the Respondent. The affidavit supporting the application was, briefly, to the effect that the parties were married by Christian rites and had six children; that they were divorced in about January, 1959, when the custody of the children was awarded to the Respondent, the

Appellant being ordered to pay maintenance for them in the sum of £4 (R8) per month; that since the divorce the Respondent has led a loose life drinking an brewing kaffir beer and shimiyane for sale and "hardly has time to attend to the welfare of the children"; that the children have on several occasions complained to him that they are being starved by the Respondent and only have one meal a day; that he has married another woman and that the Respondent is not a proper person to have the custody of the children because "in spite of her getting R8 from me every month she is unable to look after the children properly". The affidavit concludes with a prayer to the Court to grant an order awarding the custody of the children to him. There was no replying affidavit by the Respondent.

When the application came before the Court it was dismissed with no order as to costs, the Commissioner holding that his Court could not interfere with an order of the Bantu Divorce Court. This judgment has now come before this Court on appeal on the following grounds:—

1. The Bantu Commissioner erred in holding that he had no jurisdiction in this matter in as much as he was not called upon to vary or amend an order of the Bantu Divorce Court.
2. The Bantu Commissioner ought therefore to have considered the merits of Appellant's application and made a further order regarding the custody of the children.

Although there is nothing on record to indicate this, the judicial officer states in his reasons for judgment that a record of a previous action between the same parties based on the same cause of action was heard in July, 1961, when the following judgment was entered:—

"Court holds that it has no jurisdiction to amend a divorce Court order. Summons dismissed. No order as to costs". He went on to say that he held the same view of the matter when he entered judgment in this case but that, (I quote) "On having since become acquainted with the decisions in the case of *Nkwanyana vs. Nkwanyana,* 1945, N.A.C. (N. & T.) 115, *Dhlamini vs. Dhlamini*, 1947 N.A.C. (N. & T.) 22 and others, it appears that the Court was mistaken".

The cases specifically quoted by the judicial officer are no longer any authority for the different view which he has now adopted, viz., that the Court of a Bantu Affairs Commissioner has jurisdiction to amend an order of a Bantu Divorce Court relating to the custody of children. The reason underlying the decisions in these cases was that at the time, i.e. before the passing of Act No. 56 of 1949, a Bantu Divorce Court had no jurisdiction in matters of custody and that any custody order made by such Court was consequently null and void *ab initio.* and could therefore, be disregarded by a Commissioner's Court.

The amendment of Act No. 9 of 1929 by Act No. 56 of 1949 conferred jurisdiction on the Bantu Divorce Courts in matters of custody and it follows that the cases cited by the Commissioner are no longer of application as the validity of a custody order made by a Bantu Divorce Court is no longer impeachable on the ground of lack of jurisdiction.

The question as to whether one Court has the power to vary an order of another Court as to custody was dealt with in the case of *Eckard vs. Olyott,* 1962 (4), S.A. 189 (0) where it was decided that at common law only the Court which granted the original order of custody of children can set aside or vary such an order.

This Court, with respect, adopts that decision and holds that a Bantu Affairs Commissioner's Court has no jurisdiction to alter an order of custody of children originally made by a Bantu Divorce Court.

Although this was not specifically stated in the application of the Appellant, it is clear from his affidavit that what he sought was, in effect, a variation of a Bantu Divorce Court's order in regard to custody and we take the view, therefore, that the Bantu Affairs Commissioner was correct in declining jurisdiction.

The appeal is dismissed with costs.

It should perhaps be remarked that this decision has no application to maintenance orders for the variation of which provision is made in Act No. 23 of 1963.

Craig and Gentle, Members of Court, concurred.

For Appellant: Mr. W. E. White of Eshowe.

Respondent in default.

Editor's Note:

The date of coming into operation of Act No. 23 of 1963 has not yet been promulgated.

NORTH-EASTERN BANTU APPEAL COURT.

MCHUNU *vs.* **MASOKA.**

B.A.C. CASE No. 65 OF 1962.

PIETERMARITZBURG: 14th February, 1963. Before Cowan, President, Craig and Vosloo, Members of the Court.

CUSTOMARY UNION.

Customary union—consent of party absent from formal celebration—validity of such union.

Summary: The Plaintiff who was the bridegroom had to be at work and was absent from the formal celebration of the union before an official witness. It was an admitted fact that he was a major and that it was arranged that his sister should and actually did, represent him at the celebration. The consents of the bride and her father were given in public at the celebration.

Held: That the Plaintiff whose consent to the union is undisputable, cannot now he heard to challenge the validity of the union merely because such consent was not expressed by him in person at the time the union was formally celebrated.

Statutes referred to:

Sections 59, 61 & 62 Natal Native Code.

Cases referred to:

Mdhlalose vs. Nkosi 1940 N.A.C. (T. & N.) 25.

Appeal from the judgment of the Bantu Affairs Commissioner, Weenen.

Cowan (President).

The admitted facts in this case are the following:—

1. That during the year 1959 Plaintiff and Defendant's daughter Delisile intended to enter into a customary union.
2. That Plaintiff engaged the services of the official witness and paid him his fee.
3. That the date of the celebraton of the union was fixed.
4. Because Plaintiff was to be away at work on that day it was arranged that his sister Phelene would represent him.

5. That at the celebration the official witness was present tokether with Defendant. Defendant's daughter Delisile, Plaintiff's father and the guests and Plaintiff's sister Phelene.
6. That the official witness asked Defendant whether he gave consent to the marriage of his daughter and Defendant answered in the affirmative. Phelene was present when these questions were asked.
7. Plaintiff is a major.
8. When Plaintiff returned from work he resided with Defendant's daughter as man and wife and he, Defendant and Defendant's daughter were all under the firm impression that a valid customary union had taken place between Plaintiff and Defendant's daughter.
9. That at the aforesaid alleged celebration the lobolo was duly agreed upon at 10 head and the Nqutu beast and of these 9 head and the Nqutu beast were delivered.
10. That Plaintiff had sexual intercourse with Defendant's daughter.
11. That the aforesaid union was not registered.

In arguing the first ground of appeal, Appellant's council contended that although Section 59 of the Natal Code of Native Law did not expressly provide that its celebration was one of the essentials of a customary union it nevertheless did so by implication as the intended wife is required by this section to make a declaration to the official witness at the celebration of the union that the union is with her own free will and consent. He argued further that this interpretation of the section derived added support from the fact that there are further references to such a celebration in sections 61 and 62 of the Code and submitted that without such a celebration there could be no valid customary union.

In the case of *Mdhlalose vs. Nkosi*, 140 N.A.C. (T. & N.) 25, this Court expressly laid down ". . . that a correct interpretation of Section 59 does not require that a gathering of people for the purpose of feasting and dancing is a necessary ingredient of a valid customary union. In our opinion such a union can be entered into even though it is not accompanied by the usual celebrations of feasting and dancing." We accept this as being the correct interpretation.

As we hold that a celebration is not one of the essentials of a customary union it follows that the Plaintiff, whose consent to the union is indisputable, cannot now be heard to challenge the validity of the union merely because such consent was not expressed by him in person at the time the union was formally celebrated.

It follows also that the second ground of appeal falls away.

In the result the appeal is dismissed with costs.

Craig and Vosloo, Members, concurred.

For Appellant: Adv. W. O. H. Menge instructed by Hellett & De Waal.

For Respondent: Adv. T. G. Juul instructed by Nel & Stevens.

NORTH-EASTERN BANTU APPEAL COURT.

KESWA *vs.* **NGCEMU:**

B.A.C. CASE No. 73 OF 1963.

PIETERMARITZBURG: 26th November, 1963. Before Cowan, President, Craig and Chatterton, Members of the Court.

PRACTICE AND PROCEDURE

Bantu Affairs Commissioner's Court Rules: Provisions of Rule 74 (2).

Summary: An application to a Bantu Affairs Commissioner's Court for the rescission of a default judgment did not set forth the grounds of the applicant's defence to the action.

Held: That the provisions of rule 74 (2) of the Rules for Bantu Affairs Commissioner's Courts do not oblige a party applying for the rescission of a default judgment to set forth in every case the grounds of his defence to an action. He may, as an alternative in an appropriate case set forth the grounds of his objection to the judgment.

Appeal from judgment of the Bantu Affairs Commissioner, Ixopo.

The following is an excerpt from the President's judgment, the remainder of the judgment being not material to this report.

Cowan, President:

Apart from remarking that both these documents (the summons and the plea) are very badly drawn up indeed — the summons, to give but one example, does not allege that the parties are Bantu — I do not consider it necessary to take this matter any further as it seems to me that both counsels' arguments were based on a faulty reading of Bantu Affairs Commissioner's Court Rule 74 (2). This rule does not oblige a party applying for the rescission of a default judgment to set forth in every case the grounds of his defence to an action. He may, as an alternative in an appropriate case, set forth the grounds of his objection to the judgment. This he has clearly done and as grounds (*c*) and (*d*) referred to above are good grounds for the rescission of the judgment his application should have succeeded.

Craig and Chatterton, Members, concurred.

For Appellant: Adv. W. O. H. Menge instructed by Leslie Simon & Co.

For Respondent: Adv. J. H. Niehaus instructed by H. L. Bulcock.

NORTH-EASTERN BANTU APPEAL COURT.

KUMALO *vs.* **MAJOZI.**

B.A.C. CASE No. 94 OF 1963.

PIETERMARITZBURG: 24th March, 1964. Before Cowan, President; Craig and Van der Westhuizen, Members of the Court.

JURISDICTION.

Jurisdiction of Chief's Court—One of the interested parties an Indian who was not joined in the action.

Summary: Plaintiff sued Defendant in a Chief's Court for the handing-over of a house allegedly bought by him which house was situated on land belonging to an Indian outside of a Bantu Reserve.

Held: The Chief had no jurisdiction to try the case.

Case referred to:

Nqeto vs. Zenzile, 1936, N.A.C. (C. & O.), 114.

Appeal from the Court of the Bantu Affairs Commissioner, Howick.

Cowan, President:

This case originated in the Court of a Chief's Deputy and the claim in that Court is recorded as being: "Plaintiff claimed his house." The Defendant's reply to this claim was: "Defendant denied allegations" and the judgment given by the Chief was: "For Plaintiff for his house with costs R3." In his reasons for judgment the Chief's Deputy stated *inter alia,* "The Indian who sold the house to the Plaintiff also gave evidence to the effect that he had sold the house to the Plaintiff and not the Defendant."

This judgment was appealed to the Court of the Bantu Affairs Commissioner and the Plaintiff then restated his claim as follows:—

> The Appellant is in wrongful and unlawful possession of a certain house situated in Merrivale, Natal, the property of the Respondent.

Wherefore Respondent claims:—

1. An Order compelling the Appellant to return the said house to the Respondent.
2. An Order ejecting the Appellant from the said house and all persons claiming occupation by through or under the Appellant.
3. Costs of suit.

In his plea to this claim the Defendant denied that he was in wrongful and unlawful possession of the said house and put the Plaintiff to the proof thereof.

Very briefly, the evidence adduced on behalf of the Plaintiff was to the effect that one Dinga Mwelase had owned (*sic*) a certain house situated on the property of an Indian which he had sold for R22 to the ex-wife of the Plaintiff who had bought it on behalf of the Plaintiff and that the Defendant was now collecting rental from the persons who occupied the house and paying rental to the Indian on whose ground it was. At the close of the Plaintiff's case the Defendant's Attorney applied for an absolution judgment and this being refused he closed his case whereupon the Commissioner entered the following judgment: "Appeal upheld and Chief's judgment altered to one of absolution from the instance. Costs to follow the suit costs for Defendant. Defendant declared a necessary witness."

In his reasons for judgment the Commissioner says that he could not confirm the Chief's judgment and was obliged to uphold the appeal because, according to the Chief's reasons for judgment, the evidence in that Court was that the Plaintiff had acquired the house from an Indian whereas in his own Court it was alleged that he had bought the house from Dinga Mwelase. The Commissioner erred in having regard to the evidence of a witness called before the Chief's Court only and not called before his own Court as he could determine the case only on the evidence before him (See *Nqeto v. Zenzile,* 1936, N.A.C. (C. & O.), 114]. It may re remarked here that the cases cited, and relied on, by the Commissioner are not in point as they have reference to the written records of Chiefs' Courts and not to a Chief's reasons for judgment.

This Court, *mero motu,* raised the question as to whether a Bantu Chief had jurisdiction to hear an action of this nature based, as it was, on the lease of immovable property. Mr. Menge, who appeared for the Appellant, contended that he did have such jurisdiction submitting that although a contract of

lease was unknown to Bantu law in ancient times such law is constantly developing and that a Contract of Lease is now cognisable by it. In developing this submission he maintained that the claim was in effect an application for a declaration of rights in respect of the house and argued that it was competent for a chief to make such a declaration as it would only be binding between the parties. This court finds it unnecessary for the purposes of this case to decide the question whether or not a Chief would have jurisdiction in an action of this nature where all the interested parties are Bantu residing within his area of jurisdiction as here one of the interested parties was an Indian over whom the Chief concerned had no jurisdiction. He was the owner of the property in question and as such had a direct and substantial interest in any order which the Chief's Court might make and was therefore a necessary party and should have been joined in the action as the record does not disclose that he had waived his rights to be so joined. As he was precluded from appearing in the Chief's Court as a party, the Chief should, if only for this reason alone, have declined jurisdiction in the matter.

In the result, the appeal is dismissed with costs but the judgment of the Bantu Affairs Commissioner is altered to one of "Appeal upheld and the judgment of the Chief's Court is altered to read 'Claim dismissed with costs'. As the point on which this appeal was decided was raised by the Court itself and not by either of the parties, there will be no order as to costs in this Court or the Bantu Affairs Commissioner's Court."

The Judicial Officer who presided at the trial has signed himself as "Landdros", "Acting Bantu Affairs Commissioner" and again, under the judgment, as "Acting Magistrate". As the law stands he could have heard the case only as a Bantu Affairs Commissioner and this is the designation he should have used.

Craig and Van der Westhuizen, Members, concurred.

For Appellant: Adv. W. O. H. Menge instructed by E. H. R. Tetren.

For Respondent: Adv. P. Roux instructed by Leslie Simon & Co.

NORTH-EASTERN BANTU APPEAL COURT.

XABA *vs.* **NGWENYA.**

B.A.C. CASE No. 95 OF 1963.

PIETERMARITZBURG: 24th March, 1964. Before Cowan, President; Craig and van der Westhuizen, Members of the Court.

COMMON LAW.

Alienation of affections—what must be proved.

Summary: Plaintiff sued Defendant for R300 damages for alienation of his wife's affections. The Bantu Affairs Commissioner absolved Defendant from the instance on the ground that the probabilities favoured him in respect of unseemly conduct alleged. On appeal it was held that that ground was not well founded but the judgment was confirmed for the reasons stated below.

Held: Despite proof of unseemly association between Defendant and Plaintiff's wife the perseverance of the former in a course of conduct with the deliberate object of alienating the affections of the latter from Plaintiff had not been established.

Cases referred to:

Brand vs. Minister of Justice and another 1953 (4) S.A.L.R. (A.D.) 712 at page 716.

Woodiwiss vs. Woodiwiss, 1958 (3) S.A.L.R. 609 at page 617.

Van den Berg vs. Jooste, 1960 (3) S.A.L.R. 71 at page 73.

Maxangalabe vs. Sotondoshe, 1940 N.A.C. (C. & O.) 134.

Appeal from the Court of Bantu Affairs Commissioner, Ladysmith.

(Only the relevant excerpt from the judgment is reported).

Cowan, (President):

The following note was made by the Commissioner during the course of the trial:—

> "Mr. Adv. Menge formally reduces the amount claimed by R2700 to R300 based solely on alienation of affection. No *injuria,* no loss of consortium".

The impression made on this court by this amendment of the claim was that the action itself had been changed to one based solely on a claim for alienation of affection and it raised the point whether such an action did in fact exist in our law. Mr. Menge, who appeared for the Appellant in this Court also, then explained, if we understood him correctly, that it had not been intended to change the basis of the action but merely to restrict the damages claimed for alienation of affection only. How damages can be claimed in respect of alienation of affection only without relying on consortium, of which it is an element, and on injuria, on which it is based, he did not explain.

But, even if we accept, for the purpose of this case, that the effect of the amendment was not to alter the basis of the action but merely to reduce the total amount of damages claimed, this Court is of the opinion that the Appellant has failed to establish his case. He gave no details at all of what was entailed in what he referred to as the "carrying on" between the Respondent and Reginah up to 1957 nor did he speak to any incidents which would have justified the Court in drawing an inference that the Respondent had persevered in behaving towards Reginah with the deliberate object of enticing her to leave the Appellant, that he succeeded in doing so and that he thus deprived the Appellant of her consortium and that as a result Reginah had lost her affection for the Appellant. [*Woodiwiss vs. Woodiwiss,* 1958 (3) S.A. 609 at p. 617; *Van den Berg vs. Jooste,* 1960 (3) S.A. 71 at p. 73.]

The appeal was dismissed with costs.

Craig and van der Westhuizen, Members, concurred.

For Appellant: Adv. W. O. H. Menge instructed by H. J. Bhengu.

For Respondent: Adv. P. Roux instructed by Alec M. Edelson.

NORTH-EASTERN BANTU APPEAL COURT.

MATITI *vs.* MATITI.

B.A.C. CASE No. 6 OF 1964.

PIETERMARITZBURG: 26th March, 1964. Before Cowan, President; Craig and van der Westhuizen, Members of the Court.

MAINTENANCE.

Act No. 10 of 1896 (Natal)—Essential to prove that claimants have been left without means of support.

Summary: Plaintiff (Respondent) summoned Defendant (Appellant) before a Bantu Affairs Commissioner alleging that he had deserted her and her child and calling on him to show cause why an order in terms of Section 3 of Act No. 10 of 1896 (Natal), for maintenance should not be made against him. The Bantu Affairs Commissioner made an order for the payment of R10 per month.

Held: There was no evidence to establish that the Respondent and her child had been left without means of support, that the Bantu Affairs Commissioner's judgment should be set aside and the matter remitted back to him for enquiry into the question and the entry of a fresh order.

Cases referred to:

Campbell vs. Campbell, 1956 (3) S.A.L.R. 234.

Statutes referred to:

Act 10 of 1896 (Natal).

Appeal from the Court of the Bantu Affairs Commissioner, Pietermaritzburg.

Cowan, President:

The Appellant was summoned to appear before the Bantu Affairs Commissioner's Court on the complaint of the Respondent, his wife, that he had deserted her and his child, Pilisiwe, and was called upon to show cause why he should not support them and why an order should not be made against him in terms of Section 3 of Act No 10 of 1896 (Natal) directing him to pay an allowance towards their maintenance. After enquiring into the matter, the Commissioner ordered him to pay an amount of R10 a month for their support until the child reached the age of 15 years and directed that all payments should be made through his office.

The Commissioner, in his reasons for judgment, says that he found the following facts proved:—

(*a*) That Plaintiff and Respondent are married according to Christian rites.

(*b*) That Respondent is in law obliged to maintain his wife and child Pilisiwe.

(*c*) That Respondent is the natural father of the child Pilisiwe age 3 months.

(*d*) That Respondent is in a position to maintain his wife and child.

(*e*) That Respondent has deserted his wife and child Pilisiwe without providing any adequate means of support;

and in this Court, Counsel for the Appellant confined his address to the findings under paragraph (*e*).

He submitted, firstly, that the evidence did not justify a finding that the Appellant had deserted the Respondent as it was customary for a Bantu man to send his wife to her parents after a quarrel. This is admittedly so but in the present case the Respondent's unrefuted evidence was to the effect that she had not gone voluntarily but had been forced to do so and that she had done this because he said that he did not love her any more. In her evidence, the Respondent had also said that she was not prepared to return because the Appellant was killing her by assaulting her and the Appellant's Counsel argued from this that there had been no desertion of her by the Appellant. He con-

tended, as was also done in the case of *Campbell vs. Campbell*, 1956 (3) S.A. 234, that the unlawful desertion referred to in Section 2 should be construed as indicating the same sort and degree of desertion as malicious desertion in matrimonial matters. This Court cannot agree with this contention and for the same reasons, which it respectfully adopts, as were given in that case. By assaulting her and forcing her to return to her father for the reasons she gave, he acted wrongfully, and unlawfully deserted her within the meaning of the section.

Counsel for the Appellant submitted, secondly that there was no evidence establishing that the Respondent and the child had been left without means of support. The Commissioner himself has made no finding on the point—his finding being merely to the effect that the Appellant himself had not provided adequate means of support—nor is the evidence on record such as would, in our view, justify this Court in making a positive finding on the point.

For this reason the appeal is allowed and the judgment of the Bantu Affairs Commissioner is set aside. The matter is remitted back to the Bantu Affairs Commissioner in order to enable him to enquire further into the question as to whether the Respondent and/or the child are in fact without means of support and, thereafter, for the entry of a fresh order. The Appellant did not ask for costs and no order as to costs will be made.

This Court is constrained to comment very adversely on the inordinate delay in the submission of the record in this matter to the Registrar. Rule 10 of Government Notice No. 2887 requires the Clerk of the Court concerned to transmit the record within fourteen days of receiving notice of appeal. Here, although notice of appeal was lodged on the 4th July, 1963, the record was not received by the Registrar until towards the end of January, 1964—a delay of approximately eight months—and the responsible officer has seemingly not even considered it meet to tender an explanation or apology. Should any future lapse of this nature occur the matter will be taken up through administrative channels.

Craig and van der Westhuizen, Members, concurred.

For Appellant: Adv W. O. H. Menge instructed by Mr. Sam Sareff.

Respondent in person.

SOUTHERN BANTU APPEAL COURT.

MTEMBU vs. MKONA.

CASE No. 6 OF 1963.

UMTATA: 29th January, 1964. Before Balk, President, Yates and Collen, Members of the Court.

EVIDENCE.

Evidential value of receipts for money.

The facts of this case are not material to this report.

Held: That receipts for money issued by a third person to one of the parties are not probative of the truth of their contents as between the parties, being hearsay in this respect.

Referred to:

Nokoyo versus Gida, 1962, N.A.C. 52 (S).

Balk (President):

This is an appeal from the judgment of a Bantu Affairs Commissioner's Court for Defendant (now Respondent), with costs, in an action instituted against him by the Plaintiff (present Appellant) for certain three head of cattle or their value, R36 each, and sheep stated variously in the summons to number eight and ten or their value, R5 each.

In the particulars of claim in the summons, the Plaintiff averred that he was the eldest son and heir of the late Mtembu (hereinafter referred to as "the deceased"), that the Defendant had paid five head of cattle as dowry for his wife, Nontlanga, to the deceased, that in or about the year 1955 the Defendant had paid "by word of mouth" a further two head of cattle to the deceased as dowry for her, that the third beast claimed was the progeny of one of these two head and that these three cattle were in the Defendant's possession. The Plaintiff further alleged that the sheep and two head of cattle had been received by the Defendant as dowry for a girl named Novume who had lived at the Defendant's kraal and whose "dowry-eater" was the deceased, and that these cattle had been accounted for but not the sheep.

In his plea the Defendant stated that in addition to the five head of cattle, he had paid R100 to the deceased at a later date, i.e. in the year 1956, representing five further dowry cattle and denied that the three head of cattle claimed formed part of the dowry paid for his wife. He alleged that six of the eight sheep received by him as dowry for Novume had died, that their deaths had been reported to the deceased and that the remaining two sheep and the two head of cattle paid in respect of Novume's dowry had been taken by the deceased.

The appeal is confined to fact.

The Commissioner gives cogent reasons in support of his judgment. As pointed out by him, it is strange that the deceased who did not die until the year 1960, should not have enforced the payment of further dowry over a number of years by resorting to the *teleka* custom if, as the Plaintiff would have the Court believe, the Defendant had paid five head of cattle only

on this score and failed to hand over the others paid "by word of mouth". This improbability is heightened by the Plaintiff's obviously false denial in the course of his evidence that he was aware of the *teleka* custom in the light of his admission that he had grown up in Bomvana territory where this custom is practised as conceded by the Plaintiff's witness, Moffat Kweza. However, as also pointed out by the Commissioner, it is common cause that the deceased and the Plaintiff came to fetch Nontlanga from the Defendant's kraal in the year 1959 for the purpose of providing her with a wedding outfit which, bearing custom in mind, they would hardly have done whilst a substantial part of the dowry remained undelivered. That this is so was also conceded by Moffat Kweza. Then, there is this feature in the evidence for the Plaintiff relied upon by the Commissioner for treating that evidence as suspect, that the Plaintiff's only witness, Moffat, first described one of the two cattle alleged to have been paid by the Defendant "by word of mouth" as an *ntusi* ox whereas is had been described by the Plaintiff as being a *gwangqa* ox and it was only on the Plaintiff's prompting Moffat whilst the latter was testifying that he altered his description of the ox to correspond with the description given by the Plaintiff in his evidence.

According to the Plaintiff's evidence only eight sheep were received by the Defendant in respect of Novume's dowry in addition to the two head of cattle. That six of the sheep died, that their deaths were reported to the deceased and to the Plaintiff and that they took away the remaining two sheep at the same time as the two cattle is manifest from the testimony of the Defendant and his wife; and their evidence in this respect gains support from the fact that, as is common cause, the deceased took two cattle yet he did not institute proceedings against the Defendant in respect of any of the sheep and the Plaintiff's explanation for the deceased's failure to do so, viz., that the Defendant evaded the issue and was absent, is singularly unconvincing on the face of it.

Mr. Airey in his argument on behalf of the Appellant submitted that in the light of the heavy expenditure which the Defendant had met, as disclosed by his cross-examination, it was highly improbable that he would still have had R100 over in August, 1956, when he stated he paid this amount to the deceased. This submission is, however, not well founded as it is manifest from the Defendant's replies under cross-examination that he could have had considerably more than R100 over from his earnings after meeting his expenses during the period in question.

Admittedly, the Commissioner should not have relied on the two receipts for money (Exhibits "C" and "D") put in by the Defendant's wife, as being probative of the time when two of the three cattle claimed by the Plaintiff had been purchased by the Defendant as, apart from the fact that these receipts indicated when the cattle had been released from pledge by the Defendant and not when they had been purchased by him, they had been issued by a third person to the Defendant and so were not probative of the truth of their contents as between the Defendant and the Plaintiff, being hearsay in this respect, see *Nokoyo versus Gida*, 1962, N.A.C. 52 (S). This error does not affect the Commissioner's finding for the Defendant as the other factors dealt with above amply justify it indicating, as they do, a decisive preponderance of probability in favour of the Defendant.

The appeal should, accordingly, be dismissed, with costs.

Yates and Collen, Members, concurred.

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

For Respondent: Mr. K. Muggleston of Umtata.

SOUTHERN BANTU APPEAL COURT.

MAPIPA vs. NDUNGANE.

CASE NO. 29 OF 1963.

UMTATA: 4th February, 1964. Before Balk, President, Yates and Gordon, Members of the Court.

EVIDENCE.

Seduction and pregnancy—admission by Defendant of sexual intercourse—onus on Defendant to prove that he was not responsible for pregnancy. Period of gestation—necessity for medical evidence.

BANTU LAW AND CUSTOM.

Seduction and pregnancy—necessity for timeous report by girl of her condition to her parents.

Summary: The Plaintiff appealed to this Court against the judgment of a Bantu Affairs Commissioner's Court for Defendant, with costs, in an action in which the latter was sued for damages for having seduced and rendered pregnant the Plaintiff's daughter, Nozizwe.

The Commissioner found that the Defendant had had sexual intercourse with Nozizwe in November 1961 but held that he could not have been responsible for her pregnancy as she gave birth to a child on the 16th October, 1962, and he, the Commissioner, considered that her pregnancy could not have lasted so long, i.e. 327 days, but no evidence was adduced to support this view.

The Commissioner also drew an adverse inference from Nozizwe's evidence that she had only reported her pregnancy to her father in May 1962, averring that this suggested that this would have been consistent with her having conceived in January or February 1962 and not in November 1961, as alleged by her.

Held: That the Commissioner's finding that the Defendant had had sexual intercourse with Nozizwe in November 1961 placed on him the onus of proving that he was not responsible for her pregnancy which resulted in the birth of her child on the 16th October 1962, if he was to escape liability for damages therefor.

Held further: That, in the absence of evidence to support his view, the Commissioner was not justified in coming to the conclusion that Nozizwe's pregnancy could not have lasted for 327 days, and he should not have taken judicial cognizance of this fact.

Held further: That the fact that Nozizwe had only reported her pregnancy to her father in May 1962 was not more consistent that she had conceived in January or February 1962 than that she had done so in November 1961, as in both cases her report to her father was late, as custom required that the report to her parents of her condition should have been made as soon as she was aware thereof.

Cases referred to:

Batyi d.a. versus Nongeula and Ano., 1962, N.A.C. 86 (S), at page 88.

Mitchell versus Mitchell and Ano., 1963 (2), S.A. 505 (D), at pages 507 and 508.

Rex versus Sewgoolam, 1961 (3) S.A. 79 (N), at page 83.

Balk (President):—

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

This appeal is from the judgment of a Bantu Affairs Commissioner's Court for Defendant (now Respondent), with costs, in an action in which he was sued by the Plaintiff (present Appellant) for five head of cattle or their value, R150, as damages for having seduced and rendered pregnant the plaintiff's daughter, Nozizwe.

In his plea the Defendant denied the alleged seduction and pregnancy so that the onus of proof rested on the Plaintiff.

The appeal is brought on the following grounds:—

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

2. The judgment is bad in law in that the Court having found that intercourse took place between Nozizwe, the Plaintiff's daughter and the Defendant towards the end of November, 1961 and the finding and admission by the Court that this has the same effect as an admission of intercourse by the Defendant himself at that time, the principle enunciated in the case of *Mda. versus Gcanga* 1957 N.A.C. page 50 should have been applied by the Court and judgment should have been given for Plaintiff as the Defendant has not established that it was physically impossible for him to be the father of the child born to the Plaintiff's daughter on the 16th October, 1962."

The Commissioner found proved that the Defendant had had sexual intercourse with Nozizwe during November, 1961 and properly so as her evidence to this effect is corroborated by that of Gertrude Adonis and their evidence is consistent in all material respects and in keeping with the probabilities whereas the Defendant's evidence is obviously unreliable as is apparent from the blatant inconsistencies therein anent the instructions he gave to his attorney as regards whether Nozizwe's "stomach" was brought to him. It is true that there is an inconsistency in Nozizwe's evidence as to whether her father, the Plaintiff, accompanied her when her "stomach" was taken to the Defendant but this inconsistency is of little importance as it may well be due to faulty recollection in that, according to her, her "stomach" was taken to the Defendant twice and the Plaintiff accompanied her only on the first occasion when the Defendant was away from his home.

The Commissioner's finding that the Defendant had had sexual intercourse with Nozizwe in November, 1961 placed on the Defendant the onus of proving that he was not responsible for her pregnancy which resulted in the birth of her child on the 16th October, 1962 if he was to escape liability for damages therefor, see *Batyi d.a. versus Nongcula and Ano.* 1962 N.A.C. 86 (S), at page 88.

The Commissioner held that the Defendant had discharged this onus. In coming to this conclusion the Commissioner relied in the main on Nozizwe's evidence that the last time on which the Defendant had been intimate with her was towards the end of November, 1961 and that her child had been born on the 16th October, 1962 so that, according to her, her period of gestation

was about 327 days. The Commissioner considered that her pregnancy could not have lasted so long but, as submitted by Mr. Muggleston in his argument on behalf of the Appellant, there is no evidence to support this view and the Commissioner was not entitled to take judicial cognizance that such was the case, see *Mitchell versus Mitchell and Ano.,* 1963 (2), S.A. 505 (D), at pages 507 and 508, cited by Mr. Muggleston; also *Rex versus Sewgoolam,* 1961 (3), S.A. 79 (N), at page 83.

The Commissioner also drew adverse inference from Nozizwe's evidence that were not justified. He felt that her failure to report her pregnancy to her father, the Plaintiff, until May, 1962 suggested that she only became aware of her condition at about or shortly before that time which would be consistent with her having conceived in January or February, 1962. There is, however, no basis for this inference in the light of Nozizwe's explanation that she did not report her condition to the Plaintiff until she had gone to Harding as she feared her parents but, apart from the fact that there is no evidence that Nozizwe conceived in January or February, 1962, her conception at that time would not be more consistent than at the time stated by her, viz., towards the end of November, 1961 bearing in mind that in both cases her report to the Plaintiff in May, 1962 of her pregnancy was late as custom required that the report to her parents of her condition should have been made as soon as she was aware thereof. The Commissioner was also of the opinion that the fact that Nozizwe went to Harding in April, 1962 for an indefinite period suggested that she was not then aware of her condition which was in conflict with her evidence that she had conceived in November, 1961, i.e. five months prior to her going to Harding. This inference also has no basis as it was not put to Nozizwe why she had gone to Harding for an indefinite period and her evidence suggests that she may well have done so as she feared her parents.

There are no other factors on which the Commissioner relied in finding for the Defendant and none are apparent from the evidence.

It follows that the Defendant failed to show that he was not responsible for Nozizwe's pregnancy and the Plaintiff is, therefore, entitled to succeed in his claim for damages.

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

A further matter calls for comment. The Commissioner did not record the date of the trial of this case or of the judgment entered by him therein. According to the affidavit filed in support of the application for condonation of the late noting of the appeal, judgment was given by the Commissioner's Court on the 16th May, 1963. It would appear from the record that that judgment was entered on the same day as the trial of the case. The notice of set down, however, indicates that the case was to be heard on the 13th December, 1962; yet there is no record of any postponements. It must be impressed on the judicial officer or officers concerned that, in terms of paragraph (*d*) of sub-rule (1) read with sub-rule (3) of Rule 55 of the Rules for Bantu Affairs Commissioners' Courts, they are required to keep a proper record of all the proceedings before them including postponements and the dates of trial and judgments, see *Dlodlo versus Dambuza.* 1963 (1) P.H., R.11 (S).

Yates and Gordon, Members, concurred.

For Appellant: Mr. K. Muggleston of Umtata.

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

SOUTHERN BANTU APPEAL COURT.

QAKAMBA AND ANO. vs. QAKAMBA.

CASE No. 30 OF 1963.

UMTATA: 28th January, 1964. Before Balk, President, Yates and Collen, Members of the Court.

BANTU LAW AND CUSTOM.

Succession—in Tembu law adulterine child does not oust legitimate son of same house from heirship therein.

Summary: In a dispute as to the ownership of certain eight head of cattle it was agreed between the parties at the trial of the action in the Bantu Affairs Commissioner's Court that the Plaintiff's right to the cattle was contingent upon his being the heir of the First Defendant's late husband, Qakamba, and the case was decided by the Commissioner on this basis. It was common cause that the Plaintiff was born to the First Defendant during the subsistence of her customary union with Qakamba, that the Plaintiff is older than the Second Defendant, and that the latter is Qakamba's legitimate son of his customary union with the First Defendant, of which there are no other surviving sons. On the evidence the Commissioner upheld the Defendants' allegation in their plea that the Planitiff was an adulterine child, but, relying on the dictum of the President of the Court in the case of *Madyibi versus Nguva,* 1944, N.A.C. (C. and O.) 36, found that the Plaintiff was the deceased's heir notwithstanding that he was adulterine.

Held: That the President's opinion which conflicted with that of the other two members of the Court and that of the assessors in the case of *Madyibi versus Nguva,* 1944, N.A.C. (C. and O.) that in Tembu law an adulterine son had the same right of succession as the legitimate son unless disinherited does not, without more, suffice to show that the previous decisions of that Court to the contrary are wrong and, therefore, in keeping with the *stare decisis* rule, these decisions ought to be followed, and that the Commissioner therefore erred in finding that the Plaintiff, and adulterine son, ousted the Second Defendant, the legitimate son in the same house, as heir of the deceased.

Referred to:

Madyibi versus Nguva, 1944, N.A.C. (C. and O.) 36.

Sidubulekana versus Fuba, 1 N.A.C. 49 and 52.

Baatje versus Mtuyedwa, 1 N.A.C. 110.

Gebuza versus Gebuza, 1938 N.A.C. (C. and O.) 15.

Balk (President):

This is an appeal from the judgment of a Bantu Affairs Commissioner's Court for Plaintiff (now Respondent) as prayed in a vindicatory action in which he sued the two Defendants (present Appellants) for certain eight head of cattle or their value, with costs.

In their plea the Defendants alleged that the Plaintiff was the adulterine child of the First Defendant, that seven of the eight cattle claimed had been derived from the dowries of the First Defendant's daughters whose guardian was the Second Defendant, and that the remaining beast also belonged to the latter.

It appears from the Commissioner's notes of the proceedings that the parties agreed that the Plaintiff's right to the cattle in dispute was contingent upon his being the heir of the First Defendant's late husband, Qakamba (hereinafter referred to as "the deceased") and the case was decided by the Commissioner on this basis. That this was the correct basis of decision was conceded by Messrs. Airey and Knopf who appeared in this Court for the Appellants and the Respondent, respectively.

It is common cause that the deceased entered into a customary union with the First Defendant, that the Plaintiff was born to the First Defendant during the subsistence of this union, that the Plainiff is older than the Second Defendant and that the latter is the deceased legitimate son of his customary union with the First Defendant of which there are no other surviving sons.

The Commissioner found that the Plaintiff was an adulterine child but that he was the deceased's heir as it had not been shown that the deceased had repudiated him.

The appeal is brought on the following grounds:—

"1. The Judgment is against the weight of evidence and is not supported thereby.

2. Having accepted that Plaintiff is an illegitimate child, the Court should have held that he was not entitled to succeed to the Estate of the late Qakamba in the presence of Qakamba's legitimate son Mhlope."

The Commissioner's finding that the Plaintiff was an adulterine child is supported by the First Defendant's evidence and that of defence witnesses, Nofungile and Ntasi, and I see no reason for holding that the Commissioner was wrong therein nor was any cogent reason to this effect advanced in argument on appeal.

The Commissioner relied on the dictum of the President of the Court in *Madyibi versus Nguva,* 1944, N.A.C. (C. & C.) 36 in finding that the Plaintiff was the deceased's heir notwithstanding that he was adulterine and that the deceased had a legitimate son, viz., the Second Defendant, by his customary union with the Plaintiff's mother, the First Defendant. That dictum, and the opinion of the Bantu Assessors in that case was relied upon by Mr. Knopf in his argument for Respondent. It is true that in that case the President is at page 39 reported to have stated that "in Tembu law an adulterine son acquires full rights of accession and inheritance in either Great, Right-Hand or *Ixiba* Houses unless and until he is publicly disinherited by his father" and that a similar view was expressed by the Tembu assessor in that case, i.e. that unless an adulterine son is disinherited by the man who was the mother's husband in a customary union at the time of the son's conception, the adulterine son is regarded as the husband's heir even though there is a legitimate son of the union born after the adulterine son. This dictum by the President does not, however, constitute the judgment of the Court as the other two members of the Court differed from him in this respect in the light of previous decisions of the Court.

Turning to those decisions it was held in *Sidubulekana versus Fuba,* 1 N.A.C. 49, consonant with the opinion of the Tembu assessors in that case, that under Tembu law an adulterine son born during the subsistence of his mother's customary union was not the husband's heir. That this is the position in Tembu law was confirmed in *Sidubulekana versus Fuba,* 1 N.A.C. 52. A similar decision was reached in *Baatje versus Mtuyedwa,* 1 N.A.C.

110, which is a case involving Tembu law and custom, but with this modification that the adulterine son cannot succeed whilst there is a legitimate male issue of the customary union. Then, in *Gebuza versus Gebuza,* 1938 N.A.C. (C. & O.) 15, at page 17, it is laid down that in Tembu law an adulterine son does not oust a legitimate son of the same House from his heirship therein.

With respect, the President's opinion and that of the assessors in *Madyibi's* case (*supra*) that in Tembu law an adulterine son had the same right of succession as the legitimate son unless disinherited does not, in my judgment, without more, suffice to show that the previous decisions of that Court to the contrary set out above are wrong and, therefore, in keeping with the *stare decisis* rule, those decisions ought to be followed.

Consequently the Commissioner erred in finding that the Plaintiff, an adulterine son, ousted the Second Defendant, the legitimate son in the same house, as heir of the deceased and it is unnecessary to consider whether the Commissioner's finding that the evidence does not suffice to establish that the deceased repudiated the Plaintiff is justified.

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

Yates and Collen, Members, concurred.

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

For Respondent: Mr. R. Knopf of Umtata.

SOUTHERN BANTU APPEAL COURT.

SIBENTELE vs. MATOLE.

CASE No. 33 OF 1963.

UMTATA: 28th January, 1964. Before Balk, President, Yates and Collen, Members of the Court.

PRACTICE AND PROCEDURE

Necessity for presiding judicial officers to record all proceedings including nature and outcome of applications. Appeal from Chief's Court—dismissal of appeal in absence of Appellant or his attorney tantamount to a default judgment—whether necessary in these circumstances for Plaintiff to adduce evidence in support of his claim—refusal of application for rescission of such default judgment serves as bar to re-opening of appeal by way of application for re-instatement.

Summary: An appeal by the Defendant from the judgment of a Chief's Court for Plaintiff for R100 as customary damages for adultery with his (Plaintiff's) wife, resulting in her pregnancy, was dismissed by a Bantu Affairs Commissioner's Court, without any evidence having been called, in the absence of appearance by or on behalf of the Defendant (Appellant). Although the presiding judicial officer did not record the outcome of a subsequent application for the rescission of this judgment, it was clear from the subsequent proceedings that he had, in fact, refused the application on the ground that

the judgment in question was not a default judgment as it left the judgment of the Chief's Court undisturbed. Defendant thereupon applied for the reinstatement of the appeal on the roll. That application was dismissed and the appeal to this Court was solely from this latter judgment.

Held: That, in terms of paragraph (*d*) of sub-rule (1) read with sub-rule (3) of Rule 55 of the Rules for Bantu Affairs Commissioners' Courts, presiding judicial officers are required to record all proceedings, including the outcome of applications.

Held further: That section 12 (4) of the Regulations for Chiefs' and Headmen's Civil Courts enacts that an appeal from the judgment of such a Court to a Bantu Affairs Commissioner's Court shall be re-heard and re-tried as if it were a case of first instance in the Commissioner's Court, and Rule 87 (2) of the Rules for Bantu Affairs Commissioner's Courts provides that if a Defendant does not appear at the time appointed for the trial of an action, a judgment against him, not exceeding the relief claimed, may be given, with costs, so that in the instant case the Commissioner's Court was entitled to enter judgment against the Defendant to the extent of the Plaintiff's claim as re-stated, to which the dismissal of the appeal was tantamount.

Held further: That the absence of a provision under Rule 87 (2) of the Rules for Bantu Affairs Commissioners' Courts indicated that it was not necessary for the Plaintiff to adduce evidence in support of his claim, for, were it otherwise, one would expect a specific provision in that respect in the Rule as in the case of Rule 41 (7).

Held further: That, even had the judgment of the Bantu Affairs Commissioner dismissing the appeal from the Chief's Court been invalid by reason of the Plaintiff's not having adduced evidence in support of his claim, such judgment remained in full force and effect on refusal of the application for its rescission and thus served as a bar to the re-opening of that appeal by way of its re-instatement on the roll, and accordingly the Commissioner properly refused the application for that relief.

Referred to:

Mjantshi versus Pamla, Case No. N.A.C. 19/63 (N.C.C. 112/62).

Sparks versus David Polliack & Co. (Pty.), Ltd., 1963 (2), S.A. 491 (T), at page 495.

Yako versus Dandala and Ano, 1961, N.A.C. 60 (S), at page 61.

Balk (President):

This case had its inception in a Chief's Civil Court which awarded five head of cattle or R100 to the Plaintiff as customary damages against the Defendant for his adultery with the Plaintiff's wife resulting in her pregnancy.

An appeal from that judgment to the Bantu Affairs Commissioner's Court having jurisdiction was noted by the Defendant. When that appeal was called on the date for which it had been set down for hearing, the Defendant's Attorney withdrew from the case as his client had not put in an appearance and he had no instructions to proceed therewith. The Commissioner thereupon dismissed the appeal, with costs.

An application for rescission of that judgment was made to the Commissioner's Court by the Defendant's attorney. The Commissioner's notes of the proceedings at the hearing of that

application do not state whether he granted or refused it but merely indicate that he pointed out that the judgment dismissing the appeal was not a default judgment as it left the judgment of the Chief's Court undisturb. However, in his reasons for judgment the Commissioner states that he refused the application. In this connection it cannot be too strongly impressed on him, particularly as this is not an isolated instance of a lapse of this nature on his part, see *Mjantshi versus Pamla,* Case No. N.A.C. 19/63 (N.C.C. 112/62) heard at Umtata on the 24th September, 1963, that, in terms of paragraph *(d)* of sub-rule (1) read with sub-rule (3) of Rule 55 of the Rules for Bantu Affairs Commissioners' Courts, he is required to record all proceedings including the outcome of applications.

After the refusal of the application for rescission, an application was made to the Commissioner's Court by the Defendant's attorney for re-instatement of the appeal on the roll. That application was dismissed by that Court.

The appeal to this Court is solely from the judgment dismissing the application for re-instatement and is brought by the Defendant on the following ground:—

> "The learned Bantu Affairs Commissioner should have allowed the application for re-instatement as the Defendant has by his affidavit, shown reasonable cause for his non-appearance to prosecute to the appeal on the 1st July, 1963."

Section 12 (4) of the Regulations for Chiefs' and Headmen's Civil Courts enacts that an appeal from the judgment of such a Court to the Bantu Affairs Commissioner's Court shall be re-heard and re-tried as if it were a case of first instance in the Commissioner's Court and Rule 87 (2) of the Rules for Bantu Affairs Commissioners' Courts provides that if a Defendant does not appear at the time appointed for the trial of an action, a judgment against him, not exceeding the relief claimed, may be given, with costs. In terms of Rule 96 (1) of those Rules a Defendant includes his attorney.

It follows that as the Defendant had not put in an appearance and his attorney withdrew from the appeal when it was called for hearing in the Commissioner's Court, that Court was entitled to enter judgment against the Defendant to the extent of the Plaintiff's claim as re-stated in terms of section 12 (1) of the above-mentioned Regulations, to which the dismissal of the appeal was tantamount.

Admittedly, no evidence was adduced by the Plaintiff in support of his claim before the dismissal of the appeal by the Commissioner's Court but, in my view, the absence of a provision under Rule 87 (2) that such evidence is required indicates that it is not necessary for, were it otherwise, one would expect a specific provision in that respect in the Rule as in the case of Rule 41 (7). That this is the position gains support from the judgment in *Sparks versus David Polliack & Co. (Pty.), Ltd.*, 1963, (2) S.A. 491 (T), at page 495.

Be that as it may, the judgment of the Commissioner's Court dismissing the appeal, even if invalid, remained of full force and effect on refusal of the application for its rescission, see *Yake versus Bandala and Ano.,* 1961, N.A.C. 60 (S), at page 61, and thus served as a bar to the re-opening of that appeal by way of its re-instatement on the roll, without more. Accordingly, the Commissioner properly refused the application for that relief.

The Commissioner conceded in his reasons for judgment that he had erred in refusing the application for rescission on the ground that his dismissal of the appeal was not a default judgment. This aspect, however, does not call for consideration as it is not under appeal.

In the result the appeal to this Court should be dismissed, with costs.

Yates and Collen, Members, concurred.

For Appellant: Mr. F. C. Airey, of Umtata.

For Respondent: Mr. R. Knopf, of Umtata.

SOUTHERN BANTU APPEAL COURT.

MVUNYISWA vs. MAYILA.

CASE No. 34 OF 1963.

UMTATA: 27th January, 1964. Before Balk, President, Yates and Collen, Members of the Court.

BANTU LAW AND CUSTOM.

Refund of dowry on dissolution of marriage—repudiation by husband of adulterine children by allowing no deductions from dowry for them.

Summary: In an appeal from the judgment of a Bantu Affairs Commissioner's Court for Plaintiff in an action in which he sued the Defendant for the return of dowry by virtue of the dissolution of the marriage between Plaintiff and the Defendant's ward on the ground of the latter's adultery, one of the grounds of appeal was to the effect that the presiding judicial officer's refusal to allow a deduction from the returnable dowry of two head of cattle for two adulterine children was " bad in law and not in accordance with Bantu law and custom as under the latter law and custom such a reduction should have been allowed and the case brought under that system of law ".

In his evidence the Plaintiff had stated that he did not want the two adulterine children.

Held: That consonant with Bantu law and custom, the Plaintiff was entitled to repudiate the two adulterine children by allowing no deduction from the returnable dowry for them and they would then " belong " to the wife's " dowry eater ".

Cases referred to:
Kabi versus Putumani, 1954, N.A.C. 210 (S), at page 213.
Ndyu versus Nxoke, 1955, N.A.C. 15 (S), at page 16.

Balk (President):

This is an appeal from the judgment of a Bantu Affairs Commissioner's Court for Plaintiff (now Respondent) as prayed, with costs, in an action in which he sued the Defendant (present Appellant) for R180 in respect of dowry refundable to him in consequence of his divorce from the Defendant's sister, Ethel, on the ground of her adultery.

In the summons the full dowry paid by the Plaintiff to the Defendant for Ethel is stated to be R220 and the customary deductions for which allowance is made, to amount to R40 representing two head of cattle, the one being in respect of the child of the marriage and the other for the marriage outfit.

An amendment of the summons was granted by the Commissioner's Court. This amendment was to the effect that in addition to the child there had been a miscarriage during the marriage and that a marriage outfit was supplied.

The Defendant alleged in his plea, as amended with the leave of the Commissioner's Court, that the Plaintiff had paid R72 only as dowry for Ethel and that there were four issues of the marriage so that he was not liable to refund any of the dowry. Accordingly, the onus of proof that the dowry paid amounted to R220 rested on the Plaintiff.

The appeal is brought on the following grounds:—

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

2. That the judgment for the Plaintiff disallowing a deduction of an equivalent of 2 head of cattle for the 2 adulterine children is bad in law and not in accordance with Native law and custom as under the latter law and custom such a deduction should have been allowed and the case was brought under that system of law."

It is common cause that the Plaintiff contracted a civil marriage with Ethel, that this marriage was dissolved by a Court of competent jurisdiction because of her adultery, that the Defendant is Ethel's " dowry-eater " that there is one child of the marriage and that there was one miscarriage during the marriage and that during the subsistence thereof Ethel bore two adulterine children. In the course of his evidence the Plaintiff acknowledged that a further beast was deductable for the miscarriage and reduced his claim to R160 which appears to have been overlooked by the Commissioner when he gave judgment for the Plaintiff as prayed, i.e. for R180.

The Plaintiff stated in his evidence-in-chief that he posted R148 in about May, 1952, and R72 in about September, 1952, to his messenger, Zokwe, and that this total of R220 represented ten head of cattle and R20 for the engagement. He qualified this statement, however, under cross-examination, saying that he had paid R20 for the engagement which included an engagement ring and formed part of the dowry, when he went to the Defendant's kraal for the formal engagement in December, 1952, so that on his own showing no reliance can be placed on his evidence that he posted the R220 to Zokwe nor, on the latter's evidence, that he had received R148 and R72 from the Plaintiff and first paid the larger sum and then the smaller sum, i.e. R220 in all to the Defendant, the second payment taking place in or about the beginning of October, 1952. This factor, which was relied upon by Mr. Airey in the course of his argument on behalf of the Appellant, lends colour to the Defendant's evidence that Zokwe had, when he paid R72 to him at his kraal as dowry for Ethel, undertaken to pay the first instalment of this dowry amounting to R108 which he had promised on his former visit to that kraal and which remained unpaid.

Admittedly, as stressed by Mr. Muggleston in his argument for the Respondent, there are unusual features in the Defendant's case relied upon by the Commissioner, i.e. the lavish expenditure by the Defendant on Ethel's wedding when she married the Plaintiff, including the wedding outfit which by far exceeded R72 notwithstanding that, according to the Defendant, that sum was all the dowry he had received for her and the Defendant's failure over a period of no less than six years to enforce payment of the R108 and two head of cattle which he alleged was the outstanding dowry for Ethel.

The absence of a convincing explanation by the Defendant for his lengthy delay in taking steps to enforce payment of the R108 detracts from the merits of his case. In addition there is the material discrepancy between the Defendant's evidence and that

of his witness, Grishon Yako, as to the number of cattle the R108 represented. These features whilst disentitling the Defendant from obtaining a full judgment, are not, in the light of the inconsistency in the evidence for the Plaintiff dealt with above, decisive of the case in the Plaintiff's favour as regards the quantum of dowry paid by him for Ethel, as submitted by Mr. Airey, bearing in mind that the onus of proof in this respect rested on the Plaintiff on the pleadings.

It follows that the Commissioner erred in finding that the Plaintiff had established this issue; and, for the reasons given above, the Defendant is not entitled to a full judgment on this issue. That being so and as this issue is the basis of the Plaintiff's case, the Commissioner ought to have decreed absolution from the instance, with costs.

The appeal, therefore, succeeds on the first ground and it is unnecessary to consider the remaining ground. It is perhaps as well to mention as regards the second ground of appeal that as the Plaintiff stated in his evidence that he did not want the two adulterine children, he was, consonant with Bantu law and custom, entitled to repudiate them by allowing no deduction from the returnable dowry for them and they would then "belong" to his wife's "dowry-eater", i.e. to the Defendant. In this connection the dicta in *Kabo versus Putumani*, 1954 N.A.C. 210 (S), at page 213, and in *Ndyu versus Nxoke*, 1955, N.A.C. 15 (S), at page 16, are instructive.

In the result the appeal should be allowed, with costs, and the judgment of the Bantu Affairs Commissioner's Court altered to a decree of absolution from the instance, with costs.

Yates and Collen, Members, concurred.

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

For Respondent: Mr. K. Muggleston of Umtata.

SOUTHERN BANTU APPEAL COURT.

NGCENI AND ANO. vs. NOZATUZE.

CASE No. 35 OF 1963.

UMTATA: 21st January, 1964. Before Balk, President; Yates and Potgieter, Members of the Court.

PRACTICE AND PROCEDURE

Appeal from Bantu Affairs Commissioner's Court—necessity for compliance by Clerks of Court with provisions of Rule 11 (*d*) *of Rules for Bantu Appeal Courts—service of notice of hearing of appeal—Respondent not legally represented and whereabouts unknown—service effected on near relative—considerations. Kraalhead responsibility for torts of inmate—summons citing both kraalhead and tortfeasor served on former whilst latter no longer residing there—such service invalid in respect of tortfeasor—judgment entered against both Defendants in absence of pleadings and appearance by tortfeasor—position on appeal by both Defendants without application having first been made by either for rescission of judgment.*

Summary: When this appeal was called there was no appearance by or on behalf of the Respondent, who had been legally represented at the trial of the action but whose attorney had refused to accept informal notice of hearing of the appeal on the ground that Respondent had told him that he could not afford to be legally represented thereat. The Respondent had also then told his attorney that he was going to the Transvaal to work. On an attempt being made by the Messenger of the Court to serve the notice of hearing on the Respondent personally, it was found that the latter was away from his kraal, so service was effected on his brother thereat. The Clerk of the Court had not been advised by the Respondent of his change of address.

The Clerk of the Court had not at the time that the appeal was noted enquired from the Respondent or his attorney whether they could accept informal notice of hearing of the appeal.

The appeal was from the judgment of a Bantu Affairs Commissioner's Court for Plaintiff (now Respondent) as prayed, with costs, against both Defendants (present Appellants), jointly and severally, in an action in which he sued them for five head of cattle or their value as the customary "fine" for adultery with his wife, resulting in her pregnancy. The Plaintiff cited the First Defendant as tortfeasor and the Second Defendant as being liable as head of the kraal at which the First Defendant resided.

The judgment against the First Defendant went by default as he neither pleaded nor appeared or was represented at the trial of the action. The judgment against the second Defendant was given as a result of the trial.

The return of the Messenger of the Court indicated that the summons in respect of both Defendants was served on the Second Defendant at the latter's kraal, and from the evidence it appeared that the First Defendant was then no longer at that kraal.

Held: That the Clerk of the Court should have enquired from the Respondent or his attorney whether they would accept informal notice of the hearing of the appeal from him in terms of Rule 11 (*d*) of the Rules for Bantu Appeal Courts, as, not having done so, the Respondent's attorney had the right in any event to refuse to accept such service.

Held further: That as the Respondent did not furnish an address in substitution for that of his attorney of record, at which the notice of hearing of the appeal could be served on him, and his whereabouts could not be ascertained, and, as it was manifest from the Respondent's conduct that he was not interested in appearing at the hearing of the appeal, the Court, at the instance of the Appellants' attorney, approved of the service of the notice of hearing of the appeal by the Messenger of the Court on the brother of the Respondent at the latter's kraal and proceeded to hear the appeal.

Held further: That the proceedings in so far as the first Defendant were concerned could not be regarded as a trial in the absence of a plea by him and of a notice of trial and in his absence, regard being had to the imperative provisions of Rule 52 of the Rules for Bantu Affairs Commissioner's Courts, and the judgment against the First Defendant was not, therefore, appealable in the light of the provisions of Rule 81 (2) which limit the right of appeal to a Bantu Appeal Court from a judgment of a Bantu Affairs Commissioner's Court to any judgment given as a result of a trial and to any final judgment.

Held further: That despite the fact that, as stated by the Commissioner in his reasons for judgment, service on a kraalhead at his kraal of a summons against an inmate thereof whilst the latter is working and residing at a labour centre away from such kraal, may be the accepted practice in the Transkeian Territories, this does not alter the fact that such service is bad as it does not comply with the requirements of sub-rule (3) of Rule 31 of the Rules for Bantu Affairs Commissioners' Courts read with sub-rule (8) of that Rule.

Held further: That a default judgment ought not to be given unless the Court is satisfied that the service of the summons on the Defendant is in order.

Held further: In regard to the contention of the Appellants' attorney, made during the course of his argument in this Court, that the defective service of the summons on the First Defendant fell to be taken into account in determining the appeal by the Second Defendant as Bantu law and custom dictated that the judgment against the Second Defendant was contingent upon a valid judgment against the First Defendant, i.e. against the tortfeasor, in that the kraalhead's liability for an inmate tort is contingent upon the inmate's liability therefor, so that the judgment against the First Defendant being, as it was, invalid for want of proper service on him of the summons, the judgment against the Second Defendant also fell to be regarded as invalid; it was held that this contention was without substance in that the judgment against the First Defendant, even though invalid, remained in full force and effect until it was properly attacked in, and rescinded by a Court of competent jurisdiction, in this case by the Bantu Affairs Commissioner's Court in terms of Rule 73 read with Rule 74 of the Rules for those Courts and not by this Court as the judgment against the First Defendant was not appealable and consequently the judgment against the Second Defendant could not be regarded as invalid on the grounds advanced by Appellants' attorney.

Held further: That it was open to both the Defendants to apply to the Bantu Affairs Commissioner's Court in terms of Rule 74 (9) for the rescission of the judgment against them on the ground that it was void *ab initio,* in the case of the First Defendant, because the service of the summons on him was bad, and in the case of the Second Defendant because the validity of the judgment against him is contingent upon a valid judgment against the First Defendant, i.e. the tortfeasor.

Referred to:

Sparks versus David Polliack & Co. (Pty.), Ltd., 1963 (2), S.A. 491 (T).

Gubungwana and Another versus Nungu, 1962, N.A.C. 12 (S), at page 13.

Mngcangceni versus Ndlangisa, 1959, N.A.C. 34 (S), at page 37.

Hagile versus Solani and Another, 1942, N.A.C. (C. & O.) 26, at page 29.

Yako versus Dandala and Another, 1961, N.A.C. 60 (S), at page 61.

Rules of Bantu Appeal Courts: Rule 11 (*d*).

Rules of Bantu Affairs Commissioners' Courts: Rules 31 (3) and (8), 52, 54 (*a*), 73, 74, 74 (9), 81 (2), 84 (5).

Balk (President):

When this appeal was called there was no appearance by or on behalf of the Respondent.

According to the correspondence filed with the Registrar of this Court, the Respondent's attorney who had accepted service of the notice of appeal, declined to accept informal notice of the hearing of the appeal from the Clerk of the Bantu Affairs Commissioner's Court on the ground that Respondent had told him that he could not afford to be legally represented thereat. The Respondent had also then told his attorney that he was going to the Transvaal to work.

The Registrar elicited from the Clerk of the Court that he had not, at the time the appeal was noted, enquired from the Respondent or his attorney whether they would accept informal notice of the hearing of the appeal from him as he ought to have done in terms of Rule 11 (*d*) of the Rules of this Court so that in any event the attorney had the right to refuse to accept such service. In this connection the Bantu Affairs Commissioner is enjoined to bring home to the Clerk of the Court the necessity for the observance of this rule as laxity in this direction may result in failure of service of the notice of the hearing of appeal on one or the other of the parties thus precluding the hearing of the appeal with the attendant inconvenience and the additional costs involved.

On receipt of the correspondence referred to above, the Registrar directed that the notice of hearing of the appeal was to be served on the Respondent personally by the Messenger of the Bantu Affairs Commissioner's Court. The Messenger found that the Respondent was away from his kraal so he served the notice on the Respondent's brother thereat.

The Registrar ascertained from the Respondent's attorney that he had told the Respondent that the appeal would be heard during January, 1964, but had not then advised him of the date of hearing as at the time he had not yet received notice thereof. The Registrar also ascertained that the Respondent's whereabouts were unknown to his attorney.

As the Respondent did not furnish an address in substitution for that of his attorney of record at which the notice of hearing of the appeal could be served on him and his whereabouts could not be ascertained and as it was manifest from the Respondent's conduct outlined above that he was not interested in appearing at the hearing of the appeal, this Court, at the instance of Mr. Muggleston who appeared for the Appellant, approved of the service of the notice of hearing of the appeal by the Messenger of the Court on the brother of the Respondent at the latter's kraal and proceeded to hear the appeal.

The appeal is from the judgment of the Bantu Affairs Commissioner's Court for Plaintiff (now Respondent) as prayed, with costs, against both Defendants (present Appellants) jointly and severally in an action in which he sued them for five head of cattle or their value, R100, as the customary " fine " for adultery with his wife, Nositile, resulting in her pregnancy. The Plaintiff cited the First Defendant as tort-feasor and the Second Defendant as being liable as head of the kraal at which the First Defendant resided.

In his plea the Second Defendant denied liability on the ground that the First Defendant was not resident at his (Second Defendant's) kraal when the alleged adultery took place.

The judgment against the First Defendant went by default as he neither appeared nor was represented at the trial of this action. The judgment against the Second Defendant was given as a result of the trial.

The appeal is brought on the following grounds:—

"1. The Court erred in entering a default judgment against the First Defendant as it is clear from the evidence that he was not aware of the action against him.

2. The Court should have found that the service of summons against First Defendant was improper and should have dismissed the summons against both Defendants.

3. The evidence does not establish that First Defendant resided at the kraal of the Second Defendant at the time the tort was committed."

The rules hereinafter referred to are those pertaining to Bantu Affairs Commissioners' Courts unless otherwise stated.

As the judgment against the First Defendant was a default judgment, it was open to him at the time he noted the appeal and is still open to him to apply to the Bantu Affairs Commissioner's Court for rescission thereof in terms of Rule 73 read with Rules 74 and 84 (5) so that that judgment cannot be regarded as a final one. Mr. Muggleston, however, contended that it was a judgment given as a result of the trial within the meaning of Rule 54 (*a*) as the Commissioner's reasons for judgment indicate that he relied on the evidence adduced on behalf of the Plaintiff in entering judgment for him as against First Defendant. But, in my judgment, the proceedings in so far as the First Defendant is concerned cannot be regarded as a trial in the absence of a plea by him and of notice of trial and in his absence, regard being had to the imperative provisions of Rule 52 which read as follows:—

"(1) The trial of an action shall be subject to the delivery by the Plaintiff after the pleadings have been closed of notice of trial for a day or days approved by the clerk of the Court: Provided that, if the Plaintiff does not within fourteen days after the pleadings have been closed deliver notice of trial, the Defendant may do so.

(2) The delivery of such notice shall *ipso facto* operate to set down for trial at the same time any claim in reconvention made by the Defendant.

(3) Service of such notice shall be effected at least seven days before the day so approved.

(4) Notwithstanding the provisions of this rule, if the parties not being legally represented appear with their witnesses on the day fixed for appearance in the summons the court may, with the consent of the parties, record the plea in open court and hear and determine the case as if it had been set down for hearing on that day."

It follows that the judgment against the First Defendant is not appealable in the light of the provisions of Rule 81 (2) which limit the right of appeal to this Court from a judgment from a Bantu Affairs Commissioner's Court to any judgment given as a result of a trial and to any final judgment, see *Sparks versus David Polliack & Co. (Pty.), Ltd.*, 1963 (2), S.A. 491 (T.), in which the effect of the corresponding provisions of the *Magistrates' Courts Act*, 1944, and the Rules thereunder are dealt with in the respect here in question.

The first ground of appeal accordingly does not call for consideration and the appeal by the First Defendant should be dismissed, with costs. However, in view of the Commissioner's statement in his reasons for judgment that service on a kraalhead at his kraal of a summons against an inmate thereof whilst the latter is working and residing at a labour centre away from such kraal, is the accepted practice in the Transkeian Territories, it is advisable to point out that such service is bad, see *Gubungwana and Another versus Nunga*, 1962, N.A.C. 12 (S), at page 13.

Turning to the appeal by the Second Defendant, the return of the Messenger of the Court indicates that the summons in respect of both Defendants was served on the Second Defendant at the latter's kraal and from the evidence it would appear that the first Defendant was then no longer at that kraal. The service in so far as the First Defendant is concerned, therefore, does not comply with the requirements of sub-rule (3) of Rule 31 read with sub-rule (8) of that rule and accordingly cannot be regarded as valid, see *Gubungwana's* case (*supra*). This point was, however, not taken by or on behalf of the First Defendant at the trial who accordingly remained joined in the action so that there was no failure of the legal requirement in this respect, viz. that the kraalhead can only be sued when the tort-feasor is joined in the action, see *Mngcangceni versus Ndlangisa,* 1959, N.A.C. 34 (S), at page 37. It is perhaps as well to add that a default judgment ought not to be given unless the Court is satisfied that the service of the summons on the Defendant is in order, see *Hagile versus Solani and Another,* 1942, N.A.C. (C. & O.) 26, at page 29.

Mr. Muggleston submitted, on the authority of *Hagile's* case (*supra*), that the defective service of the summons on the First Defendant fell to be taken into account in determining the appeal by the Second Defendant as Bantu law and custom dictated that the judgment against the Second Defendant was contingent upon a valid judgment against the First Defendant i.e. against the tort-feasor, in that the kraalhead's liability for an inmate's tort is contingent upon the inmate's liability therefor so that the judgment against the First Defendant being, as it is, invalid for want of proper service on him of the summons, the judgment against the Second Defendant also fell to be regarded as invalid. With respect, the judgment in *Hagile's* case in this connection ought not, in my view, to be followed here bearing in mind that the judgment against the First Defendant even though invalid for want of proper service on him of the summons, remains of full force and effect until it has been properly attacked in, and rescinded by, a Court of competent jurisdiction, in this case by the Bantu Affairs Commissioner's Court in terms of Rule 73 read with Rule 74 and not by this Court as the judgment against the First Defendant is for the reasons given above not appealable, see *Yako versus Dandala and Another,* 1961, N.A.C. 60 (S), at page 61. Consequently the judgment against the Second Defendant cannot be regarded as invalid on the grounds advanced by Mr. Muggleston. That this is the correct view gains support from the fact that the setting aside of the judgment against the Second Defendant on these grounds whilst the judgment against the First Defendant remained operative until such time as it was rescinded by a Court of competent jurisdiction would have the effect of depriving the Plaintiff of his right of recourse against the Second Defendant at the will of the First Defendant i.e., whilst the latter continued to take no steps to have the judgment against him rescinded, and would thus result in an untenable position. On the other hand, it is open to both the Defendants to apply to the Bantu Affairs Commissioner's Court in terms of Rule 74 (9) for the rescission of the judgment against them on the ground that it is void *ab initio,* in the case of the First Defendant because the service of the summons on him was bad, and in the case of the Second Defendant because the validity of the judgment against him is contingent upon a valid judgment against the First Defendant i.e., *tort-feasor,* for the reason given above. The second ground of appeal accordingly fails.

Proceeding to a consideration of the remaining ground of appeal, it is manifest from the Commissioner's reasons for judgment that in finding that the First Defendant was, at the time of the commission of the tort, residing at the Second Defendant's kraal, he relied on Nositile's evidence and that of the Plaintiff's other two witnesses, Tintsi and Matulana, and rejected the Second Defendant's evidence.

As stressed by Mr. Muggleston, no confidence can be placed in Tintsi's evidence in view of his extreme vagueness in cross-examination as to when the First Defendant last returned from work to the Second Defendant's kraal after giving specific evidence in this respect in his evidence in chief and the inconsistency in his testimony in this respect as is apparent from his statement in his evidence in chief that the First Defendant returned to the Second Defendnat's kraal during the 1961 *geleshe* season (about October, 1961) and stayed there until the autumn of 1962 and under cross-examination that this *geleshe* season was when Nositile's " stomach " was taken to the Second Defendant's kraal which it is common cause was in 1962; nor, as also stressed by Mr. Muggleston, can any confidence be placed in Matulana's evidence regard being had to the blatant inconsistency therein under cross-examination as to when he saw the motor car at the Second Defendant's kraal.

Nositile's evidence is free from inconsistency and generally bears the impress of truth. It is true that, as pointed out by Mr. Muggleston, she first said that the First Defendant had been intimate with her five times before she had conceived and then that she had been intimate with the First Defendant many times over a period which extended to about four months. This inconsistency, however, is more apparent than real bearing in mind that in keeping with the Bantu mode of expression Nositile may well by five times have intended to convey the number of times. The further point taken by Mr. Muggleston that Nositile had not answered when asked in cross-examination whether she had seen the First Defendant on the day on which the " stomach " was taken to the Second Defendant's kraal also strikes me as being of little moment as, without more, her failure to reply can hardly be regarded as indicative of her being unworthy of credence as it may have been prompted by other causes.

It is manifest from Nositile's evidence that the First Defendant was wont to live at leave and return to, the kraal of his father, the Second Defendant, periodically and that the First Defendant was residing at that kraal at the time he committed adultery with her and rendered her pregnant, the duration of his stay there then extending from about October, 1961, to about February, 1962. That the First Defendant was actually residing at the Second Defendant's kraal at that time, i.e. from October, 1961, to about February, 1962, as testified to by Nositele, and not merely on a visit there then gains support from the improbability in the Second Defendant's evidence, bearing custom in mind, in that he would have the Court believe that although the First Defendant was his eldest son and heir and had left his (Second Defendant's) kraal some ten years previously, he had visited it twice only during the whole of that period and then only for a few minutes each time.

In these circumstances the Commissioner cannot be said to be wrong in finding that the First Defendant was residing at the Second Defendant's kraal at the time the former committed adultery with Nositile and rendered her pregnant and that, therefore, as laid down in *Msenge versus Ndsungu,* 1962, N.A.C. 75 (S), the Second Defendant was liable for this tort.

It follows that the third ground of appeal also fails and that the appeal by both Defendants should be dismissed, with costs.

Yates and Potgieter, Members, concurred.

SOUTHERN BANTU APPEAL COURT.

MAKANANDANA vs. MHLENGI.

CASE No. 38 OF 1963.

UMTATA: 21st January, 1964. Before Balk, President, Yates and Potgieter, Members of the Court.

EVIDENCE.

Adultery—corroboration of woman's evidence—mere opportunity does not constitute corroboration.

Summary: Plaintiff sued Defendant for damages for adultery with his wife, Notatile, followed by her pregnancy. In corroboration of his wife's testimony, Plaintiff called a witness, Nohotele, who gave evidence to the effect that the Defendant brought Notatile home one night to her (Nohotele's) kraal where Notatile was then living and reported that the latter had had a fit. This was admitted by the Defendant.

Held: That the fact that the Defendant had had the opportunity of committing adultery with Notatile on the occasion that he brought her home does not, without more, afford corroboration of Notatile's evidence that he did, in fact, commit adultery with her.

Referred to:

Samuels versus Ngobese, 1962 (2) P.H., J. 17 (N).

Balk (President):

This is an appeal from the judgment of a Bantu Affairs Commissioner's Court for the Defendant (now Respondent), with costs, in an action in which he was sued by the Plaintiff (present Appellant) for five head of cattle or their value, R100, as damages for adultery with his wife, Notatile, followed by pregnancy.

In his plea the Defendant denied the alleged adultery so that the onus of proof rested on the Plaintiff.

The appeal is confined to fact.

The evidence of the Plaintiff's witness, Nohotele, does not advance his case as it amounts to no more than that the Defendant brought Notatile home one night to her (Nohotele's) kraal where Notatile was then living and reported that the latter had had a fit, which is admitted by the Defendant. That the Defendant then had the opportunity of committing adultery with Notatile does not without more serve to corroborate her evidence that in fact he did so, see *Samuels versus Ngobese,* 1962 (2) P.H., J. 17 (N). On the contrary, Nohotele's denial that Notatile had told her that she was Defendant's lover, as testified to by Notatile, indicates that the latter cannot be regarded as a reliable witness. That being so the matter resolved itself to Notatile's word against that of the Defendant whose evidence appears to be consistent and straightforward so that the Commissioner can hardly be said to be wrong in finding for him.

The appeal should accordingly be dismissed, with costs.

Yates and Potgieter, Members, concurred.

SOUTHERN BANTU APPEAL COURT.

TENGELA vs. MADI.

CASE No. 41 OF 1963.

UMTATA: 27th January, 1964. Before Balk, President, Yates and Collen, Members of the Court.

PRACTICE AND PROCEDURE

Appeal from Chief's Court—permissible for inclusion of progeny of stock in restated claim which born subsequent to proceedings in Chief's Court.

Summary: In an appeal from the judgment of a Bantu Affairs Commissioner's Court upholding the judgment of a Chief's Court one of the grounds of appeal was to the effect that—

> "Two of the ten head of cattle, for which judgment was given, were born after the trial at the Chief's Court, whereas the judgment (of the Commissioner's Court) should not have granted relief in respect of causes of action arising after the institution of proceedings in the Chief's Court."

Held: That the inclusion of the progeny in the restated claim in the Commissioner's Court was competent in terms of section 12 of the Regulations for Chief's and Headmen's Civil Courts, as amended, which provides for the amplification by the Plaintiff of his claim in the Commissioner's Court. That the legislature intended that such amplification of the claim was to include an increase of the quantum claimed occasioned by circumstances such as those here in question becomes evident if the underlying principle is borne in mind, viz. that multiplicity of actions is to be avoided.

Referred to:

Steinberg versus Steinberg, 1962 (4), S.A. 321 (E), at page 324.
Regulations for Chiefs' and Headmen's Civil Courts, Section 12.

Balk (President):

This case had its inception in a Chief's Court which found for the Plaintiff for the eight specific cattle claimed by him from the Defendant.

An appeal by the Defendant from that judgment to the Bantu Affairs Commissioner's Court was dismissed, with costs, but the judgment of the Chief's Court was altered to one for Plaintiff for the ten specific cattle claimed in the Commissioner's Court or, failing their return, payment of their value, R354.

The pleadings, as restated in the Commissioner's Court, read as follows:—

Plaintiff's Claim.

"1. That the Parties are Bantu as defined by the Act.

2. That Plaintiff's sister, Noganile, was married to the late Tengela Mabone according to Bantu Law and Custom and formed the Right Hand House.

3. That Defendant is the heir of the late Tengela Mabone in the Great House.

4. That Plaintiff supplied a temporary *ubulunga* beast for his sister Noganile being a black heifer which has had the following progeny:—

(1) Rwanqa red cow, (2) red cow, (3) red cow, (4) black young ox, (5) red bull calf with white brush, (6) red heifer, (7) red bull calf, (8) red young ox, (9) red heifer.

5. That without Plaintiff's knowledge and consent Defendant used the original black heifer and substituted for it a red and white young ox.

6. That Plaintiff seeks to allot but Defendant denies that Plaintiff has temporary *ubulunga* stock at his kraal.

Wherefore Plaintiff pays for judgment against Defendant for the delivery and transfer of the 10 specific head of cattle enumerated in paragraphs 4 and 5 hereof, and costs."

Defendant's Plea.

"1. Defendant admits that Noganile married Tengela Mabone by custom but denies that she was the wife of the right hand house. Defendant states that Noganile was the Qadi wife of the great house.

2. Defendant denies that Plaintiff supplied a temporary *ubulunga* beast for Noganile.

3. Defendant denies that he or his father have had a black heifer and that any black heifer of theirs has born any of the progeny set out in paragraph 4 of Plaintiff's Statement of Claims.

4. Paragraph 5 of Plaintiff's Statement of Claim is denied.

Wherefrom Defendant prays for Judgment with costs."

The Plaintiff's claim, as restated in the Commissioner's Court, was amended with the leave of that Court by substituting the words "Qadi to Great" for the words "Right hand" in paragraph 2 and adding the words "or their value R40 each" at the end of paragraph 4 and at the end of the last paragraph.

The appeal to this Court from the judgment of the Commissioner's Court is brought by the Defendant on fact and on the further ground—

"that two of the ten head of cattle, for which judgment was given, were born after the trial at the Chief's Court, whereas the judgment should not have granted relief in respect of causes of action arising after the institution of proceedings in the Chief's Court."

It is manifest from the Plaintiff's evidence that the claim, as restated in the Commissioner's Court, included two progeny of the stock initially claimed which had been born after the judgment had been given in the Chief's Court. The inclusion of this progeny in the restated claim was competent in terms of section 12 of the Regulations for Chief's and Headmen's Civil Courts, as amended, which provides for the amplification by the Plaintiff of his claim in the Commissioner's Court on appeal thereto from a judgment of a Chief's or Headamn's Civil Court and for the retrial of the action in the Commissioner's Court. That the legislature intended that such amplification of the claim was to include an increase of the quantum claimed occasioned by circumstances such as those here in question becomes evident

if the underlying principle is borne in mind, viz., that multiplicity of actions is to be avoided, see *Steinberg versus Steinberg*, 1962 (4), S.A. 321 (E), at page 324. There is, therefore, no substance in the further ground of appeal.

Turning to the remaining ground of appeal, the Plaintiff's version, according to his evidence, is that when his sister, Noganile, entered into a customary union with Tengela Mabone, since deceased, whose heir in his Great House is the Defendant, his (Plaintiff's) father gave her a *nala* ox as a temporary *ubulunga* beast. He (Plaintiff) took this ox back and in its place gave Noganile a dark red heifer again as a temporary *ubulunga* beast. The heifer had two progeny, viz., a black and white heifer which died and a white bull calf with red ears. The dark red heifer also died. He substituted a black heifer for the white bull calf with red ears. This black heifer had ten progeny and the Defendant substituted a red ox for the black heifer as he gave the latter to his cousin who paid it as dowry. It was this red ox and the progeny of the black heifer which he claimed from the Defendant who had identified some of this progeny to him; other of this progeny he knew from his visits to the Defendant's kraal.

In his evidence the Defendant denied that the *ubulunga* beast had been given to Noganile. He also denied that he and his father ever had a black heifer and that he had ever given the Plaintiff to understand that there were *ubulunga* cattle or progeny thereof at his kraal. He gave an account of the sources of the eleven head of cattle in his possession which he admitted included the cattle described by the Plaintiff.

As pointed out by the Commissioner in his reasons for judgment and stressed by Mr. Muggleston in his argument on behalf of the Respondent, the Plaintiff's witness, Gugulitile, bears out that the Plaintiff's father gave Noganile a *nala* ox as a temporary *ubulunga* beast and Gugulitile's evidence was not seriously challenged in cross-examination. The Plaintiff's evidence that he substituted the black heifer for the white bull with red ears, that the black heifer had progeny and that the Plaintiff was shown these cattle at the Defendant's kraal is corroborated by the Plaintiff's witness, Madlevu, who is Noganile's eldest son by the Defendant's late father, Tengela Mabone, in the latter's *qadi* to the great house.

It is true that, as stressed by Mr. Airey in his argument on behalf of the Appellant, there are discrepancies between the Plaintiff's and Madlevu's evidence as regards the total number of progeny of the black heifer and the number of such progeny at the time that Noganile returned to her people. But these discrepancies are of little importance as they may well be due to faulty recollection regard being had to the lengthy intervals between the Plaintiff's visits to the Defendant's kraal and to the fact that he also relied on reports made to him by the Defendant anent the progeny of the black heifer. There are also discrepancies between their evidence as regards the pedigree of some of the nine progeny of the black heifer but these discrepancies are also of little moment as they may also well be due to faulty recollection particularly as with one exception, they are red in colour. The inconsistency in the Plaintiff's evidence as to what became of the black heifer referred to by Mr. Airey—the Plaintiff stated that the Defendant had given this heifer to his cousin who paid it as dowry and then that it had been slaughtered —is more apparent than real as it may have been slaughtered by the person to whom it was paid as dowry. There is no substance in Mr. Airey's submission that the temporary *ubulunga* beast ought to have accompanied Noganile, then a widow, when she left her late husband's kraal and returned to her own people's kraal and that, therefore, there was no need for a permanent *ubulunga* beast which the Plaintiff stated he wished to allot; for

under Tembu law and custom which applies here, a widow leaving her late husband's kraal without the consent of the head of the kraal there is nothing to indicate that Noganile had such consent—has no right to take her *ubulunga* beast with her, see *Rarabe versus Rarabe,* 1937, N.A.C. (C. & O.) 229, at pages 230 to 233 and *Whitfield's South African* Native Law (Second Edition) at page 108 and 109. It should be added that there is also nothing to indicate that Noganile's customary union with her husband, Tonegla, was dissolved; had it been her *ubulunga* beast would have been returnable to her people, see *Rarabe's* case (*supra*), at page 231, *Joke versus Gqirana* 3, N.A.C. 285 and *Whitfield* (*supra*) at page 109. The Defendant admitted in the course of his evidence that Madlevu had lived with him and that they were friendly until Madlevu had left his kraal in the previous year (1962). The Defendant did not deny Madlevu's testimony that he had driven him (Madlevu) away in about August, 1962, because the latter knew the cattle in dispute and supported the Plaintiff's claim to them. He could not say why Madlevu should bear false testimony against him. He admitted that Madlevu should know the stock at his kraal; yet he went on to say that Madlevu should not have been asked about his stock as he had never looked after it because he attended school and lived at the school. Thereafter he admitted that Madlevu had stayed with him. He was equally inconsistent as regards whether his elder brother, Zimela, had given evidence in this case at the Chief's Court. Apart from the blatant inconsistencies in the evidence of the Defendant's witness, Goswana, as to whether he knew the Defendant's livestock and was his neighbour and as to whether he could read, there is a material discrepancy between their evidence as regards the exchange to which Goswana was called to testify. The Defendant stated that he had obtained one of the red cows from Goswana in exchange for a horse and that the cow had given birth to a heifer whereas, according to Goswana, the Defendant obtained the red cow and calf from him in exchange for the horse. The testimony of the Defendant's remaining witness, Gavu, is equally unconvincing bearing custom in mind for he would have the Court believe that he gave to the Defendant, whose stock he did not know, a black ox in exchange for ten sheep without having a witness on his side at the transaction.

In the circumstances there can be little doubt that the probabilities favour the Plaintiff's case and the Commissioner cannot, therefore, be said to be wrong in having found for him.

The appeal to this Court accordingly fails but in order that the Commissioner's judgment may be definite in all respects the differing values of the individual cattle should be specified therein. Here it should be mentioned that, in the light of the evidence and the Commissioner's reasons for judgment, he erroneously placed the value of R20 instead of R40 on one of the cattle, seemingly one of the calves born after the Chief's judgment. In the absence of a cross-appeal, however, it is not proper for this Court to remedy this error.

In the result the appeal to this Court should be dismissed, with costs, but the judgment of the Commissioner's Court should be amended to read:—

> "The appeal is dismissed, with costs, but the judgment of the Chief's Court is altered to one for Plaintiff for the specific ten cattle claimed or, failing the recovery of any of them by the Plaintiff, payment of the value of any such beast as follows:—
>
> *Rwanqa* red cow, R38.
>
> Red bull calf with white brush, R36.
>
> Red bull calf and the younger red heifer, R20 each.
>
> Remaining six cattle, R40 each.

Yates and Collen, Members, concurred.

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

For Respondent: Mr. K. Muggleston, of Umtata.

SOUTHERN BANTU APPEAL COURT.

QOLOQOLO vs. DUNYANA.

CASE No. 44 OF 1963.

UMTATA: 3rd February, 1964. Before Balk, President, Yates and Gordon, Members of the Court.

EVIDENCE.

Discrepancies in evidence of unlettered Bantu as to time factor—such discrepancies ought not in general to be held against them. Denial in evidence of statements made in affidavit—proof of such statements not afforded by mere handing in of affidavit in absence of evidence by person who attested affidavit and that of interpreter.

Summary: This was an appeal from the judgment of a Bantu Affairs Commissioner's Court for Plaintiff (now Respondent) as prayed, with costs, in an action in which he claimed R300 from the Defendant (present Appellant) in repayment of a loan in that sum.

Held: That the discrepancies in the evidence for the Plaintiff as regards when the loan was made, which were stressed by the Appellant's attorney in the course of his argument, were rightly not held against them as it was apparent from their evidence that they are unlettered, and to such persons time according to European standards is more often than not meaningless.

Held further: That the Commissioner ought not to have held that the defendant was discredited by his denial under cross-examination that he had made certain statements in an affidavit in the absence of proof that he had done so, which was not afforded merely by the affidavit that had been filed in the action, but which would have been afforded by the evidence of the person who attested the affidavit supported by that of the interpreter, if one was used, neither of whom was called, but that this misdirection on the part of the Commissioner did not, however, affect the rejection of the defendant's evidence as it was justified on other grounds.

Referred to:

Qoyo versus Mpisekava, 1957, N.A.C. 111(S), at page 112.
Rex versus Nyede, 1951 (3), S.A. 151 (T).

Balk (President):

This is an appeal from the judgment of a Bantu Affairs Commissioner's Court for Plaintiff (now Respondent) as prayed, with costs, in an action in which he claimed R300 from the Defendant (present Appellant) in repayment of a loan in this sum.

In this plea the Defendant denied the alleged loan so that the onus of proof rested on the Plaintiff.

The appeal is brought on the following grounds:—

"1. That the Assistant Bantu Affairs Commissioner erred in refusing to grant the Application for Absolution from the Instance at the conclusion of the Plaintiff's case in that the evidence of Plaintiff and his witnesses revealed material discrepancies particularly as to when the alleged loan took place.

2. That the Plaintiff and his witnesses have failed to prove that the amount claimed was in fact lent to the Defendant at the time as alleged in the claim and the Assistant Bantu Affairs Commissioner erred in finding that they had done so, and he should have found that Defendant be absolved from the instance with costs.

3. That the judgment as a whole is against the evidence and probabilities of the case."

The Plaintiff's evidence that he made the loan to the Defendant is, as submitted by Mr. Airey in the course of his argument for the respondant, amply borne out by that of his witnesses, Gelegele and Kazibe. Notwithstanding exhaustive cross-examination, the Plaintiff and Gelegele remained unshaken as did Kizibe who was only cross-examined very briefly. Their evidence is free from material discrepancies and accords with the probabilities whereas it is manifest that the Defendant who was the only defence witness, cannot be regarded as reliable for, after denying under cross-examination that he knew the Plaintiff at all, he conceded that he had known him by sight for a long time and stated further that the Plaintiff had confided in him the previous year when they boarded the same bus that he was taking dagga to Durban for sale. In addition there is a blatant inconsistency in the Defendant's evidence as regards whether he spoke to Wellington, a clerk in the employ of the Plaintiff's attorney, in regard to the case. Moreover, he was obviously evasive as is evidenced by his reply on re-examination "I never went to Plaintiff's attorney" when it was put to him that in his statement to his own attorney's clerk he had said that he had seen the Plaintiff's attorney. It is true that, as submitted by Mr. Muggleston in his argument on behalf of the Appellant, there is a discrepancy between the Plaintiff's evidence and that of his witnesses as regards when the loan was made and that there is also an inconsistency in Gelegele's evidence in this respect. But, as is apparent from their evidence, the Plaintiff's witnesses are unlettered and to such persons time according to European standards is more often than not meaningless so that, as contended by Mr. Airey, the discrepancies in their evidence in this respect ought not in general to be held against them, see *Qoyo versus Mpisekaya*, 1957, N.AC. 111 (S), at page 112. There is also, as pointed out by Mr. Muggleston, a discrepancy between Gelegele's evidence and that of Kazibe as to who handed the R300 over to the Defendant. But, as submitted by Mr. Airey, little importance can be attached to this discrepancy as it may be due to faulty recollection. Mr. Muggleston also referred to a discrepancy between the Plaintiff's evidence and that of Gelegele as to when the latter and the Defendant came to the Plaintiff's kraal on the day on which the loan allegedly took place and to an inconsistancy in the Plaintiff's evidence as to how much of the R300 the Plaintiff took out of a box. These discrepancies, however, are more apparent than real if viewed in their proper perspective and thus of no moment, as submitted by Mr. Airey.

It follows that the Commissioner cannot be said to be wrong in regarding the discrepancies in the evidence for the Plaintiff as unimportant and in accepting this evidence and rejecting that of the Defendant. The Commissioner ought not, however, to

have held that the Defendant was discredited by his denial under cross-examination that he had made certain statements in an affidavit in the absence of proof that he had done so which was not afforded merely by the affidavit that had been filed in the instant action, but which would have been afforded by the evidence of the person who attested the affidavit supported by that of the interpreter if one was used, neither of whom were called, see *Rex. versus Nyede,* 1951 (3), S.A. 151 (T).

This misdirection did not, however, affect the rejection of the Defendant's evidence as it was justified on other grounds as is apparent from what has been stated above.

In the circumstances the Commissioner also cannot be said to be wrong in finding for the Plaintiff at the close by the parties of their cases let alone refusing the application by the Defendant's attorney for absolution from the instance at the close of the Plaintiff's case.

The appeal should, accordingly, be dismissed, with costs.

Yates and Gordon, Members, concurred.

For Appellant: Mr. K. Muggleston of Umtata.

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

SOUTHERN BANTU APPEAL COURT.

MTUZULA vs. NKOHLA.

CASE No. 47 OF 1963.

UMTATA: 23rd January, 1964. Before Balk, President, Yates and Potgieter, Members of the Court.

PRACTICE AND PROCEDURE

Cattle—assessment of value to be placed on cattle used for customary purposes in Transkeian Territories.

The facts of this case are not material to this report.

Held: That in the absence of an admission or proof that the value of cattle used for customary purposes, including dowry cattle, in any district in the Transkeian Territories exceeds the standard value of R10 each, this value falls to be adopted by the Court so that there can be no question of the Court taking judicial cognizance of a higher value.

Referred to:

Mwanda versus Kuse, 1962, N.A.C. 64 (S), at page 66.

Balk (President):

This is an appeal from the judgment of a Bantu Affairs Commissioner's Court for Plaintiff (now Respondent) as prayed, except for costs, on the claim in convention and decreeing absolution from the instance, with costs, on the counterclaim in an action in which the Plaintiff in convention sought an order for the return of his wife, Nowiniti, within seven days of judgment or, failing such return, the restoration of the dowry paid for her, viz. R26

and a red heifer and a black ox or payment of their value, R50 each. The counterclaim was for a grey stallion, a red heifer and a black heifer or payment of their value, R50 each, this stock being alleged to be part of the dowry agreed upon for Nowiniti and paid by the Plaintiff in convention to the Defendant in convention " by word of mouth " but not handed over by the former to the latter.

For the sake of convenience the Plaintiff and the Defendant in convention will be referred to simply as the Plaintiff and the Defendant both when the claim in convention and the counterclaim is dealt with.

In his plea to the counterclaim the Plaintiff denied the alleged payment of the stock so that the onus of proof thereof rested on the Defendant.

The appeal in so far as it concerns the judgment on the claim in convention is confined to the R50 per beast which the Defendant was ordered to pay as an alternative to the return of the two head of dowry cattle and is brought on the following ground:—

> " Although the value of the stock was not questioned in the Plea, it was still competent to raise the matter *in limine* or from the bar, and the Court was entitled to take judicial cognisance of the fact that dowry stock in the district is valued at R20 per beast, and the Plaintiff could not obtain judgment for a higher amount without any evidence to prove the value claimed."

The judgment on the counterclaim is attacked on appeal solely on fact.

In the particulars of claim in the summons it was averred that the value of the two head of dowry cattle claimed was R50 each. As pointed out by the Commissioner in his reasons for judgment, this averment was not challenged by the Defendant in his plea so that it fell to be regarded as admitted and the Commissioner properly based his judgment thereon, see *Sgatya and Another versus Mbane,* 1956, N.A.C. 48 (S), at page 51. Accordingly there is no merit in the appeal in so far as the judgment on the claim in convention is concerned i.e. in the first ground of appeal. In connection with this ground it is perhaps as well to add that in the absence of an admission or proof that the value of cattle used for customary purposes, including dowry cattle, in any district in the Transkeian Territories exceeds the standard value of R10 each, this value falls to be adopted by the Court so that there can be no question of the Court taking judicial cognisance of a higher value, see *Mwanda versus Kuse,* 1962, N.A.C. 64 (S), at page 66, and the authorities there cited.

Turning to the counterclaim, there are, as pointed out by the Commissioner, discrepancies in the evidence for the Defendant. Of these the most material appears to be that regarding whether the Defendant had claimed the stallion and two heifers in dispute from the Plaintiff when the latter *putumaed* his wife, Nowiniti, after she had left him on the first occasion. The Defendant stated that he had then claimed this stock whereas his only witness other than himself, viz. Zwelinjani, was positive that this was not the case. Apart from the fact that this is a material discrepancy, it has this added significance that if the Defendant did not then claim the stock from the Plaintiff, as testified to by Zwelinjani, it is improbable, bearing custom in mind, that the stock had been paid " by word of mouth " by the Plaintiff as alleged by the Defendant. Then there is this further factor weighing against the Defendant's case that he should have evinced so little interest in the stallion and two heifers which is evident from his admission that he had not earmarked this stock, that he had not known of the progeny of the heifers except for one calf, that he had not claimed this calf and that he did not know what had

become of the stock. This lack of interest on the part of the Defendant indicates that it is most unlikely that the stock was paid to him by the Plaintiff as alleged. Moreover, there is also this improbability in the Defendant's evidence that the Plaintiff should of his own accord have paid the stallion and two heifers as dowry for Nowiniti in addition to the dowry which he had already paid for her to the Defendant following her *twala* when no further dowry had been agreed upon or demanded by the Defendant after the initial dowry payment.

It follows that the probabilities do not favour the Defendant's case on the counterclaim and that the Commissioner cannot be said to be wrong in having decreed absolution from the instance, with costs, thereon in so far as the Defendant is concerned on whom the onus of proof on the relevant pleadings rested.

The appeal should accordingly be dismissed, with costs.

Yates and Potgieter, Members, concurred.

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

For Respondent: Mr. R. Knopf of Umtata.

SOUTHERN BANTU APPEAL COURT.

MAYEKISO vs. NGWILIKANE.

CASE No. 48 OF 1963.

UMTATA: 22nd January, 1964. Before Balk, President, Yates and Potgieter, Members of the Court.

EVIDENCE.

Admissibility of evidence to contradict witness as to previous statements made by him inconsistent with his present testimony —right of appellate tribunal to consider recorded evidence erroneously ruled to be inadmissible by Court a quo.

Summary: This was an appeal from the judgment of a Bantu Affairs Commissioner's Court in an interpleader action, declaring certain three head of cattle not executable.

In his evidence for the claimant, the judgment debtor stated that he had no stock of his own and that the cattle at his kraal were the property of the claimant. A witness for the judgment creditor gave evidence to the effect that the judgment debtor had told her that he was having two head of cattle registered in claimant's name for dipping purposes to avoid execution by the execution creditor and had requested her not to disclose that he owned any cattle. The evidence of this witness was recorded by the presiding judicial officer but, on application by the claimant's attorney, was subsequently ruled by him as being inadmissible. The Appellant's attorney submitted that this evidence could not be taken into account by this Court in the absence of a ground of appeal specifically challenging the ruling of the Court *a quo.*

Held: That the Commissioner erred in ruling that the evidence of judgment creditor's witness anent certain statements made to her by the judgment debtor was inadmissible, as this

evidence was admissible to show that the execution debtor had made former statements relative to the subject matter of the instant proceedings which where inconsistent with his evidence therein.

Held further: That in appeals on fact it is for the appellate tribunal to determine for itself on all the admissible evidence before it whether or not the judgment of the Court *a quo* is correct.

Referred to:

Salzman versus Holmes, 1914, A.D. 471, at pages 477 and 478.

Adams versus Skeyi, 1955, N.A.C. 147 (S), at pages 148 and 149.

Mcimbi versus Mpondweni, 1956, N.A.C. 20, at pages 23 and 24.

Balk (President):

This is an appeal by the execution creditor from the judgment of a Bantu Affairs Commissioner's Court in an inter-pleader action declaring certain three head of cattle not executable, with costs.

The appeal is confined to fact.

The Commissioner correctly held that the onus of proof rested on the claimant (now Respondent) as the cattle had been attached by the Messenger of the Bantu Affairs Commissioner's Court in the execution debtor's possession, see *Veti versus Hlati,* 1957, N.A.C. 3 (S), as page 5. The Commissioner found that this onus had been discharged. That he, however, erred in coming to this conclusion will be apparent from what follows.

According to the claimant's testimony, he is the owner of six head of cattle at the execution debtor's kraal, including the three attached by the Messenger of the Court, he having placed these cattle there for the use of the execution debtor's wife who is his cousin. In other words, the claimant *ngomaed* the cattle to her. He stated that he had placed two heifers at that kraal for that purpose in the year 1957. They later had two calves. One of the heifers died. He bought a red ox from one Fololo which he also placed at the execution debtor's kraal for the use of the latter's wife as well as a *wasa* cow and a red and white bull calf both of which he purchased from one Peter Mayekiso. Of these cattle, he slaughtered one and sold two head. This leaves a balance of three head of cattle belonging to the claimant at the execution debtor's kraal; yet the claimant maintained that he had six head there. From a comparison of the Plaintiff's testimony with that of his witness, the execution debtor, it is evident that the claimant omitted to mention three calves. The significance of this omission is heightened, firstly, by the fact that the claimant was unable to account for one of the cattle entered in the relative stock card. He said that at that stage he had six head of cattle but if his stock card showed seven head (as it does) he was possibly mistaken. Secondly, there is his testimony that on the return of the execution debtor and the latter's wife to the Tsomo district in the year 1962, the stock card was changed back into his (the claimant's) name from her name, that there were then six head of cattle and that since then there has been no change in their number; yet the claimant went on to say that he sold two of the cattle in question and slaughtered one of them after the stock card had been altered to his name again. In my judgment it is inconceivable, as submitted by Mr. Airey in the course of his argument on behalf of the Appellant, that there should have been these inconsistencies if in fact the claimant was the owner of the

cattle and he had *nqomaed* them to the execution debtor's wife as he would have the Court believe, particularly as the claimant lived in the same ward and dipped his stock in the same dipping tank as the execution debtor and had remained at home since the inception of the alleged *nqoma* transaction so that he had every facility to inspect the cattle and acquaint himself with increases and losses consonant with custom. There is, as pointed out by Mr. Airey, this discrepancy between the claimant's evidence and that of the execution debtor that whilst the former stated that there were six head of cattle when the stock card was put back into his name, the execution debtor said that there were then eight head. Then, there is this further material discrepancy between their evidence that whereas the claimant stated that he had dealt with execution debtor's wife and not with the execution debtor in placing the cattle with her and that the execution debtor had nothing to do with the cattle, the execution debtor's version was that the cattle had been entrused to him by the claimant, i.e. that the latter had left them in his personal care and that he was responsible for them. This discrepancy makes both the claimant's and the execution debtor's testimony suspect for there is no room for error here. Moreover, there is Ethel Mantambo's evidence for the execution creditor indicating that the execution debtor is unworthy of credence. The latter denied under cross-examination that he had purchased any cattle. He also denied that he had gone with Ethel's husband, Titaus Mantambo, since deceased, to Tsojana and to Tsomo Village to purchase cattle whereas, according to Ethel, she overheard a conversation between the execution debtor and Titus during the year 1955 that the two heifers which they had then acquired, had been purchased by them at Tsojana and the execution debtor had then asked her not to disclose that he owned any cattle. She had also learnt from him that the two heifers which he and Titus had acquired in the year 1957, had been purchased by them in Tsomo Village. Ethel went on to say that one of the heifers acquired in 1955 together with one of those acquired in 1957 were then, i.e. in 1957, registered in the claimant's name for dipping purposes and that the execution debtor had then told her that he was doing this to avoid execution by the execution creditor. It is also manifest from Ethel's evidence that the two heifers registered in the claimant's name in 1957 were subsequently removed from her kraal to that of the execution debtor which was also denied by the latter in cross-examination. That Ethel's evidence is to be preferred to that of the execution debtor is apparent from his manifestly false denial under cross-examination that he and Titus were great friends as testified to by both Ethel and the claimant.

The Commissioner regarded parts of Ethel's evidence—he does not specify which parts—as hearsay and, at the instance of the claimant's attorney, he ruled that her testimony anent the execution debtor's request to her not to mention that he owned stock and his intimation to her that he was having the two heifers registered in the claimant's name for dipping purposes to avoid execution by the execution creditor, was inadmissible because it was hearsay, the position being that the Commissioner recorded this evidence and on the claimant's attorney objecting thereto, he intimated that a ruling would be given later and thereafter he crossed the evidence out. The Commissioner erred in this ruling as the evidence was admissible to show that the execution debtor had made former statements relative to the subject matter of the instant proceedings which were inconsistent with his evidence therein, see *Salzman versus Holmes,* 1914, A.D. 471, at pages 477 and 478. Mr. Mugglestone submitted that this Court was precluded from taking this evidence into account in the absence of a ground of appeal specifically challenging the Commissioner's ruling that it was inadmissible. There is no substance in this submission as in appeals on fact it is for the appellate tribunal to determine for itself on all the admissible evidence before it whether or not the judgment of the Court *a quo* is correct, see

Adams versus Skeyi, 1955, N.A.C. 147 (S), at pages 148 and 149, and *Mcimbi versus Mpondweni,* 1956, N.A.C. 20, at pages 23 and 24.

The testimony of the claimant's witness Peter Mayekiso, that the claimant had bought cattle from him does not advance his case as there is nothing to show that these cattle were amongst the three head attached and in any event the claimant's case is suspect on his own showing and that of his witness, the execution debtor, as is evident from what has been stated above.

The evidence of the remaining witness called by the claimant, viz. the dipping foreman, in regard to the cattle registered in the claimant's name in the dipping records also affords him no assistance as such evidence is not probative of the ownership of the cattle, see *Veti's* case (*supra*), at page 5. Although the Commissioner stated in his reasons for judgment that this was the position, he went on to say that the claimant adduced this evidence to show how he used his rights as owner of the cattle which appears to negative his concession.

It follows that the claimant signally failed to discharge the onus of proof resting on him so that the Commissioner was wrong in declaring the three head of cattle not executable and ought instead to have declared them to be executable.

The appeal should accordingly be allowed, with costs, and the judgment of the Commissioner's Court altered to one declaring the three head of cattle to be executable, with costs.

Yates and Potgieter, Members, concurred.

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

For Respondent: Mr. K. Muggleston of Umtata.

NORTH-EASTERN BANTU APPEAL COURT.

BUTELEZI vs. MDHLALOSE.

B.A.C. CASE No. 49 OF 1963.

PIETERMARITZBURG: 27th August, 1963. Before Cowan, President; Craig and Rossouw, Members of the Court.

PRACTICE AND PROCEDURE

Res judicata—*judgment of absolution from the instance.*

Summary: Plaintiff sued in the Bantu Affairs Commissioner's Court for damages for seduction, pregnancy, lying-in, medical and nursing expenses and loss of wages. Defendant pleaded *res judicata* specially. If transpired that Defendant had been sued for damages in a Chief's Court by present Plaintiff's guardian and the latter had been awarded two head of cattle. On appeal to the Bantu Affairs Commissioner's Court the Chief's judgment was set aside and for it was substituted, "Claim dismissed, with costs." In the present case the Bantu Affairs Commissioner upheld the special plea and dismissed the summons with costs.

Held: That, apart from other considerations, the end result of the earlier case which originated in a Chief's Court was an absolution judgment and could not found a plea of *res judicata.*

Cases referred to:

Umvovo versus Umvuvo, 1953 (1), S.A.L.R. 195 (A.D.) at p. 200.

Ex parte Minister of Native Affairs: in re Kako versus Beyi, 1948 (1), S.A.L.R. 388 (A.D.).

Appeal from Court of Bantu Affairs Commissioner at Vryheid.

Cowan, President:

In the Bantu Affairs Commissioner's Court the present Appellant, who was cited as being assisted by one Felokwake Butelezi, sued Ketayipi Mdhlalose (the present Respondent) for the sum of R400 damages for her seduction and pregnancy alleging that she had also incurred lying-in, medical and nursing expenses and loss of wages.

After requesting a number of further particulars, which it would seem from the record, were never furnished, the Respondent entered a special plea of *res judicata* " in that on the 24th August, 1960, judgment was given in favour of the Defendant with costs in the Native Commissioner's Court of Vryheid (Case No. 128/59) in an action based on the same cause of action as this matter". He also pleaded over denying each and every allegation contained in the summons.

After several adjournments the matter finally came before the court on the 20th May, 1963, and the Appellant's attorney then requested a further postponement owing to the illness of one of his witnesses. This was objected to by the Respondent's attorney and the court then proceeded to deal with the special plea of *res judicata*. There is no note in the record, which there should have been, that the record of Case No. 128/59 was ever formally put before the court. It would seem, however, that this was done by consent as it was referred to by both attorneys in their addresses and by the Commissioner in his reasons for judgment. The record of that case discloses that Felokwake had brought an action in a chief's court against the Respondent on the 17th October, 1959, in which he claimed two head of cattle as damages arising out of the impregnation of his sister, the present Appellant, by the Respondent. The defence to the claim is recorded as being, " Defendant denies liability and notes an appeal against the judgment". The judgment entered was, " For Plaintiff for two head of cattle plus £2 costs". An appeal against this judgment to the Commissioner's court was subsequently upheld with costs, the judgment of the chief being set aside and substituted by one of, " Claim dismissed with costs ".

To revert to the present action: The Commissioner upheld the plea of *res judicata* and dismissed the summons with costs and this judgment has been appealed against to this court on the following grounds.—

(*a*) the parties to the action heard on the 24th August, 1960 (Case No. 128/59) were not the same as the parties to the instant action;

(*b*) the prior action was not founded on the same cause of action as the instant action, and

(*c*) the prior action did not finally determine the rights of the present parties in relation to the instant dispute.

It is unnecessary to discuss the merits of these grounds as they are patently good. As regards ground (*c*), however, it should perhaps be remarked that it appears from the Commissioner's reasons for judgment that he was influenced to take the view that the matter was *res judicata* because of the fact that the Appellant's guardian's previous action against the Respondent arising out of the Appellant's alleged seduction had been brought under Bantu law and that (I quote) " the court could find no decided cases

where the guardian had failed under Bantu custom that the female could then resort to common law". But even if the parties in the two cases had been the same, which they are not, the end result of the previous action was the dismissal of the claim and this amounted to an absolution judgment. It follows, therefore, that no conclusion reaches in those proceedings, not even the fact that Bantu law was applied in them, could be binding in subsequent proceedings [see *Umvovo versus Umvovo*, 1953 (1), S.A.L.R. 195 (A.D.) at p. 200].

The appeal must therefore succeed on all three grounds and it is allowed with costs and the Bantu Affairs Commissioner's judgment altered to one of "The special plea is dismissed". The matter is remitted back to the lower court with leave to the parties to set it down for hearing.

It seems desirable, for the future guidance of the Commissioner in dealing with cases of this nature, that his attention should be invited to the case of *Ex parte Minister of Native Affairs:* in re *Yako versus Beyi*, 1948 (1), S.A.L.R. 388 (A.D.) in which the discretion of a Commissioner to apply Bantu law in suits between Bantu was considered and settled.

Craig and Rossouw, Members, concurred.

For Appellant: Adv. W. O. H. Mange instructed by F. Tromp.

For Respondent: In default.

NORTH-EASTERN BANTU APPEAL COURT.

CEBEKULU vs. CEBEKULU AND OTHERS.

B.A.C. CASE No. 50 of 1963.

PIETERMARITZBURG: 27th August, 1963. Before Cowan, President; Craig and Rossouw, Members of the Court.

NATAL CODE OF BANTU LAW

Official witness—presumption of due appointment—validity of customary union.

Summary: At the hearing of a claim for dissolution of a customary union and at the end of Plaintiff's case the attorney for Defendant queried the competence of the official witness who had officiated at the celebration of the union. The Bantu Affairs Commissioner held that the witness had not been duly appointed and, *suo motu*, declared the customary union invalid.

Held: That as the official witness had on occasions acted as such for a period of 13 years and had on this occasion so acted there was a very strong presumption that he had been duly appointed, his office being a public one.

Held further: That too much weight had, in the circumstances prevalent, been placed on the bare statement of the witness that he was not an official witness.

Cases referred to:

Rex versus Naidoo, 1909, T.S. 43.

Kulu versus Mlambo, 1960, N.A.C. 75.

Statutes referred to:

Natal Code of Bantu Law: Proc. 168 of 1932: Sections 16 (1) (2) and 59 (*c*).

Appeal from the Court of the Bantu Affairs Commissioner, Dundee.

Cowan, President:

The Appellant was the Plaintiff in the court of a Bantu Affairs Commissioner and the particulars of his claim in that court were as follows:—

"1. All parties hereto are Natives as defined by Law.

2. Plaintiff and First Defendant entered into a customary union on 17th December, 1949, which was registered on 20th December, 1949, at Helpmekaar, Dundee District, under No. 67/1949.

3. First Defendant is the daughter of the late Sambana Gabuza hereinafter referred to as the Deceased, and is duly assisted herein by the Second Defendant.

4. Second Defendant is the son and heir of the Deceased and the legal guardian of the First Defendant.

5. The lobola agreed upon with the Deceased was nine head of cattle as First Defendant had had a child by another man prior to the union.

6. Plaintiff paid eight head of cattle lobola to the Deceased leaving a balance of one beast due.

7. Four children were born of the union namely:—

(*a*) Nombeni, a girl;
(*b*) Kalisile, a girl;
(*c*) Kalesake, a boy;
(*d*) Mafico, a girl;

who are all minors living.

8. In September, 1961, First Defendant wrongfully, unlawfully and maliciously deserted Plaintiff and went to live with Third Defendant in adultery as husband and wife, with whom she is still living.

9. Attempts at reconciliation have been made, but have failed."

His claim against the First Defendant was for a decree of divorce on the grounds of her adultery and malicious desertion and for the custody of the four minor children of the union. He claimed an order against the Second Defendant for the refund of four head of lobolo and for cancellation of the debt of the one beast still owing. As against the Third Defendant he claimed R50 as damages for his wrongful and unlawful actions in enticing the First Defendant from his kraal and/or for abducting or harbouring her and/or committing adultery with her and/or depriving him of her services. He also claimed costs against all the Defendants.

It should be remarked here that the summons used was one drawn up for use in Magistrates' Courts and does not comply with the rules of Bantu Affairs Commissioners' Courts in that the Defendants were not called upon to enter an appearance on or before a day, date and hour fixed by the clerk of the court but were merely required to enter an appearance within ten days after service of the summons upon them. Another feature calling for comment is the most unsatisfactory notices of return of service of the summons. There are two of these. In the first, the Messenger of the Court purports to have served on the 17th July, 1962, a true copy of the summons "upon the herein named

Defendant by handing a copy thereof at his place of abode at Helpmekaar to N. J. Xulu (who accepted service for Defendants)". In the second return of service the Messenger certifies that he duly served a copy of the summons on the 11th February, 1963, "upon the herein named Defendant by handing same to him personally . . .". It is impossible to deduce from this service which Defendants were served with the summons on the 17th July—if, indeed it was served on more than one Defendant on that day—or on which Defendant the summons was served on the 11th February, 1963.

The record does not disclose that any request was made for a default judgment against any of the Defendants or that the matter was ever set down for trial but, notwithstanding this, the Plaintiff's attorneys issued a "notice of re-instatement" purporting to re-instate the case for hearing by the Court on the 28th January, 1963. This notice was addressed to the Clerk of the Court and to "Messrs. Smith, Lyon & Thorrold, Defendant's Attorney". On this day the judicial officer recorded that Defendants Nos. 1 and 2 were present and represented by Mr. Dunn and that Defendant No. 3 was in default. Here it may be remarked that if it was on Defendant No. 3 that the summons was served on the 11th February, 1963, it is not surprising that he did not attend the Court on the 28th January, 1963. The judicial officer went on to make the following note: "No appearance to defend filed and no plea. Necessary process to be filed. Postponed to 7th May, 1963. Defendants to pay wasted costs (Defendants Nos. 1 and 2)".

Defendant No. 2 through his attorney, entered an appearance to defend on the 11th February and filed the following plea:—

"1. Second Defendant admits paragraphs 1, 2, 3, 4, 5 and 6 of Plaintiff's particulars of claim.

2. Second Defendant avers that First Defendant had two children by another man, Majozi, viz. Duduzile and Nombeni.

3. Second Defendant denies that Nombeni is Plaintiff's child and avers that she was conceived before Plaintiff and First Defendant fell in love.

4. Second Defendant avers that Plaintiff is entitled to the custody of Nombeni as prayed because she is an illegitimate child.

Wherefore Defendant prays for judgment in his favour with costs."

In view of the nature of the claim made against him this plea of the Second Defendant discloses no defence to the action and is unintelligible.

The record does not disclose that either of the Defendants Nos. 1 or 3 entered an appearance to defend the action or filed a plea.

When the matter came before the Court on the 7th May, 1963, the judicial officer recorded that Defendants Nos. 1 and 2 were present and that Mr. Dunn appeared for them and that Defendant No. 3 was in default. How Mr. Dunn could appear for Defendant No. 1 who had not entered an appearance to defend is not stated. Notwithstanding the fact that no application in writing for a default judgment against Defendant No. 3 appears to have been made, it seems that the case was also regarded as being against him at that stage as at the end of his examination the Plaintiff intimated that he claimed R50 damages against him as set out in his summons plus costs.

At the trial the register of the customary union between the Plaintiff and Defendant No. 1 was put in by consent. This disclosed that the union was celebrated on 17th December, 1949, and registered on 20th December, 1949, and that it was signed by the parties to the union by means of their marks. The signature of the official witness is reflected as "Johannes Xulu (Headman) His X mark". It emerged, however, from the evidence of one Shiboshe Buthelezi whom the Plaintiff had called as a witness that it was he who had officiated as the official witness of the celebration. Under cross-examination, he stated, "Johannes Xulu was not present at the celebration of the union. I who was the official witness of the celebration of the union did not accompany them to register the customary union . . . I normally officiate at customary unions when Johannes Xulu is absent. It is the practice that Johannes Xulu takes the people to Court and have the union registered". On being subsequently recalled and examined by the court he made the following statement: "I am not an official witness. I am a commoner. I went to this celebration of the customary union on the instruction of the induna". Under examination by the Plaintiff's attorney he said, "I am a tribal constable of Induna Xulu. I am entitled to ten head of cattle plus the *nqutu* beast for each of my daughters. I do not hold any appointment by the Bantu Affairs Commissioner but I perform the Induna's duties . . .". On being examined by the Defendant's attorney he stated: "I only officiated on instruction of the Induna if the Induna could not go there himself. I cannot officiate at any customary union unless I am specially instructed to do so".

At the end of the Plaintiff's case the Defendant's attorney raised the question of the validity of the customary union whereupon the Commissioner, *mero motu,* declared the union to be invalid and dismissed the Plaintiff's summons with costs.

Summarised, the reasons given by the Commissioner for his finding are as follows:—

1. In terms of section 59 (*c*) of the Code one of the essentials of a customary union is that there should be an official witness *to whom a public declaration should be made* (the wording and underlining is his).
2. Section 16 (1) lays down that *official witnesses* must be appointed by Chiefs to officiate *inter alia* at the celebration of customary unions. (The wording and underlining is again his.)
3. The evidence of Shiboshe Buthelezi reveals that he holds no appointment as official witness.
4. Where the essentials of section 59 (*c*) are lacking the union is void *ab initio* and not merely voidable.

Section 16 (1) of the Code reads as follows:—

> "Chiefs and headman are responsible for the appointment of a sufficient number of official witnesses to serve the requirements of the tribes or communities under their jurisdiction as regards the celebration of customary unions, for the due compliance by the members of such tribes or communities with the regulations relating to such unions and for the due notification to the Native Commissioner by the official witnesses of all such unions."

It will be observed firstly that while Chiefs and headmen are responsible for the appointment of a sufficient number of official witnesses no attempt is made to prescribe the manner such appointments are to be made, the intention being, apparently, to leave this to the individual Chief or headman concerned. Secondly, there is no provision in the Code that the authority of a Bantu Affairs Commissioner is necessary for the appointment of

an official witness but a certain measure of control is placed in his hands by section 16 (2) of the Code which obliges a Chief or headman to terminate any such appointment when so directed by the Commissioner. Subject to the indirect control vested in the Commissioner by section 16 (2), the number of official witnesses to be appointed by particular Chief or headman is left to the discretion of the Chief or headman concerned.

In the instant case it seems clear that the substantive official witness is Johannes Xulu who is also a Chief's deputy. It is also clear from the record that from 1949, at the latest, the practice in that area has been for Shiboshe to officiate as an official witness at weddings on the specific instructions of Johannes when he, himself, was unable to attend any such function.

It was open to the Chief to appoint both Johannes and Shiboshe as official witnesses and as this office is a public one there is a presumption that the person acting in it has been properly appointed and this presumption is a very strong one indeed. (*Rex versus Naidoo,* 1909 T.S. 43.) The only evidence on record on which Shiboshe's appointment could be challenged is his own and in my view the Commissioner has attached too much weight to his bare statement that he was not an official witness. It is clear from his evidence as a whole that he recognised that Johannes held the substantive post of official witness and that he was only entitled to deputise for him when he was specifically instructed to do so. Recognising, as he did, that he was merely an assistant and subordinate of Johannes, it is quite conceivable and, indeed, probable that he did not consider that he was entitled to hold himself out to be an official witness in his own right and I do not think that anything more than this can be read into his evidence.

There is nothing in the record from which it can be inferred that this arrangement did not carry the express approval of the Chief and, as it has operated for at least some thirteen years now, it is difficult to conceive that it was not at any rate tacitly approved by him. In his address to this Court, Mr. Menge, who appeared for the Respondent, did not contend that Johannes (who is also the Chief's deputy as well as being an official witness) was not entitled to appoint Shiboshe as an official witness but he submitted, if I understand him correctly, that, what he termed, "*ad hoc* appointments" of Shiboshe to officiate when Johannes was unable to do so, constituted such an irregularity as to make them invalid. I can see no virtue in this submission. The Code authorises the appointment of more than one official witness and if a second one is appointed there appears to me to be no reason whatsoever why his appointment should not be made subject to the condition that he may only officiate at a ceremony if the main official witness is unable to attend such a function.

In my view the Commissioner erred in holding that Shiboshe was not an official witness and in holding that for this reason there was no valid customary union between the Appellant and the First Defendant. It is therefore unnecessary to consider the judgment in the case of *Kulu versus Mlambo,* 1960, R.A.C. 75, the correctness of which Mr. Menge attacked in his address to the Court.

The appeal is allowed with costs; the judgment of the Bantu Affairs Commissioner dismissing the summons is set aside and the case is remitted back to the Lower Court for hearing on its merits.

Craig and Rossouw, Members, concurred.

For Appellant: Adv. J. A. van Heerden instructed by Wynne & Wynne.

For Respondent: Adv. W. O. H. Menge instructed by Smith, Lyon & Thorold.

SOUTHERN BANTU APPEAL COURT.

MAQEKEZA vs. NQAPULANA.

CASE No. 51 OF 1963.

UMTATA: 30th January, 1964. Before Balk, President, Yates and Collen, Members of the Court.

BANTU LAW AND CUSTOM.

Failure of father to attend funeral of child indicates his repudiation of such child.

PRACTICE AND PROCEDURE

Appeals from Bantu Affairs Commissioners' Courts—costs of appeal where judgment of court a quo *altered to one of absolution from the instance.*

Summary: This was an appeal from the judgment of a Bantu Affairs Commissioner's Court for Defendant (now Respondent) for the custody of one, Nomakatini, who, the Plaintiff averred in his summons, was one of the two children of his customary union with one Nokayini which had been dissolved by the consent judgment in a former action, and for whom provision had been made in that judgment for the customary deductions from the dowry returnable. The Defendant in his plea denied that such deductions had been made and alleged that Nomakatini was the only issue of the Plaintiff's customary union with Nokayini, and that this child had died.

In the evidence for the Defendant it was alleged that the latter had reported the death of Nomakatini to the Plaintiff but that the Plaintiff had not attended the funeral.

The appeal was allowed, with costs, and the judgment of the Commissioner's Court was altered to one of absolution from the instance, with costs.

Held: That it was improbable that a report had been made to Plaintiff that Nomakatini had died, for, in that event, Plaintiff's failure to attend the funeral would have indicated his repudiation of the child, in which case it would be inconceivable that he would have advanced the instant claim.

Held further: That the alteration of the judgment of the Court *a quo* from one for the Defendant to a decree of absolution from the instance appeared to be one of substance and not merely one of form as the evidence indicated the probability of the Plaintiff being able to adduce further testimony in support of his case so that the Appellant was entitled to costs of appeal.

Referred to:

Van der Schyf versus Loots, 1938, A.D. 137, at page 145.

Balk (President):—

This is an appeal from the judgment of a Bantu Affairs Commissioner's Court for Defendant (now Respondent), with costs, in an action instituted against him by the Plaintiff (present

Appellant) for the custody of one, Nomakatini, who, the Plaintiff averred in his summons, was one of the two children of his customary union with one Nokayini which had been dissolved by the consent judgment in a former action. The Plaintiff further averred in the summons that the customary deductions from the dowry returnable had been made in the judgment in that case in respect of the two children, that, despite demand, the Defendant had refused to give him the custody of Nomakatini and had claimed that the latter was his own child.

In his plea the Defendant denied that such deductions had been made and stated that the judgment in the prior action read as follows:—

"(*a*) For Plaintiff (Nokayini assisted by the present Defendant) for dissolution of the customary union.

(*b*) For Defendant (now Plaintiff) for 6 cattle or R120 being returnable dowry."

The Defendant went on to allege that Nomakatini was the only issue of the Plaintiff's customary union with Nokayini and that this child had died.

The appeal is confined to fact.

As the Defendant's plea that Nomakatini had died is inconsistent with the averments in the summons that the Defendant had refused to give her to the Plaintiff and had claimed that she was his own child, those averments are, consonant with Rule 45 (8) of the Rules for Bantu Affairs Commissioner's Courts, deemed to have been denied by the Defendant so that the onus of proof rested on the Plaintiff.

The Plaintiff's case, according to his testimony, is that there were two children of his customary union with Nokayini, viz., Zandile, a boy who had died before the birth of the second child, and Nomakatini, a girl. At the time of the judgment in the prior action which was entered on the 29th May, 1962, Nomakatini was alive and in the custody of her mother, Nokayini. Thereafter Nomakatini disappeared from the kraal of the Defendant who is Nokayini's brother, and he (Plaintiff) found her at the kraal of one Qwenga and took her away. Subsequently Nomakatini was taken from him by the Police and returned to Qwenga's kraal. He (Plaintiff) had seen Nomakatini at his own kraal and at Nokayeni's kraal before he had taken her from Qwenga's kraal.

There are, so submitted by Mr. Airey in his argument on behalf of the Respondent, inconsistencies in the Plaintiff's evidence as regards when Nokayini left his kraal. These inconsistencies affect his credibility as they bear on his identification of the child he took from Qwenga's kraal as Nomakatini. The Plaintiff denied under cross-examination that he had stated in his plea in the prior action that Nokayini had deserted him three years previously. He went on to say that she had left him when the summons in that case was issued which was just after Christmas, 1961. He conceded that he had received that summons a long time after she had left him. Thereafter he said that she was with him up to Christmas, 1961, that she had lived with him peacefully until then and that if it was stated in his plea in the prior action that she had deserted him three years previously it did not represent his view. The significance of these inconsistencies is accentuated by the evidence for the Plaintiff of his other wife, Nohelm, who was emphatic that Nokayini had been away from the Plaintiff's kraal for three to four years before the dissolution of their customary union and that Nokayini had not been living peacefully with the Plaintiff until early in the year 1962. Then, there is, as stressed by Mr. Airey, an admission by the Plaintiff's remaining witness, Nodumile, in her evidence that Nomakatini had lived at her mother's people's kraal all the time which is in conflict with the Plaintiff's evidence that

he had seen Nomakatini at his kraal before he took her from Qwenga's kraal. It is true that Nodumile went on to say that Nomakatini had been brought to the Plaintiff's kraal when she was four months old and had lived there for a long time but this testimony carries little weight in the absence of an explanation by her as to how she came to admit that Nomakatini had always lived at her mother's people's kraal and only serves to indicate the inconsistency of her evidence which is heightened by her statement that she was at her home kraal at the time when Nomakatini was brought to the Plaintiff's kraal followed by her statement that she was then at the Plaintiff's kraal. Nodumile's evidence is also inconsistent as regards the number of times she saw Nomakatini and as to whether the Plaintiff had hidden Nomakatini when he took her from Qwenga's kraal. Accordingly no confidence can be placed in the Plaintiff's or Nodumile's testimony. The same applies to Nohelm's evidence. She stated in her evidence-in-chief that Nokayini had returned to the Plaintiff's kraal with Nomakatini when the latter had reached the age of understanding. She went on to say that Nomakatini was then in her fourth month. Her explanation that she did not know which occasion was referred to when she said that Nokayini had returned to the Plaintiff's kraal with Nomakatini when the latter had reached the age of understanding is singularly unconvincing in the light of her further evidence from which it is manifest that Nomakatini had not, when she had reached the age of understanding, returned to the Plaintiff's kraal with her mother. Moreover, Nokayini's evidence that Nomakatini returned to the Plaintiff's kraal at the age of four months and remained there until she started to walk, when she was about one year old, is in conflict with Nodumile's admission referred to above that Nomakatini had always lived at her mother's people's kraal. It follows that the Plaintiff did not establish his case and was not entitled to judgment.

There are, as submitted by Mr. Muggleston in his argument on behalf of the Appellant, also inconsistencies and improbabilities in the evidence for the Defendant indicating that no reliance can be placed thereon. The Defendant admitted that in the prior action it had been explained to him and Nokayini that the present Plaintiff (then Defendant) had alleged in his plea that there were two children of his customary union with Nokayini and that a wedding outfit had been supplied with her. The Defendant also admitted that he and Nokayini had agreed to the consent judgment in the prior action and that, of the nine head of cattle paid as dowry for Nokayini, one beast had remained with him for the wedding outfit which indicates that the consent judgment for the return of six head of dowry cattle was based on an allowance of two head for the two children. At that stage the Defendant changed his version and said that he had not agreed to the consent judgment and had refunded seven head of dowry cattle to the Plaintiff. He then also denied that the consent judgment accorded with the Plaintiff's plea in the prior action. These factors made the Defendant's evidence and that of his witness, Nokayini, that there was only one child of her customary union with the Plaintiff most improbable and indicate that the truth lies in the latter's version that there were two children of that union. It is also manifest from the Defendant's testimony that Nokayini's denial in the course of her evidence that the Plaintiff had alleged in the prior case that there were two children of the union is false. Then, there is an improbability in the evidence for the Defendant that the death of Nomakatini was reported to the Plaintiff by the Defendant and that the Plaintiff had not attended the funeral as in that event it is inconceivable, as contended by Mr. Muggleston, that the Plaintiff would have advanced the instant claim, bearing custom in mind, for his failure to attend the funeral would have indicated repudiation of the child. Accordingly, the Plaintiff's version that Nomakatini's death was not reported to him is the more probable. This disposes of Mboneli's evidence for the Defen-

dant that he reported the death to the Plaintiff in December, 1961, which, in any event, is suspect in the light of the blatant inconsistencies therein as to the period he was away at work at the mines during the year 1961. The evidence of the Defendant's remaining witness, Headman Pongomile, that the Defendant reported the death of his sister's child to him in December, 1961, also does not advance the Defendant's case as it is not probative of the death being hearsay in this respect. Besides this witness was unworthy of credence on his own showing as he would have the Court believe that, although he was in Court and close to Mboneli whilst the latter was giving evidence, he did not hear that evidence. Accordingly the Defendant also did not establish his case and was not entitled to a full judgment so that the Commissioner ought to have decreed absolution from the instance, with costs.

The alteration of the judgment of the Commissioner's Court from one for the Defendant to a decree of absolution from the instance appears to be one of substance and not merely one of form as the evidence indicates the probability of the Plaintiff being able to adduce further testimony in support of his case so that the Appellant is entitled to costs of appeal, see *van der Schyf versus Loots,* 1938, A.D. 137, at page 145.

In the result the appeal ought to be allowed, with costs, and the judgment of the Commissioner's Court altered to a decree of absolution from the instance, with costs.

Yates and Collen, Members, concurred.

For Appellant: Mr. K. Muggleston of Umtata.

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

NORTH-EASTERN BANTU APPEAL COURT.

BUTELEZI vs. MAGUBANE.

B.A.C. CASE No. 53 OF 1963.

PIETERMARITZBURG: 28th August, 1963. Before Cowan, President; Craig and Rossouw, Members of the Court.

PRACTICE AND PROCEDURE

Claim for damages for seduction and pregnancy—faulty pleadings—lack of corroboration—parties unrepresented—Bantu Affairs Commissioner's duty to assist—" Reasons for Judgment " of no assistance to Appeal Court—inexactitude in use of word " seduction."

Summary: Plaintiff sued Defendant for two head of cattle for rendering his daughter pregnant and because there was no corroboration of the daughter's allegations the Bantu Affairs Commissioner gave judgment for Defendant.

Held: That had the Bantu Affairs Commissioner, as was his duty, investigated this matter adequately and advised Plaintiff of the necessity for evidence *aliunde* in respect of responsibility for the pregnancy the latter might have been able to say whether or not such evidence was available.

Cases referred to:

Sitole versus Sitole, 1940, N.A.C. 115.

Ngoma versus Kumalo, 1941, N.A.C. 35.

Dsibande versus Dlamini, 1947, N.A.C. 131.

Bulanga versus Bulanga, 1960, N.A.C. 1.

Ntombela versus Piliso, 1938, N.A.C. 201 (T & N.)

Appeal from Court of Bantu Affairs Commissioner at Vryheid.

Craig, Permanent Member:

Plaintiff sued Defendant for two head of cattle or their value R50 being damages for allegedly rendering pregnant the former's daughter Doris. Defendant denied the allegation and after hearing evidence the Bantu Affairs Commissioner gave judgment for Defendant, with costs.

The matter now comes before this Court on appeal on the following grounds:—

1. The judgment is against the evidence and weight of the evidence.
2. The evidence led by Plaintiff's daughter of her report to the Defendant, during the second month of her pregnancy, that the Defendant persuaded her to give him time to report to his parents, was not denied, and therefore served as corroboration of her evidence.
3. In any event Defendant was not entitled to a full judgment, on the evidence on record.

The summons does not allege that the female concerned was seduced or that she was unmarried or that she gave birth to a child as a result of her pregnancy so that *ex facie* that document a claim for two head of cattle as damages appears to be incompetent (*vide* section 137 of the Code). True, in his evidence Plaintiff alleges "seduction and pregnancy" and there is a presumption of virginity in favour of an unmarried girl but it is not alleged or established that Doris is and always has been unmarried. It is improbable that Plaintiff had personal knowledge of the unblemished state of Doris before her present lapse and she was silent on this point which would be one peculiarly within her own knowledge. These points were not canvassed by the Bantu Affairs Commissioner whose duty it was to assist both parties, who were unrepresented, to present their cases. There is no record of any questions having been put by the court. The Commissioner's attention is directed to the reports of the following cases, viz. *Sitole versus Sitole,* 1940, N.A.C. 115, *Ngoma versus Kumalo,* 1941 N.A.C. 35, *Dsibande versus Dlamini,* 1947, N.A.C. 131 and *Bulunga versus Bulanga* 1960 N.A.C. 1.

Proof that Doris gave birth to a child in or about February, 1963 was conclusive though, for some unexplained reason, the Bantu Affairs Commissioner did not regard this as a "Fact Found Proved". She has testified that Defendant sired the child and he has denied it on oath. No necessary corroboration of her testimony on this point was forthcoming and this court cannot subscribe to the view submitted by Mr. Roux, who appeared for Appellant, that the fact that Defendant had not denied in evidence the allegation that the pregnancy had been reported to him on two occasions was corroborative of Doris's statement that he (Defendant) was the father of the child.

Normally, one would expect a party to deny each and every statement by the other party, with which he disagreed but it must be borne in mind that neither party was legally represented and appear to have been left to their own resources. It is improbable that either was versed in the niceties of procedure

and evidence or made written notes of the evidence tendered by the other and the omission to deny was probably due to forgetfulness.

The Commissioner's "Reasons for Judgment" were of no assistance to this Court. They were partly based on inexactitude. He found no facts proved. He states, *inter alia*, "The only evidence of the seduction is that of Plaintiff's daughter Doris and that is denied under oath by Defendant . . .". But Doris at no time said that Defendant seduced her. Seduction connotes virginity and defloration. What Doris did say was that Defendant had had connection with her, had rendered her pregnant and that he was the father of the child she bore and these are the allegations which Defendant denied. His denial that he had ever had connection with Doris would have been wide enough to cover an allegation of seduction had one been made.

There is in truth no corroboration of Doris's allegation that the Defendant is the father of her child and, as he denied it on oath, the Plaintiff was not entitled to judgment in his favour. It would seem, however, that both the parties are illiterate Bantu and, as the action was brought under Bantu law, it is very doubtful whether the Plaintiff had in fact any knowledge of the common law rule requiring evidence *aliunde* in support of the woman's story. In these circumstances one could reasonably have expected the Commissioner to have pointed out to the Plaintiff the necessity for such evidence *aliunde* and to have enquired from him whether he was in a position to adduce any. This was not done, however, and as a consequence this aspect of the case received no investigation whatever. It is possible that other evidence may be available which will corroborate the girl's story and for this reason and following the case of *Ntombela versus Piliso*, 1938, N.A.C. 201 (T. & N.) the appeal will be allowed and the judgment of the lower court altered to one absolving the Defendant with costs.

As the Respondent (Defendant) was in no way responsible for the inadequate investigation of the matter in the lower court there will be no order as to the costs of this appeal.

Cowan, President, and Rossouw, Member, concurred.

For Appellant: Adv. P. E. Roux instructed by A. C. Bestall & Uys.

Respondent in person.

SOUTHERN BANTU APPEAL COURT.

MENZI vs. MATIWANE.

CASE NO. 53 OF 1963.

KING WILLIAM'S TOWN: 10th March, 1964. Before Balk, President, Yates and Muir, Members of the Court.

PRACTICE AND PROCEDURE

Appeal from Chief's Court—application for condonation of late noting—such application tantamount to request for extension of time in which to note appeal—further considerations—requirement that where merits put in issue supporting affidavit to reflect essential information thereanent—considerations—applicant only required to show "good cause" within the meaning of the relevant regulation—applicant should not ordinarily be indentified with his attorney's negligence.

BANTU LAW AND CUSTOM

Dowry—recovery of—tribes which have no fixed dowry....

Summary: This was an appeal from the refusal of a Bantu Affairs Commissioner's Court of an application by the Defendant for condonation of the late noting of an appeal from the judgment given against him in a civil action by a Chief's Court.

The Plaintiff's claim in the Chief's Court was for dowry for his sister, by whom it was common cause Defendant had had three children, and for whom no dowry had been paid. There was, however, nothing to show that such dowry had been agreed upon.

In his written judgment the Commissioner gave three reasons for his refusal of the application, viz. firstly, because the appeal was not only out of time but had not been properly noted in another respect in that the applicant had failed to deposit with the Clerk of the Court the fees referred to in sub-section (2) of section *nine* of the Regulations for Chiefs' and Headmen's Civil Courts; secondly, because no reasons had been given in support of the allegation in the affidavit filed with the application that the proposed appeal had a reasonable prospect of success; and, thirdly, that no reasons were furnished in that affidavit "why Appellant was in any way prejudiced seeing that he was the father of three children born to the woman for whom *lobola* had to be paid."

Held: That the Commissioner ought not to have refused the application on the score that the applicant had not deposited the fees referred to in the relevant regulation, without affording him an opportunity of doing so forthwith as it is manifestly unjust to deprive an intending Appellant of his right to appeal solely because he had not deposited fees without affording him the opportunity of immediately remedying the position. This view gains support, firstly, from the language of sub-section (3) of section *nine* of the Regulations for Chiefs' and Headman's Civil Courts providing for the condonation of the late noting of an appeal by way of an extension of the period prescribed for the noting thereof and thus permitting an applicant for such relief being afforded an opportunity of depositing the fees; and, secondly, from the analogy arising from the procedure followed where unstamped documents are put in as evidence, viz. they are ordered by the Court to be stamped *nunc pro tunc* so that they may be receivable as evidence.

Held further: That where, as here, the merits of a proposed appeal are put in issue, the applicant ought to furnish briefly essential information in his supporting affidavit to enable the Court to decide what prospect of success there is in the proposed appeal.

Held further: That as in the instant case it was obvious from the Chief's written record that the Chief's Court erred in giving judgment against the Defendant, the applicant's failure to set out essential information in the supporting affidavit indicating what prospect of success there was in the proposed appeal was of little moment.

Held further: That is was not necessary for the applicant to prove that he was prejudiced by the judgment of the Chief's Court. All that was necessary for him to do was to show "good cause" within the meaning of sub-section (3) of *nine* of the relevant Regulations.

Held further: That where, as appeared to be the case in the instant proceedings, the applicant himself was in no way to blame for the late noting of an appeal which was entirely due to the negligence of his attorney, the Applicant should not ordinarily be indentified with his attorney's negligence to the extent of being debarred from proceeding with the proposed appeal.

Held further: That the Chief's judgment was manifestly wrong as amongst tribes that have no fixed dowry and practise *ukuteleka,* such as the Xhosa tribes in the Ciskei to which the Defendant belongs, dowry cannot, in the absence of an agreement to make a specific dowry payment, be recovered by recourse to law only by invoking the *ukuteleka* custom.

Referred to:

Gleneagles Farm Dairy versus Schoombee, 1947 (4), S.A. 66 (E), at page 71.

Dzanibe versus Dlamini, 81 [1963 (1)] P.H., R. 12 (S).

Meintjes versus H. D. Combrinck (Edms.), Bpk., 1961 (1), S.A. 262 (A.D.) at page 265.

Skweyiya versus Sixakwe, 1941, N.A.C. (C. and O.) 126, at page 127.

Cheche versus Nondabula, 1962, N.A.C. 23 (S), at pages 27 and 28.

Mkize versus Mkize, 1952, N.A.C. 194 (N.E.), at page 195.

Slomowitz versus Town Council of Vanderbijlpark, 79 [1962 (1)] P.H., F. 36 (T).

Silber versus Ozen Wholesalers (Pty.), Ltd. [1954 (2)], S.A. 345 (A.D.), at pages 352 and 353.

Batelo versus Vapi, 1957, N.A.C. 74 (S), at page 75.

Regulations for Chief's and Headman's Civil Courts: Section 9 (3).

Balk (President):—

This is an appeal from the refusal by a Bantu Affairs Commissioner's Court of an application by the Defendant for condonation of the late noting of an appeal from the judgment given against him in a civil action by a Chief's Court.

The appeal is brought on the following grounds:—

"1. That the Presiding Judicial Officer erred in dismissing the unopposed application for condonation of late noting of appeal on the ground that no good and sufficient reason had been adduced by the applicant to justify condonation. On the facts deposed to in the affidavit filed of record as amplified by applicant's attorney at the request of the Judicial Officer himself, the Presiding Officer should have found:—

(*a*) That the applicant has a good and bona fide defence to the action in that he submits that the Respondent is not the proper person to sue him in any event, and

(*b*) That the Late Nongemtu Matiwane was not the applicant's wife and that therefore he could not be expected to pay *lobola* for her.

(*c*) That the applicant was not in wilful default.

2. That even if there had been no proper Notice of Appeal at all before Court, the Presiding Judicial Officer should not have found this is ground (sic) for dismissing the application for condonation of late noting of appeal, especially in view of the intimation made by applicant's attorney that the application for leave to proceed with the appeal forthwith would not be pursued, in the event the Court granted application for condonation of late noting of appeal."

In his written judgment the Commissioner gives three reasons for refusing the application, viz., firstly, because the appeal was not only out of time but had not been properly noted in another respect in that the applicant had failed to deposit with the Clerk of the Court the fees referred to in sub-section (2) of section *nine* of the Regulations for Chiefs' and Headmen's Civil Courts without which an appeal is not in terms of that sub-section properly noted; secondly, because no reasons had been given in support of the allegation in the affidavit filed with the application that the proposed appeal had a reasonable prospect of success; and, thirdly, that no reasons were furnished in that affidavit " why appellant was in any way prejudiced seeing that he was the father of three children born to the woman for whom *lobola* had to be paid."

Dealing with these reasons seriatim, the Commisioner ought not to have refused the application on the score that the applicant had not deposited the fees referred to above without affording him an opportunity of doing so forthwith as it is manifestly unjust to deprive an intending appellant of his right to appeal solely because he had not deposited fees without affording him the opportunity of immediately remedying the position, particularly where, as here, the omission appears to have been due to an oversight on the part of the applicant's attorney, for which the applicant was not to blame. This view gains support, firstly, from the language of sub-section (3) of section *nine* of the Regulations referred to above, providing for the condonation of the late noting of an appeal by way of an extension of the period prescribed for the noting thereof and thus permitting of an applicant for such relief being afforded an opportunity of depositing the fees; and, secondly, from the analogy arising from the procedure followed where unstamped documents are put in as evidence, viz., they are ordered by the Court to be stamped *nunc pro tunc* so that they may be receivable as evidence, see *Gleneagles Farm Dairy versus Schoombee,* 1947 (4) S.A. 66 (E), at page 71. That the omission to deposit the fees was in all probability inadvertent and not intentional is apparent from the fact that both in the timeous notice of appeal which the Clerk of the Court stated had not been received by him and in the late notice of appeal there is a request to the Clerk of the Court to advise the applicant's attorney of the amount of the fees to be deposited. The Commissioner's stricture in his reasons for judgment that no effort was made by the applicant to ascertain the amount of the fees is accordingly unfounded.

Admittedly, where, as here, the merits of a proposed appeal are put in issue, the applicant ought to furnish briefly essential information in his supporting affidavit to enable the Court to decide what prospect of success there in in the proposed appeal, see *Dzanibe versus Dlamini* 81 [1963 (1)] P.H., R. 12 (S) and the authority there cited, viz., *Meintjes versus H. D. Combrinck (Edms.), Bpk.,* 1961 (1) S.A. 262 (A.D.), at page 265. In the instant case, however, it is obvious from the Chief's written record that the Chief's Court erred in giving judgment against the Defendant in that the Plaintiff's claim is for dowry for his sister and whilst the Defendant admitted in his plea in the Chief's Court that he had three children by her and had not paid dowry for her, there is nothing to show that the Defendant had agreed to make any

such payment; and amongst tribes which have no fixed dowry and practice *ukuteleka*, such as the *Xhosa* tribes in the Ciskei to which the Defendant belongs, as was conceded by the Respondent in the course of his argument, dowry cannot, in the absence of an agreement to make a specified dowry payment, be recovered by recourse to law but only by invoking the *ukuteleka* custom, see *Skweyiya versus Sixakwe*, 1941 N.A.C. (C and O.) 126, at page 127, and *Cheche versus Nondabula*, 1962 N.A.C. 23 (S), at pages 27 and 28. As the judgment of the Chief's Court is, therefore, manifestly wrong, the applicant's failure to set out essential information in the supporting affidavit indicating what prospect of success there was in the proposed appeal is of little moment, see *Mkize versus Mkize*, 1952 N.A.C. 194 (N.E.), at page 195. It should be added that the Respondent in this Court conceded that his claim in the Chief's Court had been incorrectly formulated in that what he wished to claim from the Appellant was not dowry for his sister but her three children by him who were with him.

It was not necessary for the applicant to prove that he was prejudiced by the judgment of the Chief's Court. All that was necessary for him to do to succeed in his application was to show "good cause" within the meaning of sub-section (3) of section *nine* of the above-mentioned Regulations. In this connection the judgments in *Slomowitz versus Town Council of Vanderbijlpark* 79 [1962 (1)] P.H., F. 36 (T), *Silber versus Ozen Wholesalers (Pty.), Ltd.* [1954 (2)] S.A. 345 (A.D.), at pages 352 and 353, and *Meintjes'* case (*supra*), at pages 264 and 265, are instructive.

This Court is not in a position to finalise the application as there is nothing to indicate that the required fees have been deposited by the applicant with the Clerk of the Court, without which the appeal is not properly noted and the practice, as laid down by this Court, is that an appeal noted late must be properly noted in all other respects before an application for the condonation of the late noting can be entertained, see *Pantshwa versus Beteyni*, 1954, N.A.C. 105 (S), at pages 108 and 109. Accordingly there is no need for this Court to consider the explanation given in the supporting affidavit. It is perhaps as well to add that where, as appears to be the case here, the applicant himself is in no way to blame for the late noting of an appeal which is entirely due to the negligence of his attorney who apparently failed to send the timeous notice of appeal to the Clerk of the Court by post under registered cover or by hand, the applicant should not ordinarily be identified with his attorney's negligence to the extent of being debarred from proceeding with the proposed appeal, see *Batelo versus Vapi*, 1957 N.A.C. 74 (S), at page 75.

In the result the appeal should be allowed, with costs, and the judgment of the Bantu Affairs Commissioner's Court refusing the application for condonation of the late noting of the appeal set aside and the case remitted to that Court for further hearing after the applicant has been accorded an opportunity by that Court of depositing forthwith the Clerk thereof the fees referred to in sub-section (2) of section *nine* of the Regulations mentioned above.

Yates and Muir, Members, concurred.

For Appellant: Mr. D. Alison of King William's Town.

For Respondent: In Person.

NORTH-EASTERN BANTU APPEAL COURT.

SHANDU vs. SHANDU.

B.A.C. CASE No. 84 OF 1963.

ESHOWE: 23rd April, 1964. Before Cowan, President; Craig and Maytham, Members of the Court.

ZULU LAW AND CUSTOM.

"Indhlunkulu" cattle used to pay lobolo of "ikohlo" heir—Debt created—No set-off of lobolo cattle for girl of "ikohlo" received by kraalhead during his lifetime.

Summary: A kraalhead paid lobolo for the heir of his "ikohlo" house and used certain "indhlunkulu" cattle for the purpose. During his lifetime the kraalhead received the lobolo given for a girl of the "ikohlo" house. After his death his "indhlunkulu" heir claimed refund of the cattle advanced from the "ikohlo" heir and the latter sought to set off the cattle which the late kraalhead had received in respect of the girl of his house.

Held:

(1) That a debt was due by the "ikohlo" to the "indhlunkulu" and

(2) that the former could not set-off the "ikohlo" cattle received by the kraalhead during his lifetime.

Appeal from the Court of the Bantu Affairs Commissioner, Mtunzini.

Cowan, President:

In this case Mr. Wynne, who appeared for the Appellant, intimated that he was not pressing the appeal against the judgment entered in respect of the claim in convention and as there is evidence on record which supports the Bantu Affairs Commissioner's finding on this claim this court is not disposed to disturb that judgment.

As regards the appeal against the judgment given on the claim in re-convention, the Commissioner found that the late Muziwendlala had paid 11 head of cattle in respect of the Respondent's lobolo and this court agrees with this finding. The Commissioner has erred, however, in his further finding that these cattle were not repayable by the Respondent, a son in the ikohlo house, because of the fact that Muziwendlala had subsequently received the lobolo of the Defendant's sister, Badukile. As the lobolo of Badukili was paid during the lifetime of Muziwendlala it belonged to him and not to the Respondent and it was not open to the latter to claim that he was entitled to set these cattle off against the cattle which Miziwendlala had advanced for lobolo purposes on his behalf.

Further, the record discloses that eight of the eleven head advanced as lobolo for the Respondent's wife were the property of the *indlunkulu* house and they could not therefore have been paid as lobolo for the Respondent without creating a debt to the indlunkulu house for their return. The Appellant, who is the

heir to that house, is clearly entitled to the return of this number of cattle. There is no evidence of the origin of the remaining three head and they may well have been a gift.

For these reasons the appeal in respect of the claim in convention is dismissed and the appeal in respect of the claim in reconvention is allowed and the Bantu Affairs Commissioner's judgment is altered to one of " For Plaintiff in reconvention for eight head of cattle, or their value at R10 each, with costs ". As the Appellant has been substantially successful in this court he is awarded the costs of the appeal.

Craig and Maytham, Members, concurred.

For Appellant: Mr. B. Wynne (Wynne & Wynne).

For Respondent: Mr. D. A. C. Haines (D. A. C. Haines & Co.).

NORTH-EASTERN BANTU APPEAL COURT.

MKIZE vs. BLOSE.

B.A.C. CASE No. 1 OF 1964.

DURBAN: 18th May, 1964. Before Cowan, President; Craig and Reibeling, Members of the Court.

PRACTICE AND PROCEDURE

Defamation—Native Law—Common Law—Prescription.

Summary: Plaintiff sued Defendant for damages for defamation of character. Summons was issued more than twelve months after the alleged defamatory statement was made. On an exception and without hearing evidence the Bantu Affairs Commissioner held that common law was applicable, upheld the exception that the claim was prescribed and dismissed Plaintiff's summons.

Held: That the Bantu Affairs Commissioner exercised his discretion wrongly as to which systems of law to apply without hearing evidence and on the strength of *Mbata versus Ntanzi,* 1945, N.A.C. 98.

Cases referred to:

Mbata versus Ntanzi, 1945 N.A.C. 98.

Ex parte Minister of Native Affairs *in re Yako versus Beyi,* 1948 (1), S.A.L.R. (A.D.) 388 at 397).

Statutes referred to:

Section 132 of the Natal Code of Native Law.

Principles of Native Law and the Natal Native Code by Stafford and Franklin: Paragraph 18 at page 221.

Appeal from the Court of the Bantu Affairs Commissioner, Pinetown.

Cowan (President):

In deciding to apply common law in this case, the judicial officer was guided solely be the remarks contained in paragraph 18 on page 221 of Stafford and Franklin's "Principles of Native Law and the Natal Code" which summarises the remarks of the president of this court in the case of *Mbata versus Ntanzi*, 1945 N.A.C. 98. This case is no authority for the decided views expressed in the paragraph quoted because a reading of the case itself clearly shows that these remarks were merely *obiter*.

The Commissioner has conceded that defamation is an actionable wrong in Native Law in terms of Section 132 of the Natal Code of Native Law and as, in view of this, either system of law could have been applied he should not have exercised his discretion as to which system it would be the fairest to apply until he had considered all the evidence led by the parties [See *ex parte* Minister of Native Affairs *in re Yako versus Beyi*, 1948 (1), S.A.L.R. (AD) 388 at 397.].

The appeal is allowed with costs, the judgment of the Bantu Affairs Commissioner is set aside and the matter is remitted to the lower court for the hearing of such evidence as the parties may wish to adduce and thereafter for a fresh judgment on the exception and, if necessary, on the merits.

Craig and Reibeling, Members, concurred.

Appellant in person.

For Respondent: Mr. P. Dickinson (Deputy State Attorney).

SOUTHERN BANTU APPEAL COURT.

MATIWANE vs. MJEKULA.

CASE No. 4 OF 1964.

UMTATA: 2nd June, 1964. Before Yates, Acting President, Johnson and Luwes, Members of the Court.

JUDGMENTS.

Absolution judgment at close of Plaintiff's case—claim for refund of earnest cattle by reason of girl's misconduct—corroboration of Plaintiff's testimony not essential requirement.

Summary: Plaintiff sued Defendant for the refund of earnest cattle paid to Defendant in respect of Plaintiff's engagement to Defendant's ward, on the ground of the latter's misconduct.

The Bantu Affairs Commissioner granted an absolution judgment at the close of Plaintiff's case and without the Defendant having called any evidence or closed his case. Plaintiff appealed to this Court.

In his reasons for judgment the Commissioner stated that as the misconduct alleged was emphatically denied corroboration of Plaintiff's evidence was essential.

Held: That a denial in a plea is no sanction and therefore does not correspond to a denial on oath and that the Commissioner obviously had in mind the rule of evidence in seduction cases that the Defendant's testimony is to be preferred to that of

the woman unless there is some corroboration of her statement; but that here the position was different as the Plaintiff was claiming refund of earnest cattle, alleging misconduct on the part of the girl, and he had to prove his case in the ordinary way. The fact that the Plaintiff's evidence was uncorroborated was no ground for granting absolution at the close of Plaintiff's case.

Yates (Acting President):—

This is an appeal from a Bantu Affairs Commissioner's Court in which judgment of absolution from the instance was granted at the close of Plaintiff's (present Appellant) case and before Defendant (present Respondent) had led any evidence or had closed his case. Plaintiff had sued Defendant for the return of seven head of cattle and their increase of four calves, which Defendant admitted were in his possession, and which had been paid in respect of Plaintiff's engagement to his sister and ward, Nobane. The grounds of the action were that Nobane had indulged in immoral conduct with other men and that Plaintiff was thus entitled to break the engagement.

Defendant in his plea denied the allegations, stating that in the premises Plaintiff was not entitled to restoration of the engagement cattle and that if he broke the engagement he would forfeit the cattle.

The appeal is brought on the ground that the evidence for Plaintiff established a *prima facie* case and therefore judgment of absolution from the instance, with costs, should not have been given at the close of the evidence of Plaintiff.

It is trite Bantu law that if Plaintiff was able to prove his allegations he would be entitled to break off the engagement and recover the earnest cattle; and that if he broke off the engagement without good cause he would forfeit the cattle already paid, *vide Native Law in South Africa, by Seymour,* 2nd edition, at page 68, and the cases there cited.

Plaintiff alone gave evidence and his testimony in essence is that on a particular night in January, 1963, he went to see Nohane at 2 a.m. He knocked at the door, which was not opened for 10 minutes, and when it was opened a man ran out dressed in his trousers but carrying his jacket and shirt, whom he was unable to recognise. He stated further that Nobane informed him that the man was a stranger and would give him no further information.

Now the question in cases as this is whether at the close of Plaintiff's case the evidence is such that a reasonable man might (not ought to) find for Plaintiff, see *Mombona versus Mzileni and Another,* 1961, N.A.C. 22, and the cases there cited.

If the Defendant had called no evidence but had closed his case, the test would then have been " is there such evidence upon which the Court *ought* to give judgment in favour of the Plaintiff? " Had the test been the latter one, there is much which could be said in support of the Commissioner's judgment, see *Lymington Estate Limited versus Murphy,* 1949 (1), S.A. 564, at pages 567/8, where a somewhat similar position obtained.

It is true, as stated by the Assistant Bantu Affairs Commissioner in his reasons for judgment, and as argued by Mr. Airey who appeared on behalf of the Respondent, there are factors which detract from his case, i.e. that he did not at once raise an alarm but remained in Nobane's room until dawn the next day, that he did not report the matter to Defendant, nor call a meeting of relatives, nor, in fact, do any of the things one would have expected him to do; but no reason has been advanced why, in the absence of a denial on oath by Nobane that Plaintiff is telling the truth, his evidence should be disbelieved.

The Commissioner has stated in his reasons for judgment that he upheld the contention of Defendant's attorney that as the misconduct alleged was emphatically denied corroboration of Plaintiff's evidence was essential. Although the misconduct was denied in the pleadings, it was not denied in the witness box under oath. A denial in a plea is no sanction and therefore does not correspond to a denial on oath, see *Komani versus Tyesi*, 1 S.D. 77, at page 78, and the cases there cited. As pointed out by Mr. Muggleston, who appeared for Appellant, the Commissioner obviously had in mind the rule of evidence in seduction cases that the Defendant's testimony is to be preferred to that of the woman unless there is some credible corroboration of her statement, see cases quoted in *Warner's Digest* at paragraphs 4523 *et seq.* But here the position is quite different. The man is claiming refund of earnest cattle, alleging misconduct on the part of the girl, and he must prove his case in the ordinary way. The fact that the evidence is uncorroborated is no ground for granting absolution at the close of Plaintiff's case, see *Jones & Buckle*, 6th edition, page 161, and the cases there cited.

In my view the Plaintiff has made out a *prima facie* case which Defendant must rebut. The appeal should be allowed, with costs, and the judgment of the Bantu Affairs Commissioner's Court altered to one setting aside the Commissioner's judgment and the case remitted to that court for trial to a conclusion.

Johnson and Luwes, Members, concurred.

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

For Respondent: Mr. K. Muggleston.

SOUTHERN BANTU APPEAL COURT.

VALELO AND ANO. vs. GOBINAMBA.

CASE No. 9 OF 1964.

UMTATA: 8th June, 1964. Before Yates, Acting President, Warner and Collen, Members of the Court.

PRACTICE AND PROCEDURE

Substitution of heir for deceased party—application for such substitution to be made on notice to heir. Seduction and pregnancy—false denial by Defendant of opportunity affords corroboration of girl's testimony.

Summary: This was an appeal from the judgment of a Bantu Affairs Commissioner's Court for Plaintiff in an action in which the latter sued the First Defendant and his late father in the latter's capacity as kraalhead for damages for the seduction of Plaintiff's daughter, Ntombemnyama, by the first Defendant followed by her pregnancy.

During the course of the trial the First Defendant disclosed that his father had died and, on the application of Plaintiff's attorney and in the absence of any objection by Defendants' attorney, the heir was substituted as the second Defendant. No notice of this application had been served on the heir.

The appeal to this Court was by the First Defendant and the Second Defendant as substituted.

The First Defendant denied that he had visited Ntombemnyama on two occasions, but in this connection the Commissioner accepted the evidence for the Plaintiff to the contrary and on appeal he, the Commissioner, was not shown to be wrong in this respect.

Held: That the name of the heir should not have been substituted as Defendant No. 2 in the absence of proper notice to him as, in terms of Rule 56 (1) of the Rules for Bantu Affairs Commissioners' Courts, an application for an order of Court affecting any other person should be on not less than three days' notice to such other person.

Held further: That there was no proof that the First Defendant's attorney had any authority to act for the substituted Second Defendant.

Held further: That the Defendant's false denial that he had visited Ntombemnyama on two occasions afforded corroboration of the latter's evidence that the First Defendant was responsible for her seduction and pregnancy.

Referred to:

Sobiyana versus Basonti, 1904, N.H.C. 51.

Warner's Digest of South African Native Civil Case Law, paragraphs 4262 and 4528/9.

Rules for Bantu Affairs Commissioners' Courts: Rules 28 (2), 56 (1).

Yates (Acting President):

This is an appeal from the judgment of a Bantu Affairs Commissioner's Court for Plaintiff (present Respondent) in an action in which he sued Defendant No. 1 as tort feasor and his late father Defendant No. 2 as kraalhead for five head of cattle or their value R100, being damages for the seduction of his daughter, Ntombemnyama, by Defendant No. 1 and her subsequent pregnancy.

During the course of the trial Defendant No. 1 disclosed that his father had died and, on the application of Plaintiff's attorney and in the absence of any objection by Defendant's attorney, the heir, Ngcenge Valelo, was substituted as Defendant No. 2.

The Assistant Bantu Affairs Commissioner gave judgment "for Plaintiff with costs, as prayed. Defendants No. 1 and No. 2 (the latter as substituted for) to pay five head of cattle or their value R100 and costs jointly and severally, the one paying the other to be absolved from paying".

Against this judgment defendants (present appellants) have appealed on the grounds:—

"1. That the learned Assistant Bantu Affairs Commissioner erred in refusing the Application for a Judgment of Absolution with costs at the close of Plaintiff's case as in fact at that stage it was appropriate that the judgment be given.

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

3. That the learned Assistant Bantu Affairs Commissioner erred in holding that Defendant corroborated the evidence of Plaintiff's witnesses, a conclusion of law which has no basis, regard being had to all the evidence.

4. That the learned Assistant Bantu Affairs Commissioner erred in taking judicial cognisance of Ntombemnyama's sex inexperience as same had not been canvassed.
5. That the learned Assistant Bantu Affairs Commissioner misdirected himself in law when he granted the application for an amendment of the summons in order to substitute Defendant No. 2 in the place of the late Valelo Msinga when the former had in no way whatsoever been informed, notified or apprised of the said application."

With regard to paragraph 5 of the Notice of Appeal it was conceded by Mr. Muggleston, who appeared on behalf of the Respondent, that the name of Ngcenge Valelo should not have been substituted as Defendant No. 2 in the absence of proper notice to him. Rule 28 (2) of the Rules for Bantu Affairs Commissioners' Courts contained in Government Notice No. 2886 of 1951 provides that on application the Court may order the substitution of an heir in place of a person who has died, but in terms of Rule 56 (1) of the same Rules an application for an order of court affecting any other person should be on not less than three days' notice to such other person. This sub-rule was not complied with, nor is there any proof that the attorney who appeared for the Defendant had any authority to act for Ngcenge Valelo, see *Sobiyana versus Basonti,* 1904, N.H.C. 51, cited in paragraph 4202 of *Warner's Digest of South African Native Civil Case Law,* in which it is stated that an application for substitution of name on death of one of the parties must be on notice to the other side, and not *ex parte.*

The appeal by the substituted Defendant No. 2 must therefore be allowed with costs on the ground that he had not been properly joined in the action.

At the outset of his argument on behalf of Defendant No. 1 (hereinafter called the "Defendant"), Mr. Airey intimated that he was not pressing the first ground of appeal.

Plaintiff's daughter, Ntombemnyama, gave evidence that she had been seduced by Defendant, who had, for some time, helped with the milking at the Plaintiff's kraal, and that thereafter she became pregnant and gave birth to a child in January, 1963. She stated that her half-sister, Nontsikelelo, had been aware of the affair and had been present on one occasion when Defendant had met her and arranged a meeting with her, and also on a subsequent occasion had conveyed a message from Defendant to her arranging an assignment. Her evidence in this regard was fully borne out by Nontsikelelo, who stated that she knew Ntombemnyama and Defendant were *metshas.* The replies and demeanour of Nontsikelelo in the witness-box impressed the judicial officer.

Mr. Airey attacked Ntombemnayma's evidence on the ground that there were numerous and serious discrepancies in regard to when she became pregnant and when her stomach was taken to Defendant's kraal. She stated in her evidence-in-chief that she had had intercourse with Defendant and had become pregnant in February, 1962, but almost immediately afterwards, when she had stated that she had given birth in January, 1963, she added that she had become pregnant in May of the previous year. Later in her evidence she said her stomach was taken to Defendant's kraal in May and that she was then four months' pregnant, but when it was put to her in re-examination that, according to her father's evidence, the stomach was taken in August, she immediately agreed and said that she had made a mistake. Both her father and sister confirmed that Ntombemnyama's stomach was taken to Defendant's kraal in August, and this is borne out by Defendant's evidence as well, so that her statement that it was taken in May is palpably incorrect. However, it must

be remembered that Ntombemnyama was a young girl in Standard I and attending school, and it is clear from a perusal of her evidence that she obviously had little idea of time as measured by European standards, so that these discrepancies are not of much moment, see *Qoyo versus Mpisekaya,* 1957, N.A.C. 111 (S).

Mr. Airey also argued that as Ntombemnyama had stated that she had missed her periods at the end of February, 1962, and that she was nine months' pregnant when she gave birth in January, 1963, she was obviously lying. Here again, however, Ntombemnyama's ideas of time may have been at fault and, in any case, as pointed out by Mr. Muggleston, if it is established that Defendant had intercourse with her even a year prior to the birth the onus is then on Defendant to rebut the presumption that he is the author of the pregnancy, see *Maphanga versus Koza & Ano,* 1 N.A.C. (S.D.) 204 (1950).

Nontsikelelo's evidence was not seriously attacked and provides ample corroboration of the main essentials of Plaintiff's story.

Defendant has denied seducing Ntombemnyama, but was at first unable to suggest any valid reason why she and her sister should lie and implicate him. The reason that he advanced later, i.e. that he quarrelled with the headman and that Plaintiff then asked him why he had assaulted the headman some two years before when Ntombemnyama became pregnant is too remote to be acceptable and, as pointed out by Mr. Muggleston, was obviously an afterthought. His evidence in regard to time is also unreliable for he first stated that the stomach had been taken to him in winter and later said that it was in the Christmas month.

His only witness, Nontyatuko, testified that she was a neighbour of Ntombemnyama and that the latter had told her that she had missed her periods and that a teacher called Nchuzana was responsible for her pregnancy. However, she advanced no reason why Ntombemnyama should have told her this, nor was any other evidence adduced to implicate the man mentioned. Her evidence that Ntombemnyama also said evil spirits were responsible for her pregnancy and her further evidence under cross-examination in regard to this aspect indicates that her evidence is not to be relied upon.

As contended by Mr. Muggleston, once the evidence of Nontsikelelo was accepted by the Assistant Bantu Affairs Commissioner, and no good reason has been advanced why he should not have done so, the Defendant's false denial that he knew her and his denial that he had visited Ntombemnyama on two occasions affords corroboration of the latter's evidence, see cases cited in *Warner,* paragraphs 4528/9.

It is clear from what has been stated above that Plaintiff established a strong *prima facie* case, which the Defendant has not rebutted, and in by view the Assistant Bantu Affairs Commissioner cannot be said to have been wrong in giving judgment against Defendant No. 1 and his appeal should be dismissed.

In regard to costs, Defendant No. 1 must pay the costs of appeal. Defendant No. 2, who did not appear and was not represented in the Court *a quo,* is entitled to costs of appeal incurred by him.

Warner and Collen, Members, concurred.

For Appellants: Mr. F. G. Airey, of Umtata.

For Respondent: Mr. K. Muggleston, of Umtata.

NORTH-EASTERN BANTU APPEAL COURT.

BUTHELEZI vs. MOLEFE.

CASE No. 10 OF 1964.

ESHOWE: 24th April, 1964. Before Cowan, President; Craig and Colenbrander, Members of the Court.

PRACTICE AND PROCEDURE

Civil case—Preponderance of probabilities—Calling of evidence—procedure.

Summary: Plaintiff claimed certain two sheep, allegedly his property, from Defendant in a Chief's Court and was awarded judgment. On appeal the Bantu Affairs Commissioner held that in the absence of "conclusive proof" that the sheep were "absolutely the property of Plaintiff", the Defendant should have been absolved from the instance. The Bantu Affairs Commissioner called on the Defendant to give evidence immediately after the Plaintiff had testified and before the latter had closed his case.

Held:

(1) That in arriving at a decision in a civil case the preponderance of probabilities is the test; and

(2) that the procedure adopted by the Bantu Affairs Commissioner in the matter of the order in which testimony was called was irregular.

Cases referred to:

Mine Workers' Union versus Brodrick, 1948 (4), S.A.L.R. (A.D.) at 980.

Nxumalo versus Gasa, 1952, N.A.C. 30 (N.E.).

Statutes referred to:

Government Notice No. 2886 of 1951—Rules 53 (7), (8) and (9).

Appeal from the Court of the Bantu Affairs Commissioner, Nqutu.

Cowan, President:

In altering the Chief's judgment in favour of the Plaintiff to one of absolution from the instance because he came to the conclusion that, "in the absence of absolutely conclusive proof that the sheep were absolutely the property of the Plaintiff", the judicial officer misdirected himself on the law applicable to the case. In civil proceedings the test is a preponderance of probabilities and no more although, of course, in civil actions based upon criminal acts the courts will take into account the greater improbability of the commission of criminal acts. [*Mine Workers' Union versus Brodrick,* 1948 (4), S.A. (A.D.) at 980.

In my view, he has also misconstrued the evidence of Mr. Moolman in respect of the ear-marks of the two sheep in dispute. This witness had inspected the sheep on the day of the trial before he gave evidence and, although he does not specifically say

so, one gains the impression from his evidence that in describing the ear-marks of the animal he was doing so from the observations he had made at this inspection and not purporting to remember the ear-marks of the sheep as they were at the time he had sold eight to the Defendant two years previously. He could not reasonably be expected to do so as, although he said that they were sheep which he had bought at a public auction, he also acknowledged under cross-examination that he had previously admitted to the Plaintiff that he had bought sheep at different places and that he had given an undertaking to telephone in order to determine what their ear-marks were—an undertaking which, it would seem, he did not carry out.

In my view the judicial officer has attached insufficient weight to the ear-marks borne by the sheep. While it is true that many people do ear-mark their sheep and that the possibility therefore exists that an animal claimed by one person as his because of its ear-mark may in fact belong to another who has an identical ear-mark, in the present case not only did both the sheep bear the Plaintiff's ear-mark but one of them bore, in addition, the ear-mark of Pisha-Pishe and this fact alone reduces to a minimum the possibility of any error having made by the Plaintiff in their identification. Further, the eight sheep which Mr. Moolman sold to the Defendant were lambs of between 4 and 6 months old at the time and these, he says, he bought at a sale and described them as being—"'n kruising tussen 'n gewone wit baster en 'n Duitse merino ram". In view of this description of the animals and in the absence of any evidence by him that he had acquired them from different owners, I think that it is a fair assumption that he acquired them from one and the same owner and one might therefore well have expected them to bear the same ear-marks.

In our view the preponderance of probabilities distinctly favour the Plaintiff and the judgment of the Chief was the correct one.

The appeal is allowed with costs and the judgment of the Bantu Affairs Commissioner is altered to read, "The appeal is dismissed with costs and the judgment of the Chief is confirmed".

The Bantu Affairs Commissioner called on the Defendant to give his evidence after the Plaintiff had given his and before the latter had closed his case. The procedure is irregular and the attention of the Bantu Affairs Commissioner is invited to the provisions of Rule 53 (7), (8) and (9) of Government Notice No. 2886 of 1951, and the case of *Nxumalo versus Casa,* 1952, N.A.C. 30 (N.E.).

Craig and Colenbrander, Members, concurred.

For Appellant: Mr. W. E. White instructed by A. C. Bestall & Uys.

Respondent in default.

SOUTHERN BANTU APPEAL COURT.

MASELA MPOLO vs. CAWE NOZIHAMBA.

CASE No. 17 OF 1963.

UMTATA: 3rd February, 1964. Before Balk, President, Yates and Gordon, Members of the Court.

PRACTICE AND PROCEDURE.

Necessity for presiding judicial officers to record nature and outcome of applications. Estoppel—necessity for party claiming estoppel to prove that his acquiescence altered position to his detriment.

Pondo custom. Illegitimate child—institution of as son by natural father—requirements. Adulterine child by married woman—natural father cannot institute such child as his son. Illegitimate child born to widow whilst latter living at her late husband's kraal—such child "belongs" to late husband's heir. Payment of fine for illegitimate child by natural father to person not entitled thereto—implications. Dowry—right of girl's custodian to receive dowry payment on behalf of "dowry-eater".

Summary: Plaintiff (present Respondent) successfully claimed an order in a Bantu Affairs Commissioner's Court declaring him to be the heir of the late Nozihamba Mpolo by virtue of customary installation. It was common cause that—

(1) the Plaintiff was the natural son of the late Nozihamba Mpolo;

(2) Nomhla was the Plaintiff's mother;;

(3) Nomhla contracted a customary union with one Mabovana;

(4) one Tyabule recovered five head of cattle as a "fine", i.e. customary damages, from Nozihamba Mpolo for Nomhla's pregnancy which resulted in the Plaintiff's birth;

(5) Nozihamba Mpolo left no legitimate male issue; and

(6) of Nozihamba Mpolo's legitimate relatives, his brother, the Defendant (present Appellant), was next in line of succession.

The questions at issue were—

(1) whether the plaintiff was born before or after Nomhla contracted the customary union with Mabovana?

(2) whether Nozihamba Mpolo made known at a family meeting that he had "fetched" the Plaintiff, his son, i.e. that he had brought him home to his kraal?

(3) whether Tyabule was the person entitled to the "fine" for Nomhla's pregnancy and, if not, whether the payment of the "fine" to him by Nozihamba Mpolo was valid?

The Defendant averred that Nomhla's mother begat her (Nomhla) and her other children by Tyabule whilst she was residing at the kraal of her husband, Mxitshwa, after the latter's death. This was, however, denied by Tyabule, who stated that he begat Nomhla after he had contracted a customary union with her mother by paying dowry for her to her people. It was not disputed that the dowry for Nomhla and her sister was paid to one Gadlazela, the heir

of Nomhla's mother's late husband, Mxitshwa, with whom at the time Nomhla and her sister were living.

The Commissioner found that a family meeting had been held by the late Nozihamba Mpolo at which he had made it known that he had "fetched" his son, the Plaintiff. This meeting was denied by the Defendant.

Mabovana had also claimed the "fine" for Nomhla's pregnancy with the Plaintiff but had not pursued this claim.

Held: That the significance of the first question at issue, which did not appear to have been appreciated by the Commissioner as he gave no finding thereon, was that, if the Plaintiff was born before Nomhla's customary union with Mabovana when she was a spinster, which was the Plaintiff's case, it was open to Nozihamba Mpolo under Pondo law and custom which obtained in the instant case, to "acquire" the Plaintiff by the payment of the "fine" for Nomhla's pregnancy which resulted in the Plaintiff's birth, plus an *isondlo* beast to her guardian, or of the "fine" only if her guardian accepted it in full settlement of his claim, and to institute the Plaintiff as his son by "fetching" him, i.e. by bringing him home and announcing that fact at a family meeting so that the Plaintiff's right of inheritance from Nozihamba Mpolo in the absence of legitimate male issue of the later would be assured. On the other hand, if the Plaintiff was conceived and born during the subsistence of Nomhla's customary union with Mabovana, as contended by Appellant's attorney, it was not competent for Nozihamba Mpolo to institute the Plaintiff as his son with the heritable rights mentioned above, regard being had to Pondo law and custom.

Held further: That it was by no means clear that Mxitshwa and, on the latter's death, Gadlazela, was the "eater" of the dowries paid to Gadlazela for Nomhla and her sister, particularly bearing in mind Nomhla's and Tyabule's testimony that she and her sister were residing at Gadlazela's kraal when he was paid the dowries for them so that he was entitled, consonant with Bantu law and custom, to receive the dowries in his capacity as Nomhla's and her sister's custodian but would have to account for the dowries to their "dowry-eater" if he was not their "dowry-eater".

Held further: That the fact that the family meeting was held before the "fine" for Nomhla's pregnancy was received by Tyabule does not invalidate the institution of the Plaintiff by Nozihamba Mpolo as his son.

Held further: That it was implicit in Tyabule's evidence that he accepted the five head of cattle in full settlement of his claim against Nozihamba Mpolo in respect of Nomhla's pregnancy resulting in the Plaintiff's birth, i.e. that he did not demand an *isondlo* beast in addition to the "fine", which it was competent for him to do.

Held further: That if Tyabule begot Nomhla whilst she was still living at the kraal of her husband, Mxitshwa, after the latter's death and before he had paid dowry for her, Tyabule could not have "acquired" Nomhla by the payment of dowry to Nomhla's mother's father subsequently and she would have belonged to Mxitshwa's heir, Gadlazela; and consequently Gadlazela or his heir and not Tyabule would have been Nomhla's "dowry-eater" and, as such, entitled to the "fine" for Nomhla's pregnancy resulting in the Plaintiff's birth, assuming that Nomhla had not as yet, i.e. when she was rendered pregnant, entered into the customary union with Mabovana.

Held further: That it was clear from the evidence that at the time when Tyabule received the customary damages for Nomhla's pregnancy, which resulted in the Plaintiff's birth, from the late Nozihamba Mpolo, the latter was unaware of any other claim in this respect except that of Mabovana, who did not pursue it, so that Nozihamba Mpolo was bona fide in not opposing Tyabule in recovering the "fine" from him by recourse to litigation. That being so, the fact that Tyabule was not perhaps the rightful person to receive the "fine" did not invalidate the institution by Nozihamba Mpolo of the Plaintiff as his son, bearing in mind the relevant principles of Bantu law and custom, as exemplified by the analogous case of a bona fide dowry payment to a person other than the "dowry-eater" resulting in a valid customary union.

Held further: That the Commissioner erred in finding that the Defendant was estopped by his conduct from disputing the fact of the institution of the Plaintiff as Nozihamba Mpolo's heir, by which it is assumed the Commissioner intended to convey that the Defendant was estopped from challenging the validity of that institution; for in order to found an estoppel it was necessary for the Plaintiff to show that acting upon the faith of the Defendant's acquiescence in his (Plaintiff's) institution as the son of Nozihamba Mpolo, and thus as his heir at the family meeting, he had altered his position to his detriment, and there is nothing to indicate that this is the case.

Referred to:

Mbese versus Lumanyo, 1957, N.A.C. 25 (S), at pages 27 and 28.

Mlahlwa versus Maqayise, 1945, N.A.C. (C. & O.) 8, at page 9.

Zeeland versus Machabe, 1944, N.A.C. (C. & O.) 24.

Mtabeni versus Mlobeli and Ano., 1 N.A.C. (S.D.) 158, at page 160.

Fubesi versus Mandlaka and Ano., 1 N.A.C. (S.D.) 10.

Poort Sugar Planters (Pty.), Ltd., versus Minister of Lands, 1963 (3) S.A. 352 (A.D., at page 363.

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

Balk (President):

This action had its inception in a Chief's Civil Court in which the Plaintiff claimed and obtained judgment for his late father's kraal and all of the latter's other property.

An appeal by the Defendant to the Bantu Affairs Commissioner's Court from that judgment was dismissed, with costs, but the judgment of the Chief's Court was altered to one declaring the Plaintiff to be the heir of the late Nozihamba Mpolo by virtue of customary installation, with costs.

The appeal by the Defendant to this Court from the Commissioner's judgment is confined to fact.

The pleadings as restated in the Commissioner's Court in terms of section *twelve* of the Regulations for Chiefs' and Headmen's Civil Courts read as follows:—

Claim.

"1. That Plaintiff is the illegitimate son of one Nozihamba, born of NOMHLA TYABULE, a spinster.

2. That during the lifetime of the said NOZIHAMBA Plaintiff

was taken from his mother's people and 5 head of cattle were paid to one TYABULE SONJICA as a fine for the said pregnancy of NOMHLA TYABULE.

3. That the said NOZIHAMBA MPOLO who had no male children installed the Plaintiff as his heir. In the premises, Plaintiff is the heir to the estate of the late NOZIHAMBA MPOLO.

Wherefore Plaintiff prays for declaration declaring him as heir of the late NOZIHAMBA MPOLO."

Defence.

"1. Defendant admits that Plaintiff is the natural son of Nozihamba born of Nomhla Tyabule but contends that Nomhla Tyabule was at the time the wife of one Mabovana Qekeze. That means that Defendant contends that Plaintiff is an adulterine child and as such, in Pondo law, cannot succeed.

2. Defendant denies that Plaintiff was taken from his people's kraal and that 5 head of cattle were paid to Tyabule Sonjica as fine for the pregnancy of Nomhla Tyabule which resulted in Plaintiff's (Cawe's) birth.

3. Defendant admits that Nozihamba Mpolo had no male children but denies that Plaintiff was installed as heir."

During the course of the trial in the Commissioner's Court two applications were made, the first by the Defendant's attorney for the amendment of the defence, as re-stated, by the substitution of a new paragraph for paragraph 2 and the other by the Plaintiff's attorney for the amendment of the claim, as re-stated, by the addition of a fourth paragraph, as follows:—

"2. Defendant denies that Plaintiff was taken from his people's kraal but *admits* that a fine of 5 head of cattle was paid to Tyabule Sonjica in respect of that pregnancy of Nomhla that resulted in Plaintiff's (Cawe's) birth after hearing in Native Commissioner's (sic) of case 181/1952 where judgment was entered by default and where, though there was execution, there was no appeal."

"4. That Defendant now Appellant is estopped from disputing Plaintiff's rights in that the alleged installation was done in his presence and with his knowledge."

The Commissioner did not record the attitude of the Plaintiff's attorney in regard to the first application nor whether he granted either of them but it would appear from his reasons for judgment that he in fact did so. In this connection it cannot be too strongly impressed upon the Commissioner, particularly as this is not an isolated lapse of this nature on his part, see *Ntlahla and Another versus Charles,* Case No. N.A.C. 24/63 (N.C.C. No. 105/61), heard at Umtata on the 1st October, 1963, that he is required in terms of paragraph (*d*) of sub-rule (1) read with sub-rule (3) of Rule 55 of the Rules for Bantu Affairs Commissioner's Courts to record all proceedings including the attitude of the opposite party to an application and the outcome thereof.

It is common cause that—

(1) the Plaintiff is the natural son of the late Nozihamba Mpolo (hereinafter referred to as "the deceased");

(2) Nomhla is the Plaintiff's mother;

(3) Nomhla contracted a customary union with one Mabovana;

(4) one Tyabule recovered five head of cattle as a "fine" i.e., customary damages, from the deceased for Nomhla's pregnancy which resulted in the Plaintiff's birth;

(5) the deceased left no legitimate male issue; and

(6) that of the deceased's legitimate relatives, his brother, the Defendant, is next in line of succession.

The questions at issue are:—

(1) Whether the Plaintiff was born before or after Nomhla contracted the customary union with Mabovana?

(2) Whether the deceased made known at a family meeting that he had "fetched" the Plaintiff, his son, i.e. that he had brought him home to his kraal?

(3) Whether Tyabule was the person entitled to the "fine" for Nomhla's pregnancy and, if not, whether the payment of the "fine" to him by the deceased was valid?

The significance of the first question at issue which does not appear to have been appreciated by the Commissioner as he gave no finding thereon, is that, if the Plaintiff was born before Nomhla's customary union with Mabovana when she was a spinster, which is the Plaintiff's case, it was open to the deceased under Pondo law and custom which obtains in the instant case, to "acquire" the Plaintiff by the payment of the "fine" for Nomhla's pregnancy which resulted in the Plaintiff's birth, plus an *isondlo* beast to her guardian, or of the "fine" only if her guardian accepted it in full settlement of his claim, and to institute the Plaintiff as his son by "fetching" him, i.e. by bringing him home and announcing that fact at a family meeting so that the Plaintiff's right of inheritance from the deceased in the absence of legitimate male issue of the latter would be assured, see *Mbese versus Lumanyo,* 1957, N.A.C. 25 (S), at pages 27 and 28, and *Mkanzela's* case there cited, at page 221. On the other hand if the Plaintiff was conceived and born during the subsistence of Nomhla's customary union with Mabovana, as contended by Mr. Muggleston in his argument on behalf of the Appellant, it was not competent for the deceased to institute the Plaintiff as his son with the heritable rights mentioned above regard being had to Pondo law and custom, see *Mlahlwa versus Maqayise,* 1945, N.A.C. (C. & O.) 8, at page 9.

In her evidence for the Plaintiff Nomhla stated that she had given birth to the Plaintiff before she had entered into the customary union with Mabovana, i.e., whilst she was still a spinster, whereas, according to the Defendant's testimony, the Plaintiff was conceived and born during that union. Tyabule's evidence for the Plaintiff does not, as stressed by Mr. Muggleston, assist the Plaintiff as regards this aspect of the case for Tyabule after denying that Nomhla had contracted a customary union with Mabovana and stating that the Plaintiff had been born in Cibeni Location before Nomhla commenced to *metsha* with Mabovana, said that the Plaintiff had been born before she had entered into such a union and that he did not know when she had done so or where the Plaintiff had been born. Nomhla's version that she gave birth to the Plaintiff before her customary union with Mabovana gains support from her testimony and that of the Plaintiff's witness, Kasa, that whilst both Tyabule and Mabovana had claimed from the deceased the "fine" for Nomhla's pregnancy which resulted in the Plaintiff's birth, Tyabule had pursued his claim and recovered the "fine" by recourse to litigation whereas Mabovana had not pursued his claim. That Mabovana made this claim is also borne out by the Plaintiff's witness, Dingilizwe; and it is manifest from Kasa's testimony that the "fine" was recovered by way of a civil action as Mabovana had also claimed it and for this reason Tyabule and the deceased wanted the Court's decision in the matter.

The Defendant did not deny that Mabovana had also claimed the damages for Nomhla's pregnancy and had not pursued this claim. It is true that the Defendant's witness, Mcapukisi, testified that Mabovana had already absonded when this "fine" was received by Tyabule but, apart from the fact that this does not controvert the evidence for the Plaintiff that Mabovana claimed the damages before they were recovered by Tyabule and did not pursue his claim, Mcapukisi admitted that he was representing Mabovana's interests at the time the "fine" was received by Tyabule and that he had not claimed it. Moreover, as stressed by Mr. Chisholm in the course of his argument for the Respondent, Mcapukisi cannot be regarded as a reliable witness for, as pointed out by the Commissioner in his reasons for judgment, Mcapukisi was prepared to go to any lengths to support the Defendant's case regardless of the truth as is evident from his testimony that Mabovana had fathered the Plaintiff whereas the Defendant admitted that the deceased was the Plaintiff's natural father.

In the circumstances there can be little doubt that, on a preponderance of probability, Nomhla's version is, as submitted by Mr. Chisholm, the correct one, bearing, as it does, the impress of truth in that it is consistent in all material respects and she did not hesitate to concede facts favourable to the Defendant's case as, for example, that the dowries paid for her and for her sister, Tshikitshiki, of whom Tyabule was also the natural father, had been paid to one Gadlazela and had not been claimed by Tyabule. The circumstances in which these dowries were paid to Gadlazela will be set out later in this judgment. It is true that there are discrepancies between Nomhla's evidence and that of Tyabule but, having regard to the material inconsistencies in the latter's evidence and to the fact that as pointed out above, Nomhla's evidence is satisfactory, her evidence falls to be accepted and that of Tyabule rejected where it differs from hers.

Mr. Muggleston contended that the fact that Gadlazela had not claimed the "fine" for Nomhla's pregnancy whereas the dowries for Nomhla and Tshikitshiki had been paid to Gadlazela, as testified to by Tyabule and Nomhla, indicated that the Plaintiff had been conceived after Nomhla had entered into the customary union with Mabovana as under Bantu law and custom the husband would in such a case be the person entitled to the "fine" for sexual intercourse with his wife by another and for rendering her pregnant, and not her "dowry-eater". This contention is, however, largely negatived by the fact that, as pointed out above, Mabovana did not pursue his claim for the "fine". Admittedly, Tyabule, whilst recovering the "fine", took no steps to recover from Gadlazela the dowries paid to him for Nomhla and Tshikitshiki. Tyabule, however, maintained that he was entitled to those dowries. It is by no means clear when it first came to Tyabule's notice that the dowries for Nomhla and Tshikitshiki had been paid to Gadlazela. Tyabule stated that the had obtained a declaration of rights that he was entitled to his children by Malokotwana including Nomhla and Tshikitshiki, in an action against Malokotwana's father, Mondela, to whom he had paid dowry for Malokotwana. Tyabule further explained why he had not sued Mxitshwa whose heir was Gadlazela, for the dowries paid for Nomhla and Tshikitshiki, his explanation in this respect as recorded being "I never sued Mxitshwa because he had been given by Mandela". Unfortunately, the Commissioner did not elicit from Tyabule what he intended to convey by this explanation. The fact remains, however, that in the circumstances it is by no means clear that Mxitshwa and, on the latter's death Gadlazela, was the "eater" of the dowries paid to Gadlazela for Nomhla and Tshikitshiki particularly bearing in mind Nomhla's and Tyabule's testimony that she and Tshikishiki were

residing at Gadlazela's kraal when he was paid the dowries for them so that he was entitled, consonant with Bantu law and custom, to receive the dowries in his capacity as Nomhla's and Tshikitshiki's custodian but would have to account for the dowries to their "dowry-eater" if he was not their "dowry-eater", see *Zeeland versus Machabe,* 1944, N.A.C. (C. & O.) 24 and *Ntabeni versus Mlobeli and Another,* 1 N.A.C. (C.D.) 158, at page 160. It follows that Nomhla's evidence that she bore the Plaintiff prior to her customary union with Mabovana whilst she was a spinster, falls to be accepted particularly also in view of the corroboration of her evidence referred to above and the further corroboration thereof afforded by the fact that the Defendant did not at the family meeting convened for the institution of the Plaintiff as the deceased's son make any objection thereto as will be apparent from what is said later in the judgment. It also follows that the deceased could validly institute the Plaintiff as his son and so as his heir.

The Commissioner's finding that the deceased held a family meeting at which he made known that he had "fetched" his son, the Plaintiff, is borne out by the evidence of Kasa and Dingilizwe who further stated that the Defendant had attended the meeting and raised no objection. Their evidence gains support from ex-Headman Nondodana's testimony that the deceased had reported to him that he had a child, the Plaintiff, at his kraal who belonged to him and that at a later date Kasa and the Defendant had reported to him that the Plaintiff had been installed as the deceased's heir and that they had agreed thereto as the deceased had no legitimate son. The evidence of these witnesses is consistent and carries conviction regard being had to custom. The only evidence to the contrary is that of the Defendant that no such family meeting was held and that he had not gone to the headman to report the Plaintiff's installation as the deceased's heir. This evidence, however, carries little weight in the light of the Defendant's admission under cross-examination that on learning that the dowry had been paid by his (Defendant's) family for the Plaintiff he did not speak to the deceased about it or take any other action as such conduct makes it difficult to escape the conclusion, bearing custom in mind, that the family meeting had in fact been held, that the Defendant had attended it and had raised no objection to the institution thereat of the Plaintiff as the deceased's heir, as testified to by the Plaintiff's witnesses. The fact that the family meeting was held before the "fine" for Nomhla's pregnancy was received by Tyabule does not invalidate the institution of the Plaintiff by the deceased as his son, see *Mbese's* case (*supra*), at pages 27 and 28.

It is implicit in Tyabule's evidence that he accepted the five head of cattle in full settlement of his claim against the deceased in respect of Nomhla's pregnancy resulting in the Plaintiff's birth, i.e. that he did not demand an *isondlo* beast in addition to the "'fine", which it was competent for him to do, see *Mkanzela's* case (*supra*), at page 221.

As regards the remaining question at issue, Tyabule testified that Nomhla was born after his customary union with Malokotwana, and that the latter had rejected him and returned with Nomhla to the kraal of her father, Mandela. Tyabule admitted

that he had cohabited with Malokotwana at the kraal of her husband, Mxitshwa, after the latter's death, that dowry paid by Mxitshwa for her had not been *ketaed* i.e. restored, and that he had contracted a customary union with her after she had left that kraal and returned to her people, paying dowry for her to her father, Mandela. The Defendant's version is that Malokotwana gave birth to Nomhla and the other children by Tyabule whilst she was residing at the kraal of her husband, Mxitshwa, after the latter's death. Whilst it is manifest from Tyabule's and Nomhla's evidence that Tyabule took no steps to recover the dowries paid to Mxitshwa's heir, Gadlazela, for Nomhla and her sister, Tshikitshiki, there are the factors dealt with above indicating that Tyabule may nevertheless be Nomhla's "dowry-eater" so that his version that he begot her after he had contracted the customary union with Malokotwana by paying dowry for her to her people may be correct. However, if Tyabule begot Nomhla whilst she was still living at the kraal of her husband, Mxitshwa, after the latter's death, and before he had paid dowry for her, Tyabule could not have "acquired" Nomhla by the payment of dowry to Malokotwana's father, Mandela, subsequently and she would have belonged to Mxitshwa's heir, Gadlazela, see *Fubesi versus Mandlaka and Another* 1 N.A.C. (S.D.) 10; and consequently Gadlazela or his heir and not Tyabule would have been Nomhla's "dowry-eater" and as such entitled to the "fine" for Nomhla's pregnancy resulting in the Plaintiff's birth assuming that Nomhla had not as yet i.e. when she was rendered pregnant, entered into the customary union with Mabovana. Be that as it may, it is clear from the evidence that at the time when Tyabule received the customary damages for Nomhla's pregnancy which resulted in the Plaintiff's birth, from the deceased, the latter was unaware of any other claim in this respect except that of Mabovana who did not pursue it so that the deceased was bona fide in not opposing Tyabule in recovering the "fine" from him by recourse to litigation. That being so the fact that Tyabule was not perhaps the rightful person to receive the "fine" does not, in my view, invalidate the institution by the deceased of the Plaintiff as his son bearing in mind the relevant principles of Bantu law and custom, as exemplified by the analogous case of a bona fide dowry payment to a person other than the "dowry-eater" resulting in a valid customary union, see *Zeeland's* and *Ntabeni's* cases (*supra*).

It follows that the Commissioner cannot be said to be wrong in finding that the Plaintiff is the deceased's heir.

It is perhaps as well to add that the Commissioner erred in finding that the Defendant was estopped by his conduct from disputing the fact of the institution of the Plaintiff as the deceased's heir by which I assume the Commissioner intended to convey that the Defendant was estopped from challenging the validity of that institution; for in order to found an estoppel it was necessary for the Plaintiff to show that acting upon the faith of the Defendant's acquiescence in his (Plaintiff's) institution as the son of the deceased and thus as his heir at the family meeting, he had altered his position to his detriment, see *Poort Sugar Planters (Pty.), Ltd. versus Minister of Lands,* 1963 (3) S.A. 352 (A.D.), at page 363; and there is nothing to indicate that this is the case.

In the result the appeal to this Court should be dismissed, with costs.

Yates and Gordon, Members, concurred.

For Appellant: Mr. K. Muggleston of Umtata.

For Respondent: Mr. C. Chisholm of Umtata.

SOUTHERN BANTU APPEAL COURT.

MANTYI AND ANOTHER vs. NGUDLE.

CASE No. 37 OF 1963.

UMTATA: 30th January, 1964. Before Balk, President, Yates and Collen, Members of the Court.

EVIDENCE.

Seduction and pregnancy—quantum of proof required—false denial by Defendant of suspicious occasion.

BANTU LAW AND CUSTOM.

Seduction and pregnancy—taking of girl's "stomach"—delay by girl in reporting pregnancy—not customary for man to act as "go-between."

Summary: The two Defendants appealed to this Court from the judgment of a Bantu Affairs Commissioner's Court for Plaintiff in an action in which the latter claimed damages for the seduction and pregnancy of his daughter, Sylvia, by the first Defendant. The second Defendant was joined in the action in his capacity as kraalhead of the first Defendant.

In the evidence for the Defendants is was alleged that Sylvia had not accompanied the Plaintiff's messengers to the second Defendant's kraal, whereas Sylvia and the Plaintiff's witnesses testified that she had accompanied the messengers. There was, however, a discrepancy in the evidence for the Plaintiff in this regard.

Held: That, as the Defendants acknowledged in their plea that the second Defendant was liable for the delicts of the first Defendant at the time in question but denied that the first Defendant had seduced and rendered Sylvia pregnant, the onus of proof in this respect rested on the Plaintiff and fell to be discharged on a preponderance of probability, bearing in mind, firstly, the general improbability of misconduct of the nature here in question occurring in view of the moral and legal sanctions against it, and, secondly, the necessity for corroboration of the girl's evidence in regard to the alleged seduction.

Held further: That it was manifest from the testimony of a witness for the Plaintiff (Ethel) not only that the first Defendant's denial that he had accompanied her and Sylvia to a boarding-house was false but also that the occasion evoked suspicion, for Ethel testified that she had left the first Defendant and Sylvia in a room at the boarding-house and had not seen Sylvia again until the next morning, so that the first Defendant's false denial serves to corroborate Sylvia's evidence that he in fact had sexual intercourse with her during that night.

Held further: That Tembu custom, which obtained in this case, demanded that Sylvia's "stomach" should have been taken by the Plaintiff's messengers to the second Defendant's kraal, which postulated that she should have accompanied them there and not that the messengers should have gone there without her to report her pregnancy, and as there appeared to be no good reason why the Plaintiff should not have complied with this custom the probabilities were that Sylvia

did accompany the messengers, and the discrepancy in the evidence for the Plaintiff in this connection accordingly assumed little importance.

Held further: That, generally, a delay by the girl to report her pregnancy to her people tells against a Plaintiff's case, but as, in the instant case, Sylvia's explanation for this delay, viz. that the first Defendant had promised to marry her and that she feared her people's reaction, appeared to be genuine, this feature did not militate against the success of the Plaintiff's case.

Held further: That the evidence of one of Defendant's witnesses, Matoti, to the effect that he had had sexual intercourse with Sylvia and that the First Defendant had made the necessary arrangements for such intimacy to take place, was properly rejected by the Commissioner, as not only were there discrepancies between Matoti's evidence and that of the First Defendant in this connection but Matoti would have the Court believe that it was customary for a man to act as "go-between", whereas this is contrary to custom.

Referred to:

Gcukumani versus N'Tshekisa, 1958, N.A.C. 28 (S), at page 29.

Van Lutterveld versus Engels, 1959 (2), S.A 699 (A.D.), at page 702.

Poggenpoel versus Morris, N.O., 1938, C.P.D. 90.

Mbulawa versus Bonkolo, 1932 N.A.C. (C. & O.) 45, at page 46.

Malufahla versus Kalankomo, 1955, N.A.C. 95 (S), at page 96.

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

Balk (President):—

This is an appeal from the judgment of a Bantu Affairs Commissioner's Court for Plaintiff (now Respondent) as prayed, with costs, in an action in which he sued the two Defendants (present Appellants), jointly and severally, for five head of cattle of their value, R150.00, as damage for the seduction and pregnancy of his daughter, Sylvia, citing the First Defendant as the tort-feasor and the Second Defendant as liable on the ground that the first Defendant was an inmate of the Second Defendant's Kraal at the time the alleged delict was committed.

In their plea the Defendants acknowledged that the Second Defendant was liable for the delicts of the First Defendant at the time in question but denied that the First Defendant had seduced and rendered Sylvia pregnant so that the onus of proof in this respect rested on the Plaintiff and fell to be discharged on a preponderance of probability bearing in mind, firstly, the general improbability of misconduct of the nature here is question occurring in view of the moral and legal sanctions against it and, secondly, the necessity for corroboration of the girl's evidence in regard to the alleged seduction, see *Goukumani versus N'Tshekisa,* 1958, N.A.C. 28 (S), at page 29, and *Van Lutterveld versus Engels,* 1959 (2), S.A. 699 (A.D.), at page 702.

The appeal is brought on the ground of want of corroboration of Sylvia's evidence that the First Defendant had sexual intercourse with her and on further grounds confined to fact.

According to Sylvia's evidence for the Plaintiff, she became intimate with the First Defendant in December, 1959 and again had sexual intercourse with him on the 7th July, 1961 when he

rendered her pregnant, the last-mentioned intercourse having taken place at a boarding-house. That Sylvia met the First Defendant on the 7th July, 1961 in Umtata and that they went to the boarding-house there accompanied by one Ethel Kosiyane is borne out by the latter in her testimony for the Plaintiff. Ethel also confirmed that *she* had left Sylvia with the First Defendant in a room at the boarding-house and that she did not see her again until the next morning. In his evidence-in-chief the First Defendant stated that he had met Sylvia in Umtata in July, 1961 but had not accompanied her to the boarding-house. He denied intimacy with her then or previously. He admitted that he had proposed love to her when they met in Umtata in July, 1961 adding under cross-examination that he had not wanted to have sexual intercourse with her but merely wished to while away the time and converse with her. He went on to say under cross-examination, however, that he had not then spent the night with Sylvia because she had not accepted his proposal. This statement makes it difficult to escape the conclusion that he was desirous of being intimate with her then, particularly in the light of his further evidence that Sylvia had said that she was in a hurry and would accept his proposals if he followed them up by writing to her and that hitherto they had been wont to do no more than converse and attend cinemas together. In my view this inconsistency in the First Defendant's evidence, i.e., whether or not he desired to have sexual intercourse with Sylvia when he met her in Umtata in July, 1961, warranted its rejection by the Commissioner. On the other hand Ethel's testimony bears the impress of truth being both consistent and generally free from unsatisfactory features. Moreover, she did not hesitate to mention factors favourable to the Defendant's case, viz., that she and Sylvia had decided to sleep at the boarding-house before meeting the First Defendant and that she had not heard him say anything about going to the boarding-house. In addition, the Commissioner states in his reasons for judgment that Ethel's demeanour was not open to criticism. In the circumstances he cannot be said to be wrong in having relied on her evidence.

It is manifest from Ethel's testimony not only that the First Defendant's denial that he had accompanied her and Sylvia to the boarding-house is false but also that the occasion evokes suspicion for Ethel testified that she had left the First Defendant and Sylvia in a room at the boarding-house and had not seen Sylvia again until the next morning so that the First Defendant's false denial serves to corroborate Sylvia's evidence that he in fact had sexual intercourse with her during the night of the 7th July, 1961, at the boarding-house in Umtata, as submitted by Mr. Airey in his argument for the respondent, see *Poggenpoel versus Morris, N.O.*, 1938, C.P.D. 90 and *Van der Merwe's* case there cited. There are, as stressed by Mr. Muggleston in his argument on behalf of the appellants, discrepancies between Sylvia's evidence and that of Ethel as regards whether the First Defendant suggested they should go to the boarding-house and whether he took them there. Sylvia's testimony is to that effect whereas Ethel stated that she had not heard the First Defendant make such a suggestion and that she and Sylvia had decided to go to the boarding-house before they met the First Defendant. This discrepancy indicates an overstatement by Sylvia but, to my mind, it does not, in the light of the First Defendant's false denial in the circumstances mentioned above, serve to detract from her credibility to the extent that she ought not to be believed as regards the First Defendant having had sexual intercourse with her during the night of the 7th July, 1961 at Umtata. There is also the discrepancy in the evidence for the Plaintiff as to whether the car in which the Plaintiff's messengers travelled to report Sylvia's pregnancy to the Second Defendant was pushed when it left the latter's kraal. According to the Plaintiff's son, Muggleston, who was one of the messengers, the car was pushed whereas Sylvia

said it was not pushed. The significance of this discrepancy is that Sylvia and the Plaintiff's messengers stated that she had accompanied them in the car to the Second Defendant's kraal whereas the latter testified that she had not done so. Tembu custom which obtains in this case, demanded that Sylvia's "stomach" should have been taken by the Plaintiff's messengers to the Second Defendant's kraal which postulates that she should have accompanied them there and not that the messengers should have gone there without her to report her pregnancy. There appears to be no good reason why the Plaintiff should not have complied with this custom so that the probabilities are that Sylvia did accompany the messengers. The discrepancy as to whether or not the car was pushed accordingly assumes little importance and may well have been due to faulty recollection or observation on Sylvia's part. A further feature in the Plaintiff's case calling for comment is the delay by Sylvia in reporting her pregnancy to her people, which was also stressed by Mr. Muggleston. The reasons given by her for this delay, viz., that the First Defendant had promised to marry her and that she feared her people's reaction, appear to be genuine so that this feature does not militate against the success of the Plaintiff's case, see *Mbulawa versus Bonkolo,* 1932, N.A.C. (C. & O.) 45, at page 46.

Turning to the evidence for the Defendants, other than that of the First Defendant which has already been dealt with, one Matoti said that he had had sexual intercourse with Sylvia in May, 1961. Not only are there blatant inconsistencies in Matoti's evidence as to the reason when he alleged he had been intimate with Sylvia but he admitted under cross-examination that he did not know where in the location the intimacy had taken place as their accommodation for that purpose had been arranged by the Second Defendant because the latter had no accommodation for them whereas, according to the Second Defendant, he made no such arrangement but brought them to his house. Moreover, Matoti would have the Court believe that it is customary for a man to act as go-between whereas this is contrary to custom, see *Malufahla versus Kalankomo,* 1955, N.A.C. 95 (S), at page 96. Again, it was not put to Sylvia in cross-examination whether she had had sexual intercourse with Matoti in May, 1961, but only whether such intercourse had taken place in July, 1961. Accordingly, Matoti's evidence was properly rejected by the Commissioner, as submitted by Mr. Airey, and Sylvia's denial that she had intercourse with Matoti fell to be accepted. Nelson Nundu's evidence is to the effect that in July, 1961, he found Sylvia in a hut with a strange constable at about 9 p.m. when looking for her as he, the Principal of the school at which she was employed, wanted the key of the needle-work cupboard of which she as needle-work teacher, had charge; further, that Ethel had told him on the 15th July, 1963, that she was going to deny that she had gone to Bityi to look for Sylvia and the key as Sylvia's people had told her to do so and to disclose the boarding-house incident. There can be little doubt that Nundu's evidence is a fabrication in view of the inconsistencies and improbabilities therein and that the truth lies with Ethel's denial of his allegations as will be apparent from what follows. Under cross-examination Nundu stated that he had not told the Defendant nor anyone else about the key incident. He went on to say that he had told a member of his staff about it and later said that he had disclosed it in the presence of his staff. He also stated that when he found Sylvia with the constable in the hut he did not form an opinion, and never thought anything. Then he said he did not know if he thought anything wrong. He first said in relation to the boarding-house incident that he had not discussed it much with Ethel and then went on to say that there was no mention of the boarding-house at all. It is improbable on the face of it that Ethel should have told Nundu that she was going to commit perjury at the behest of Sylvia's people and so jeopardise the

Plantiff's case as well as put herself in Nundu's hands unnecessarily.

It follows that the Commissioner cannot be said to be wrong in finding for the Plaintiff and the appeal should accordingly be dismissed, with costs.

Yates and Collen, Members, concurred.

For Appellants: Mr. K. Muggleston of Umtata.

For Respondent: Mr. F. Airey of Umtata.

Addendum by Balk (President):

I feel constrained to comment on the allegation in the grounds of appeal embodied in the notice of appeal that the Commissioner "guessed" at the probabilities, an allegation to which he took exception in his reason for judgment. There is nothing in the record to indicate that this allegation is justified. On the contrary, as is manifest from what has been stated above, there can be no doubt that there is a preponderance of probability in favour of the Plaintiff's case entitling him to the judgment entered by the Commissioner. It follows that the allegation is unfounded. The attorney who signed the notice of appeal would be well advised to refrain from such allegation in future as not only are they quite unnecessary in that a ground stating that the judgment is against the weight of he evidence and the probabilities is all that is required in an appeal on fact but they ill become an attorney being, as he is, an officer of the Court.

SOUTHERN BANTU APPEAL COURT.

DLAMINI vs. KESWA.

CASE No. 43 OF 1963.

UMTATA: 6th February, 1964. Before Balk, President, Yates and Harris, Members of the Court.

PRACTICE AND PROCEDURE.

Judgments — recorded judgment to be definite in its terms. Appeals from Bantu Affairs Commissioner's Courts—grounds of appeal to be specifically and clearly formulated. Evidence —onus of proof—circumstances where onus on Defendant.

BANTU LAW AND CUSTOM.

Duty of person in whose custody livestock left for safekeeping to report losses thereof—such person liable to owner for any stock disposed of by unauthorised person.

Summary: This was an appeal from the judgment of a Bantu Affairs Commissioner's Court for Plaintiff (present Appellant) for a saddle or its value, R8, and for Defendant (now Respondent) with costs, presumably in respect of the remainder of Plaintiff's claim) in an action for the recovery of the saddle and other of his property consisting of cattle, horses, and a plough, or their value.

Plaintiff averred that he was the heir of the late Mqanjelwa, who had placed the property with the Defendant for safekeeping, and that he, the Plaintiff, was a minor at the time of Mqanjelwa's death. Plaintiff stated that he reached majority during 1951. The Defendant, whilst admitting that

the property in question, with the exception of the plough, had been left with him, alleged that certain of the stock had died, others had been sold by the late Mqanjelwa's brother, Isiah, and his widow, and others were stolen or lost. A witness for the Plaintiff averred that Isiah was mentally unbalanced and incapable of acting as the Plaintiff's guardian and dealing with cattle.

The Defendant denied that this was so, but admitted that deaths and other losses of Mqanjelwa's stock were, after the latter's death, reported to Emma, his (Mqanjelwa's) sister. The Defendant also failed to establish that Isiah was the Plaintiff's guardian at the time of the alleged sale.

Held: That, in order that the Commissioner's judgment should have been definite, he ought to have stated therein that he found for the Defendant as regards the remainder of the Plantiff's claim and not merely have entered judgment for plaintiff for the saddle or its value followed by judgment for Defendant, with costs.

Held further: That the manner in which the grounds of appeal were set out, viz. in the form of argument, did not comply with the requirements of Rule 7 (*b*) of the Rules for Bantu Appeal Courts which require that grounds of appeal be formulated specifically and clearly as grounds of appeal.

Held further: That as the Defendant admitted in his plea that he was in possession of the livestock in question on the death of the late Mqanjelwa and as he did not dispute that the Plaintiff had then inherited the stock, the onus of accounting for it rested on the Defendant, but that the position was different as regards the onus of proof in respect of the plough, which onus rested on the Plaintiff on the pleadings as the Defendant denied therein that it had come into his possession.

Held further: That Defendant's admission that losses of the stock were reported to Emma lends colour to the evidence for the Plaintiff that Isiah was mentally unbalanced, for losses of livestock would not otherwise have been reported to a woman bearing custom in mind.

Held further: That as the Defendant failed to establish that Isiah was the Plaintiff's guardian at the time he was alleged to have sold certain of the Plaintiff's stock, he, Defendant, remained liable to the Plaintiff for this stock or its value.

Referred to:

Rule 7 (*b*) of Rules for Bantu Appeal Courts.

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

Balk (President):—

This is an appeal from the judgment of a Bantu Affairs Commissioner's Court for Plaintiff (present Appellant) for a saddle or its value, R8, and for Defendant (now Respondent), with costs, presumably in respect of the remainder of the Plaintiff's claim, in an action for the recovery of the saddle and other of his property consisting of cattle, horses and a plough or their value.

Here it should be mentioned that in order that the judgment should be definite the Commissioner ought to have stated therein that he found for the Defendant as regards the remainder of the Plaintiff's claim and not merely have entered judgment for Plaintiff for the saddle or its value followed by judgment for Defendant, with costs.

In the particulars of claim in the summons the Plaintiff averred that the property had been placed with the Defendant for safe-keeping by the late Mqanjelwa (hereinafter referred to as "the deceased") and that, despite demand, the Defendant had failed to deliver it to him.

The Defendant denied in his plea that the plough had been left with him but admitted that he had in his possession on the deceased's death ten head of cattle, seven horses and a saddle, all the property of the deceased, and alleged, *inter alia*, that five of the cattle had been sold by the deceased's brother, Isiah, and that five of the horses had died.

The appeal is confined to the Commissioner's finding for Defendant in so far as these five cattle, five horses and the plough are concerned. The grounds of appeal are set out in the form of argument instead of being formulated specifically and clearly as grounds of appeal as required by Rule 7 (*b*) of the Rules of this Court. It appeared from the grounds of appeal as formulated that an appeal on fact was intended and with the concurrence of Messrs. Muggleston and Airey, who appeared in this Court for the Appellant and the Respondent, respectively, the appeal was heard on this basis. The attorney who drew the notice of appeal would be well advised to comply with the requirements of Rule 7 (*b*) in future in view of the risk of the notice of appeal being held by this Court to be invalid for want of observance of those requirements and of the appeal in consequence being struck off the roll, with costs.

As the Defendant admitted in his plea that he was in possession of the five cattle and five horses, the property of the deceased on the latter's death and as he did not dispute that the Plaintiff had then inherited the stock, the onus of accounting for it rested on the Defendant. The position is different as regards the onus of proof in respect of the plough which rested on the Plaintiff on the pleadings as the Defendant denied therein that it had come into his possession.

The Commissioner erred in relying on the evidence of the Defendant's witness, Mpengele, that he had come across Isiah and the Defendant selling two oxen as these cattle were not identified as being two of the five cattle alleged by the Defendant to have been sold by Isiah. The Commissioner also erred in relying on the evidence of the Defendant's witness, Alexander Duze, that the five horses which were brought on to his farm by the Defendant, had died as not only is there nothing to identify them as five of the horses left by the deceased but, according to Duze, the Defendant had told him that the five horses belonged to the deceased's late brother, Mqalose, as stressed by Mr. Muggleston.

The Defendant's evidence cannot, as submitted by Mr. Muggleston, be regarded as reliable in view of the inconsistencies therein. He stated in his evidence in chief that on the deceased's death the latter had left seven horses, including the five in question but under cross-examination he alleged that the deceased was still alive when the five horses died. Again, in his examination in chief he stated that the saddle would be serviceable if repaired whereas in cross-examination he said that the saddle had been repaired. Here it is perhaps as well to mention that an inference adverse to the Defendant is not justified by reason of the fact that in paragraph 5 of his plea it is stated that the saddle is an old one, worn out and of no value and that it no longer existed as the plea was drawn not by the Defendant but by his attorneys and there is nothing to indicate how he instructed his attorneys and that the wording of the paragraph was not due to an error on their part, see *Ngombane versus Mankayi*, 1956, N.A.C. 115 (S), at page 117.

Apart from his unreliability, the Defendant did not, as pointed out by Mr. Muggleston, establish that Isiah was the Plaintiff's guardian at the time of the alleged sale as the evidence does not indicate when the sale took place so that it cannot be determined whether the Plaintiff was a minor at the time; nor did the Defendant establish that Isiah was then the Plaintiff's senior paternal adult male relative and as such his guardian according to Bantu law and custom, if a minor, particularly in view of the mention by Alexander Duze of another brother of the deceased, viz., the late Mqalose, the date of whose death was also not disclosed. Besides, there is Emma Mazinyo's evidence for the Plaintiff that Isiah was mentally unbalanced and incapable of acting as the Plaintiff's guardian and dealing with cattle. It is true that the Defendant denied that this was so but his admission that deaths and other losses of the deceased's stock were, after the latter's death, reported to Emma, the deceased's sister, indicates that no paternal adult male relatives of the deceased other than Isiah were then available and lends colour to Emma's version that Isiah was not normal mentally; for losses of livestock would not otherwise have been reported to a woman bearing custom in mind. Moreover, Emma's evidence carries conviction being consistent and according with custom and, therefore, falls to be preferred to that of the Defendant which cannot be regarded as reliable for the reasons given above. It should be added that the significance of the Defendant's failure to prove that Isiah was the Plaintiff's guardian at the time Isiah sold the five cattle is that it also betokens that the Defendant failed to prove that Isiah was authorised to sell the cattle of which he Defendant had control, as admitted by him, for it could only be by reason of Isiah being the Plaintiff's guardian that he could have had such authority under Bantu law and custom bearing in mind that there is nothing to show that he had any other authority to do so. It follows that the Defendant failed to establish that Isiah had any right to sell the five cattle if indeed he did so, so that, consonant with custom, the Defendant remained liable to the Plaintiff for these cattle or their value.

Emma also testified that whilst the Defendant had reported the death of one of the deceased's horses to her he had not done so in respect of any of the five horses so here also, consonant with custom, the Defendant remained liable to the Plaintiff for the five horses or their value, see *Manunga versus Yekiso,* 1936, N.A.C. (C. & O.) 87, at page 88.

Admittedly, the Plaintiff did not institute proceedings against the Defendant for the property in question for some ten years after attaining majority and no reason for his failure to do so is disclosed. But this aspect appears to be of little moment in view of the Defendant's admission that he had the stock coupled with the fact that there is nothing to show that he was prejudiced in his defence by the delay.

As regards the plough, Emma's testimony that the Defendant took it outweighs the Defendant's denial that he did so as, for the reasons given above, Emma's testimony is to be preferred to that of the Defendant.

The value of the cattle, horses and plough as stated by the Plaintiff in the particulars of claim in the summons was not called into question by the Defendant in his plea so that it falls to be regarded as having been admitted by him in terms of Rule 45 (8) of the Rules for Bantu Affairs Commissioner's Courts, see *Sgatya and Another versus Mbane,* 1956, N.A.C. 48 (S), at page 51.

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

" For Plaintiff for five head of cattle or their value, R40 each, five horses or their value, R60 each, the saddle or its value R8 and the plough or its value R6, with costs. For Defendant as regards the remainder of Plaintiff's claim."

Yates and Harris, Members concurred.

For Appellant: Mr. K. Muggleston of Umtata.

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

NORTH-EASTERN BANTU APPEAL COURT.

NZUSA vs. NCANANA.

B.A.C. CASE No. 98 OF 1963.

ESHOWE: 23rd April, 1964. Before Cowan, President, Craig and Maytham, Members.

PRACTICE AND PROCEDURE.

Lapsing of appeal—locus standi *of woman whose guardian was absent on a day subsequent to first day of hearing—dismissal of appeal without hearing evidence.*

Summary: Plaintiff sued in a Chief's Court and was awarded judgment against Defendant, a woman, who was duly assisted by her guardian on 1st September, 1958. She appealed to the Bantu Affairs Commissioner's Court and on 24th May, 1959, the Defendant and her guardian were present and Plaintiff was in default. The case was postponed as the Chief's reasons for judgment had not been filed. At the resumed hearing on 10th November, 1959, Defendant was present and her guardian and the Plaintiff were in default. The Bantu Affairs Commissioner struck the case off the roll. On reinstatement all parties were present and the Bantu Affairs Commissioner *suo motu* raised the question of whether the appeal had lapsed and, apparently without consulting the parties decided that it had and dismissed the appeal with costs.

Held: That the Bantu Affairs Commissioner erred in striking the case off the roll as Defendant was present, though her guardian who was present at a previous hearing was in default on that day, and should have proceeded with the hearing in the absence of Plaintiff.

Held: That the Bantu Affairs Commissioner erred in holding that the appeal had lapsed in the particular circumstances of this case.

Held: That the Bantu Affairs Commissioner erred in dismissing the appeal, even though he had decided that it had lapsed, without hearing evidence.

Cases referred to:

Davids versus Pullen and Others, 1958 (2) S.A.R. 405 at 411,

Gumede versus Mkwanazi, 1959, N.A.C. 24.

Goldman versus Stern, 1931, T.P.D. 261.

Cases distinguished:

Mxamli versus Mabandla, 1952, N.A.C. 219.

Laws referred to:

Act No. 38 of 1927 section *twelve* (4) and (6).

Rule 10 (1) of G.N. 2885 of 1951.

Appeal from the court of the Bantu Affairs Commissioner, Mahlabatini.

Craig, Permanent Member:—

Plaintiff sued Defendant, duly assisted, in a Chief's Court for the delivery of a red heifer for which he had, allegedly, paid her R20. The Chief gave judgment for Plaintiff for the heifer concerned with costs on 1st September, 1958.

This judgment was taken on appeal to the Bantu Affairs Commissioner by Defendant and on 24th May, 1959, when Defendant and her guardian were present and Plaintiff in default the case was postponed to 10th November, 1959, as the Chief's reasons for judgment had not been filed.

On 10th November, 1959, Defendant appeared in person but her guardian and Plaintiff were in default. The acting Bantu Affairs Commissioner then struck the case off the roll.

Thereafter on a Notice of Re-instatement the case came before court on 25th September, 1963, and all parties were present.

The Court, *suo motu,* raised the question of whether the appeal had lapsed for want of prosecution and, apparently without consulting the parties as there is no record of their views or any evidence on the question, held that it had so lapsed and dismissed the appeal with costs.

The matter has now been brought on appeal to this Court on the following grounds:—

(1) The judgment is against the evidence and the weight of the evidence.

(2) The learned Native Commissioner was not entitled by law to dismiss the appeal on the grounds stated by him and should have heard evidence as required in the regulations contained in Government Notice No. 2885, dated 9th November, 1951 and more particular Regulation No. 12 thereof.

The first postponement on 24th May, 1959, was justified and the Chief's reasons for judgment were filed on 5th March, 1959.

I can find no justification for the action of the Acting Bantu Affairs Commissioner in striking the case off the roll on 10th November, 1959. The Appellant (Defendant) was present and, presumably, prepared to proceed. The fact that her guardian was absent did not affect her *locus standi vide Davids versus Pullen and others,* 1958 (2) S.A.L.R. 405 at page 411. The record is silent as to why the then Bantu Affairs Commissioner acted as he did instead of hearing the appeal in the absence of the Plaintiff (Respondent) and it must be presumed that he acted arbitrarily. In my view the submission of Mr. White, who appeared for Appellant, that the order should be regarded as having the effect of an adjournment *sine die* is sound.

I find myself unable to support the action of the Bantu Affairs Commissioner in dismissing the appeal on 25th September, 1963. It is essential that evidence be led *vide Gumede versus Mkwanazi,* 1959, N.A.C. 24 and that is lacking so that the Bantu Affairs Commissioner acted irregularly. There is no provision in the rules for a Bantu Affairs Commissioner's Court for the lapsing of an appeal but the Bantu Affairs Commissioner has quoted the case of *Mxamli versus Mabandla,* 1952, N.A.C. 219, as authority for the course adopted by him.

But that case had not reached the stage the present one had nor was there any evidence of the dilatoriness which characterised the Appellant in *Mxamili's* case on the part of the present Appellant. The pleadings appear to be in order (though it is noteworthy that the beast concerned is not the property of the Appel-

lant) and at no time was Defendant in default of appearance. The Bantu Affairs Commissioner apparently decided the matter without a prior objection by the Respondent and without recording any views of explanations of the parties, if, indeed, these were called for.

In the particular circumstances of this case I feel that justice requires that the appeal in the Court *a quo* be proceeded with to finality.

The appeal to this Court should be allowed, with costs, the Bantu Affairs Commissioner's judgment set aside and the case remitted back to his Court for hearing to a conclusion.

Cowan, President:—

The proceedings which gave rise to this appeal have been summarised by the learned Permanent Member and I agree with the conclusion at which he has arrived.

Section *twelve* (4) of Act No. 38 of 1927, provides that if the appellant has noted his appeal in the manner and within the period prescribed by regulation under sub-section (6), the execution of the judgment shall be suspended until the appeal has been decided (if it was prosecuted at the time and in the manner so prescribed) or until the expiration of the last-mentioned period if the appeal was not prosecuted within that period, or until the appeal has been withdrawn or has lapsed.

One of the regulations visualised by this section is Regulation No. 10 (1) of G.N. No. 2885 of the 9th November, 1951, the relevant portion of which requires, *inter alia,* the Clerk of the Court to whom the notification of an appeal is made, to fix a time and date for the hearing of the appeal.

In the case before us the Clerk of the Court fixed such time and date as 10 a.m., on the 24th February, 1958. As the appellant duly appeared at this time and date to prosecute the appeal and on both the subsequent dates to which the hearing of the appeal had been postponed it cannot be said that up to time that the appeal was struck off the roll it had not been prosecuted at the time and in the manner laid down by section *twelve* (4) of the Act. In this respect this case is distinguishable from the case of *Mxamli versus Mabandla,* N.A.C. (5), 219, relied on by the Bantu Affairs Commissioner in that in the latter case the appellant, through his failure to carry out the duty imposed on him by Regulation 10 (1) of serving a notice of set down of the appeal on the Respondent, had not taken all the steps necessary to prosecute the appeal.

The reason why the appeal from the Chief's court was struck off the roll on the 10th November, 1959, does not appear from the record and as the appellant had attended the court—presumably for the purpose of prosecuting her appeal—I cannot conceive of any sufficient reason why she was not permitted to do so.

It is possible that the judicial officer took the view that owing the absence of her guardian on the day in question the appellant had no *locus standi* to proceed any further in the matter and that for this reason he struck it off the roll for want of prosecution. But if this was indeed the case, then he would clearly have been at fault in doing so as the appeal had manifestly been brought with the knowledge and consent of the appellant's guardian and an injustice would have been done to her by not permitting her to proceed with it.

For this reason, and in the absence of any objection by the Respondent, the ends of justice would have been better served had the Bantu Affairs Commissioner regarded the previous striking of the appeal off the roll as being merely a suspension of the matter (*Goldman versus Stern,* 1931, T.P.D. 261) and have permitted the appellant to continue with it.

Maytham, Member, concurred.

For Appellant: Mr. W. E. White.

SOUTHERN BANTU APPEAL COURT.

TAUZENI vs. TSOKI.

CASE No. 8 OF 1964.

KING WILLIAM'S TOWN: 7th July, 1964. Before O'Connell, President, Yates and Leppan, Members of the Court.

PRACTICE AND PROCEDURE.

Appeals from Bantu Affairs Commissioner's Courts — request for presiding officer's reasons for judgment prior to noting of appeal — undue delay by presiding officer in delivering such reasons to clerk of court — incumbent on appellant to note appeal in absence of reasons within twenty-one days after judgment.

Referred to:—

Rules 2 (1) and 4 of Rules for Bantu Appeal Courts.

Both members concurred in the following addendum by the President to the judgment of this Court in the above case:—

"I wish to add that it is opportune to sound a warning that the words in rule *four* of the Bantu Appeal Appeal Court rules 'or within fourteen days after the delivery to the clerk of the said court by the officer who delivered the judgment of a written judgment in terms of sub-rule (1) of rule *two*' are not to be construed to mean that the party who has requested the written jugdment is entitled to sit back and do nothing if the judicial officer fails to deliver the written judgment within the period laid down in sub-rule (1) of rule *two*, i.e. within ten days of the written request for judgment. Nor should the words be interpreted as meaning that the time for noting an appeal is extended in such a case until fourteen days after some uncertain future date on which the judicial officer sees fit to deliver the written judgment. The policy that there be finality to litigation is in no way affected or altered by the provisions of the two rules quoted; in point of fact, an analysis of those rules shows that the party who avails himself of the provisions of sub-rule (1) of rule *two* is granted a *maximum* extension of ten extra days within which to consider his position and, if so advised, to note an appeal. If the written judgment has not been delivered within ten days of the request therefor, the party concerned should take care to see that his appeal is noted within twenty-one days of the original judgment — in this connection see the remarks of the Court in *Ngcamu versus Majozi d/a Zondi*, 1959, N.A.C. 74. It is, of course, open to a party in a proper case to seek a *mandamus* compelling the judicial officer to comply with the peremptory provisions of sub-rule (1) of rule *two*."

NORTH-EASTERN BANTU APPEAL COURT.

BUTELEZI vs. DLAMINI.

B.A.C. CASE No. 12 OF 1964.

PIETERMARITZBURG: 3rd August, 1964. Before Cowan, President; Craig and Parsons, Members of the Court.

PRACTICE AND PROCEDURE.

Appeal from default judgment of Chief's Court—no record of rescission having been refused—unreasonable delay by Chief in adjudicating—Chief's reasons for judgment not called for or furnished.

Summary: A Chief gave a default judgment against Defendant who appealed, out of time, to the Bantu Affairs Commissioner's Court. In his affidavit Defendant stated he had applied for rescission of that judgment but that the Chief had not yet given him a hearing: The Bantu Affairs Commissioner granted condonation by consent, presumed that the Chief had refused to rescind his default judgment, proceeded to hear the appeal without being in possession of the Chief's reasons for judgment and allowed it.

Held: No appeal lies against a Chief's default judgment unless and until he has refused to rescind it.

Held further: Unreasonable delay by a Chief in adjudicating is provided for in the rules applicable to Bantu Affairs Commissioners' Courts.

Held further: The Bantu Affairs Commissioner should have refused condonation despite the consent of the parties.

Cases referred to:

Ntsabalala versus Piti, 1956, N.A.C. 111.

Regulations referred to:

Bantu Affairs Commissioners' Courts: 7, 9, 10, 11 Chiefs' Courts: 3 (2).

Appeal from the Court of the Bantu Affairs Commissioner, Vryheid.

Craig, Permanent Member:—

The proceedings in the Bantu Affairs Commissioner's Court were quite irregular. They purported to be an appeal against a default judgment entered by a Chief and, in terms of the proviso to Regulation 9 (1), as amended, of the Regulations for Chief's and Headmen's Civil Courts such an appeal did not lie unless and until an application for the rescission of such judgment had been refused. In the absence of any evidence whatsoever on the point it was not open to the Commissioner to presume, as he says he did, that the Chief had refused to rescind the default judgment. Such a refusal requires registration in terms of Regulation 9 and subject to the time limit prescribed by Regulation 7 as it would be appealable (*Ntabalala versus Piti,* 1956, N.A.C. 111).

If, as is suggested in an affidavit lodged by the Appellant in the Commissioner's Court, there was unreasonable delay on the part of the Chief concerned in adjudicating on his application for the rescission of the default judgment his remedy was to apply to the Court of the Bantu Affairs Commissioner for the hearing of the matter as is provided for by Chiefs' Courts Regulation 3 (2). On this point alone the appeal had to succeed.

In passing it must be pointed out that the Clerk of Court did not notify the Chief that an appeal had been lodged [Regulation 10 (1) (*d*) nor were reasons for judgment furnished by the Chief *vide* Regulation 11 (1)]. Both of these are peremptory.

The correct course for the Commissioner to have followed was to have refused the application for condonation of the late noting of the appeal from the Chief's Court despite the agreement of the parties that it should be granted.

The appeal was upheld with costs and the judgment of the Bantu Affairs Commissioner altered to "Application for condonation of the late noting of the appeal is refused with no order as to costs."

Respondent in default.

Cowan, President, and Parsons, Member, concur.

For Appellant: Adv. W. O. H. Menge instructed by A. C. Bestall & Uys.

NORTH-EASTERN BANTU APPEAL COURT.

MALLIE vs. MESSENGER OF COURT AND MTIMKULU.

B.A.C. CASE No. 20 OF 1964.

PIETERMARITZBURG: 3rd August, 1964. Before Cowan, President; Craig and Parsons, Members of the Court.

EJECTMENT.

JURISDICTION.

PRACTICE AND PROCEDURE.

Jurisdiction of Bantu Affairs Commissioner's Court—White Messenger of that Court cited as a Respondent—warrant of ejectment—when it may validly be issued and executed—prospective judgment not competent.

Summary: A compromise between the parties as to rentals, the date on which the Defendant undertook to vacate the premises and that on Defendant's default the Plaintiff "shall be entitled to eject the Defendant from the Plaintiff's property immediately" was made an order of Court. Plaintiff subsequently caused a warrant of ejectment to be issued and this was served by the European Messenger of the Bantu Affairs Commissioner's Court. Defendant was granted a rule *nisi* operating as an interim inderdict restraining the Messenger and Plaintiff from ejecting him pending decision on an application by him that the warrant be set aside as invalid. On the merits of the application the Bantu Affairs Commissioner in due course discharged the rule *nisi* with costs.

On appeal to this Court by Defendant (Appellant) points were taken *in limine* by Plaintiff's (Respondent) counsel that the Bantu Affairs Commissioner's Court's jurisdiction was ousted as the Messenger of Court was not a Bantu and that the appeal was not properly before this Court as a notice of appeal had not been served on the Messenger. Both these objections were overruled. Respondent's counsel then asked for a postponement and withdrew when this was refused. Thereafter Appellant's counsel addressed the Court.

Held: That the jurisdiction of the Bantu Affairs Commissioner's Court over its Messenger derived from the fact that he was its officer charged with the execution of its process and not from his race and that it was unnecessary to cite him as a party and so unnecessary to serve notice of appeal upon him.

Held further: That the Bantu Affairs Commissioner's Court could not give a prospective judgment and that the agreement

which was made an order of Court did nothing more than entitle the Plaintiff to apply to the Court on the due happening of a certain event for a warrant of ejectment.

Held further: That the application to set aside the warrant of ejectment should have been granted.

Cases referred to:

Louis Sacks N.O. and *Maria Malope versus John Mdhlali,* 1956, N.A.C. 43.

Works referred to:

Shorter Oxford Dictionary.

Statutes referred to:

Act 38 of 1927.

Appeal from the Court of the Bantu Affairs Commissioner, Camperdown.

Cowan, President:—

In December, 1962, the present Respondent issued a summons against the Appellant claiming his ejectment from his property, payment of R72 arrear rental up to and including December, 1962 and costs. The action was defended and when the matter came to trial on the 7th May, 1963, a compromise was arrived at by the parties and a written record thereof in the following terms was signed by their attorneys:—

1. The Defendant undertakes to pay to the Plaintiff the sum of R30 representing rental for the Plaintiff's property for the months of January, February, March, April and May 1963 to the Plaintiff's Attorneys at Camperdown by the 31st March, 1963.
2. The Defendant continue to pay rental of the sum of R6 per month in respect of the property by the last day of each succeeding month to the Plaintiff's Attorneys at Camperdown until the 30th January, 1964, whereafter such day the Defendant undertakes to vacate the Plaintiff's property. The first payment in respect of such rental shall be made on or before 30th June, 1963 and should the Defendant default in the payment of any one instalment then the Plaintiff shall be entitled to eject the Defendant from the Plaintiff's property immediately.
3. There shall be no order as to costs.

This document was handed into Court and its terms were made an order of the Court, the judgment recorded being one of, "Judgment by consent as per written consent order filed."

The Respondent subsequently caused a warrant to be issued for the ejectment of the Appellant from the property and this was served on the Appellant by the Messenger of the Court, a European, on the 17th February, 1964. The Appellant then applied for, and was granted, a rule *nisi* restraining the Messenger and the Respondent from ejecting the Appellant from the property and the matter has now come before this Court as an appeal against the judgment of the Commissioner discharging that rule with costs.

The Respondent's attorney took the point *in limine* in the lower court that, as the Messenger of the Court was one of the Respondents in that Court and was not a Native as defined by Act No. 38 of 1927, that Court had no jurisdiction to grant the interdict. This objection was over-ruled by the Commissioner and was again taken in this Court by the Respondent's counsel who relied for this contention on the decision given by the Central Bantu Appeal Court in the case of *Louis Sachs, N.O.* and *Maria*

Malope versus John Mdhludi, 1956. N.A.C. 43. I do not propose to discuss the question of whether the decision given in that case was or was not a correct one because in my view the reasons given for that decision can have no application in the matter now before us. Here we have the case where the Appellant sought to restrain the Messenger of the Court from executing a warrant of execution which he claimed was invalid and to my mind it cannot be that the Court was precluded from doing so because the Messenger was a European. The warrant was a process of the Court and it clearly had the right to determine whether it was a valid one and should be executed or whether it was an invalid one which it should direct the Messenger not to execute. The right to exercise this authority over the Messenger does not depend on whether his race was such as would make him subject to the jurisdiction of the Court in the ordinary way but derives simply from the fact that he is an officer of the Court charged with the execution of its process.

Another point taken by Mr. Menge *in limine* was that as no notice of appeal had been served on the Messenger of the Court the appeal was not properly before this Court. In our view there is no merit in this point. The Messenger of the Court was cited in the interim interdict proceedings simply because it was necessary to restrain him from executing the warrant until such time as the merits of the application for the setting aside of the warrant could be decided by the Court. He had, however, no interest in the subsequent proceedings as no costs had been asked for against him and this is borne out by the fact that he neither filed a replying affidavit nor did he appear on the day the application was heard. It was, indeed, unnecessary to cite him in those proceedings and the fact that no notice of this appeal has been served on him is not one to which this Court is prepared to attach any importance as he can be occasioned no prejudice whichever way the appeal is decided.

For these reasons the points raised by Mr. Menge were overruled and he then applied for the postponement of the hearing of the appeal. This request was opposed by the Appellant's counsel and, as Mr. Menge could advance no reason why it was made other than that he had been instructed to do so by his attorneys, his application was refused. He then intimated that he had no mandate to argue the appeal on its merits and, with the Court's leave, he withdrew from the case.

In his reasons for judgment, the Bantu Affairs Commissioner says, *inter alia,* " I concluded that once the terms of the settlement were recorded and converted into the judgment of the Court, there the matter ended; the Plaintiff's rights to issue a writ of ejectment immediately the Defendant fell into arrear with his rent was indisputably established and the Defendant had to abide by it ". He went on to say in a subsequent paragraph, " I concluded that once the terms of the settlement were recorded and converted into the *Judgment of the Court* there the matter ended; the Plaintiff's right to issue a Writ of Ejectment immediately the Defendant fell into arrear with his rent was indisputably established, and the Defendant had to abide by it ". In my view the Commissioner has given a wrong meaning to the word " entitled " in the phrase, " the Plaintiff shall be entitled to eject the Defendant from the Plaintiff's property immediately ", which is contained in paragraph 2 of the agreement arrived at by the parties. The verb " to entitle " is defined in the *Shorter Oxford Dictionary* as meaning " to give a rightful claim to anything ". Under the agreement, therefore, the Plaintiff had no right to evict the Defendant should he fall into arrear with his rent—he merely had the right to claim the Defendant's eviction and he could pursue this claim only through the Court. The fact that the agreement between the parties was made a judgment of the Court could give the Plaintiff no greater right than he had under the agreement

as no right of eviction had accrued to him at that stage and a Court would not give a prospective judgment nor make an order of ejectment prior to the happening of the event which would warrant the granting of such an order.

For these reasons the appeal must succeed. It is upheld with costs and the judgment of the Bantu Affairs Commissioner is altered to one of. "The application to set aside the warrant is granted with costs".

Craig and Parsons, Members, concur.

For Appellant: Mr. C. S. Ntloko (C. S. Ntloko & Co.)

For Respondent: Adv. W. O. H. Menge instructed by Randles, Davis & Wood.

NORTH-EASTERN BANTU APPEAL COURT.

NTULI vs. MKONZA.

B.A.C. CASE No. 23 OF 1964.

PIETERMARITZBURG: 4th August, 1964. Before Cowan, President; Craig and Parsons, Members of the Court.

COURTS.

BANTU LAW AND CUSTOM.

Chief's Court proceeding—criterion is Chief's "Written Record" —Lobolo—woman may not be sued therefor.

Summary: Plaintiff sued Defendant, a woman, in a Chief's Court for R40 he allegedly had paid her mother for her and for "other personal effects". The Chief awarded him R40 and costs and these proceedings comprised the "Written Record". On appeal the claim was shown as for R40, i.e. four head and personal effects, and the Chief's judgment as being for payment of R40 or 4 head and personal effects and costs. When the Chief furnished his "Reasons for Judgment" the claim was shown as being for four head of lobolo cattle, personal effects and fencing and building material and the Chief's judgment as being for four lobolo cattle or their value of R40 plus costs and Plaintiff to collect the articles claimed. The Bantu Affairs Commissioner's judgment was to the effect that the Chief's judgment was upheld in part only and judgment given for Plaintiff for the refund of three lobolo cattle or their value R30 and for payment of R52.70 being expenses incurred by Plaintiff plus costs and costs in the Chief's Court.

Held: That the Bantu Affairs Commissioner should have concerned himself solely with the claim and judgment for lobolo as set out in the Chief's "Written Record".

Held further: That there is nothing in Bantu law which sanctions a woman being sued for lobolo.

Held further: That the appeal should have been allowed and the Chief's judgement altered to one dismissing the claim.

Cases referred to:

Malufahla versus Kalankomo, 1955, N.A.C. 95 (S).

Dimiza versus Gxalaba, 1955, N.A.C. 93 (S).

Am versus Kuse, 1957, N.A.C. 92 (S.).

Kunene versus Madonda, 1955, A.A.C. 75 (N.E.).

Bulunga versus Bulunga, 1960, N.A.C. 1.

Appeal from the Court of the Bantu Affairs Commissioner, Paulpietersburg.

Craig, Permanent Member:

This case originated in a Chief's Court and according to the "Written Record" Plaintiff's claim against Defendant was for "R40 being lobolo paid for Defendant and other (sic) personal effects." The "particulars of defence" appear as "Did not know where to get the money as she lived with Plaintiff for 12 years as his wife." The Chief gave judgment "For Plaintiff for payment of R40 plus costs of R2.50. Nothing paid yet."

This judgment was taken on appeal to the Bantu Affairs Commissioner but for some unexplained reasons the following different details appear on the "Notice of Hearing of Appeal":—

"*Claim.*

Payment of R40 being lobolo paid by him for Defendant i.e. four head. Plaintiff and Defendant lived together as man and wife for 12 years but the marriage was not registered and there were no children born out of this union. This amount of R40 was received by Defendant's late mother Lizzie. Plaintiff also claimed his personal effects.

Defendant's Reply to Claim.

Did not know where to raise this amount from. Her mother who received this money is deceased and she used it to maintain herself and her inmates of her kraal. Plaintiff rejected her.

Judgment of the Chief.

For Plaintiff for payment of R40 or 4 head of cattle and personal effects and costs of R2.50."

By the time the Chief furnished his "Reasons for Judgment" on 25th January, 1964, the details of the proceedings had undergone further radical, and unexplained, changes viz.:—

"*Claim.*

The refund of his 4 lobolo cattle he paid to Defendant's late mother, Lizzie, as lobolo for Defendant, who lived with him as his wife for 12 years, and also his personal effects and fencing and building material he used whilst he lived with Defendant at Lizzie's kraal. Plaintiff said Defendant had now rejected him.

Defendant's Reply to Claim.

(1) She had no cattle of her own wherewith to make the refund.

(2) Claimed her wages for services she had rendered to Plaintiff for 12 years.

Judgment.

For Plaintiff for 4 lobolo cattle or their value of R40 — plus costs of R2.50, and Plaintiff to collect the articles claimed.

Reasons for Judgment.

1. Parties lived together as man and wife for 12 years.

2. No children were born.

3. Defendant rejected the Plaintiff because she said he continuously assaulted Defendant.

4. The Union was not registered at Court."

The Chief's "Written Record" is the criterion as regards pleadings in his Court [*Malufahla versus Kalankomo*, 1955, N.A.C. 95 (S).]. If a Plaintiff does not challenge the correctness of the Chief's written record he is, in subsequent proceedings in the Bantu Affairs Commissioner's Court, bound by his claim as recorded by the Chief's Court [*Diniza versus Gxalaba*, 1955, N.A.C. 93 (S)].

The correctness of the claim as recorded by the Chief was not challenged in the instant case [*Am versus Kuse*, 1957, N.A.C. 92 (S), and *Kunene versus Madonda*, 1955, N.A.C. 75 (NE)].

That being so the only claim on which the Commissioner could adjudicate was that which appears on the Chief's written record. The Chief gave no judgment in respect of personal effects and the Plaintiff did not appeal on that point so that the Commissioner should have concerned himself solely with the Chief's judgment for R40 lobolo.

The Chief is empowered only to adjudicate on civil claims arising out of Bantu Law and Custom and under that system there is nothing which sanctions a woman being sued for lobolo (*Bulunga versus Bulunga*, 1960, N.A.C. 1). For the same reason Defendant cannot be heiress to her mother. Further, there is nothing on record to indicate that Defendant is in possession of any of her late mother's property.

The appeal is allowed, with costs and the Bantu Affairs Commissioner's judgment is altered to read "The appeal is allowed with costs" and the Chief's judgment is altered to read "The claim is dismissed, with costs."

Cowan, President, and Parsons, Member, concur.

For Appellant: Adv. W. O. H. Menge instructed by A. C. Bestall & Uys.

For Respondent: Adv. J. A. van Heerden instructed by Vorster & De Villiers.

NOORDOOSTELIKE BANTOE-APPÈLHOF

ZULU vs. ZULU EN NGWENYA.

B.A.H. SAAK No. 25 VAN 1964.

PRETORIA: 6 Julie 1964. Voor Craig, Waarnemende Voorsitter; Marais en Chatterton, Lede van die Hof.

Absolusie van die instansie—nie-sluiting van pleitstukke—getuienis deur en ten bate van Eiser onbestrede.

BANTOEBOEDELS.

PRAKTYK EN PROSEDURE.

Opsomming: Eiser het sekere boedelbates geëis en na wysiging van sy dagvaarding was die pleitstukke nie gesluit nie. Eiser en sy getuies het getuienis afgelê en dit was onbestrede. Op laasgenoemde stadium het die Bantoesakekommissaris uitspraak van absolusie gelewer op aansoek van Verweerders.

Gehou: Dat uitspraak van absolusie nie regverdig was op die stadium waarop dit gelewer was nie.

Sake waarna verwys is:

Mzimela and others versus Mzimela, 1960, N.A.C. 80.

Staden versus Prinsloo, 1947, S.A.L.R. 842.

Bee versus Railway Passengers Assurance Co., 1947, (4) S.A.L.R. 356.

Goosen versus Stevenson, 1932, T.P.D. 223.

Wetgewing waarna verwys is:

Goewermentskennisgewing No. 1664 van 1929.
Appèl van die Bansoesakekommissarishof, Morgenson.

Craig, Waarnemende Voorsitter: —

Volgens my mening was daar geen regverdiging vir die uitspraak van absolusie op die stadium waarop dit gelewer was nie.

Op 15 November 1963 het Eiser se prokureur aansoek gedoen om sy dagvaarding volgens 'n kennisgewing gedateer 7 November 1963 te wysig en nieteenstaande die feit dat Verweerder se prokureur aangegee het dat hy geen beswaar daarteen maak nie, het die Bantoesakekommissaris geen beslissing op die geskilpunt gelewer nie. Maar selfs as dit aangeneem word dat hy die aansoek toegestaan het (en sy skriftelike uitspraak gee aan dat hy, ten feite, so gedoen het) was dit klaarblyklik met dien verstande dat die Verweerders kans sou hê om hulle pleitstukke te wysig, maar wat nie gedoen was teen die tyd van aansoek om absolusie deur hulle prokureur nie. Die pleitskrifte was dus nie gesluit nie en net vir daardie rede alleen moes die Kommissaris die aansoek van die hand gewys het.

Dit is vir my nie duidelik hoekom die Eiser, om te slaag, bevind dat dit nodig is om te wys dat Verweerders op bedrieglike of onwettige wyse te werk gegaan het nie. Indien dit bevind word dat die Eiser die regmatige erfgenaam is en derhalwe die eienaar van die nalatingskap is, maak dit nie saak welke middele deur die Verweerders aangewend is om die boedelbates te verkry nie. 'n Regmatige eienaar is geregtig om sy eiendom te vindikeer tensy die besitters daarvan hulle regte daarop kan bewys.

Die feit dat die Assistent Bantoesakekommissaris te Morgenson blykbaar beslis het op 4 Januarie 1961, dat Eerste Verweerder oorledene se erfgenaam was, verskaf nie die laaste woord op die geskilpunt nie. Ek twyfel dat die verrigtinge ingehandig as Bewysstuk "A", geld as 'n ondersoek soos beoog deur artikel 3 (2) van Goewermentskennisgewing No. 1664 van 1929. Dit blyk dat die Assistent Kommissaris wie opgetree het, aangeneem het dat Eerste Verweerder die erfgenaam was weens die blote feit dat hy die "Sterfkennis" en die "Inventaris" geteken het as "Oudste seun van oorledene" en ten spyte van die verklaring van Roslina Ngwenya dat "Toe oorledene vir Jotham Zulu se moeder, Ndhlovu, gekoop het, *het hy ook vir Jotham betaal"* (my onderstreping). Dit mag wel wees dat Eerste Verweerder 'n buiteegtelike kind is en, volgens Bantoereg, nie geregtig is om te erf nie. Verder is ek bewus van die feit dat oorledene se eerste huwelik 'n siviele huwelik was en as daardie vrou nog lewe, mag die bepalings van artikel 2 van bogemelde Goewermentskennisgewing van toepassing wees. As 'n getwis ontstaan, moes artikel *drie* (3) van die Kennisgewing opgeroep word en dit blyk dat iets van daardie aard gebeur het, onwetend miskien, in die huidige saak (sien *Mzimela and others versus Mzimela,* 1960, N.A.C. 80).

Die getuienis deur en ten bate van Eiser ten dien effekte dat hy die enigste oorlewende manlike afstammeling van oorledene is, is onbestrede. Hy het die bewyslas genoegsaam gekwyt om 'n uitspraak van absolusie te voorkom [*Staden versus Prinsloo,* 1947, S.A.L.R. 842 en *Bee versus Railway Passengers Assurance Co.,* 1947 (4), S.A.L.R. 356], en die *prima facie* saak wat hy gestig het, vereis 'n antwoord (*Goosen versus Stevenson,* 1932 T.P.D. 223).

As dit nie was dat die pleitskrifte nie gesluit was nie, mag 'n uitspraak van absolusie ten gunste van Tweede Verweerder miskien regverdig gewees het aangesien die enigste getuienis wat geopper-

was dat sy sogenaamde beskermling enigiets van die bates verwyder het, blyklik op hoorsê gebaseer is.

Met verwysing na die Kennisgewing van Appèl is daar klaarblyklik niks op die rekord om Appellant se bewering dat Sara Zulu (Manana), op 4 Januarie 1964 (of op 4 Januarie 1961) voorgehou het dat Eerste Verweerder die enigste erfgenaam was, te regverdig nie.

Verweerders se prokureur het gefouteer om aansoek te doen om absolusie voordat hy die pleitskrifte gesluit het en die Kommissaris het gefouteer om die aansoek toe te staan.

Volgens my mening moet die appèl slaag met koste en die Bantoesakekommissaris se uitspraak verander word tot " Aansoek om absolusie van die hand gewys ".

Die saak moet terugverwys word na die Bantoesakekommissaris vir verdere verhoor na afsluiting van die pleitskrifte.

Marais en Chatterton, Lede, stem saam.

Vir Appellant: Adv. D. Kuny in opdrag van mnr. D. L. de Jager.

Vir Respondent: Adv. J. D. M. Swart in opdrag van mnr. E. W. Pienaar.

NORTH-EASTERN BANTU APPEAL COURT.

NDHLOVU vs. PHETHA.

B.A.C. CASE No. 37 OF 1964.

PIETERMARITZBURG: 6th August, 1964. Before Cowan, President; Craig and Parsons, Members of the Court.

BANTU LAW AND CUSTOM.

Ngqutu cattle—ownership.

Summary: Plaintiff, a woman duly assisted by her son, sued for the return of seven head of cattle attached for her son's debt on the ground that they were her property being progeny of the *ngqutu* beasts paid for her three daughters. It transpired that two of the girls were daughters of the deceased *indhlunkulu* wife to whose house Plaintiff had been affiliated and that five of the cattle claimed were progeny of *ngqutu* beasts paid for them. The third girl was, in fact, the daughter of Plaintiff.

Held: That the ownership of the five head of cattle vested in the *indhlunkulu* of which Plaintiff's son was heir and that they were rightly attached for his debt.

Legislation ferred to:

Natal Bantu Code Sections 3 (*a*) and 96 (4).

Appeal from the Court of the Bantu Affairs Commissioner, Camperdown.

Craig, Permanent Member:—

The Plaintiff, duly assisted by her son, Velekhaya Phetha, sued for the return of seven head of cattle, or their value, which had been attached in satisfaction of a judgment given against Velekhaya. She alleged she was the lawful owner of such cattle as they were the progeny of certain *ngqutu* beasts which were given to her in respect of the marriages of certain of her daughters.

It is undisputed that Plaintiff's "house", a junior one, was affiliated to the *indhlunkulu* of her late husband and that, on the failure of the latter house to produce male issue but only seven daughters, Velekhaya became the heir thereto.

On Plaintiff's own admission two of the "daughters" (Puzani and Kadenzeka) whose *ngqutu* beasts she claims as her own were not so related to her but are the natural daughters of the deceased *indhlunkulu* wife. Plaintiff has no right whatever to these cattle, which account for five of those in dispute, on the basis of *ngqutu* as claimed by her.

The contention of Mr. Menge, who appeared for the Respondent (Plaintiff) in this Court, that Plaintiff, because of affiliation of her house, became to all intents and purposes the mother of the girls Puzani and Kadenzeka on the death of their natural mother was rejected. The purpose of affiliation *vide* Section 3 (*a*) of the Natal Bantu Code is to provide against failure of an heir in the senior house to which the junior is attached. The rights to the *ngqutu* cattle which Mr. Menge sought to establish for Plaintiff are not provided for, explicitly or impliedly, by the Code.

These five cattle are, in terms of Section 96 (4) of the Natal Bantu Code the property of the *indhlunkulu* of which Velekhaya is the heir and were rightly attached in reduction of his debt to the Defendant whose appeal in respect of them must succeed.

The other two cattle are, allegedly, progeny of the *ngqutu* beast of Plaintiff's own daughter Lena and the onus was on Plaintiff to establish the allegation on a balance of probabilities.

The Commissioner was favourably impressed by Plaintiff whom he found was acting under compulsion at the time of the attachment. If she were, which is doubtful, she kept her wits about her sufficiently to ensure that only the smallest cattle were taken. At no time during the attachment did she resist it on the ground that the cattle were hers by virtue of the *ngqutu* custom though it is on record that she resisted successfully the attachment of a black cow with a white spot on its side on the ground that it was a *ngqutu* beast. Plaintiff's evidence as to the progeny of Lena's *ngqutu* beast was vague and in no way complicated. It was a simple matter to say that it had had quite a lot of increase and that of such increase a black and white bullock and a black bullock were attached. Velekhaya's knowledge of Lena's *ngqutu* beast is based on hearsay and he gave no details of its progeny.

Because of the unsatisfactory circumstances outlined above Plaintiff cannot be said to have discharged the onus which rested upon her. In the absence, however, of refutation by Defendant of what she did say he should have been absolved from the instance.

In the result the appeal is allowed with costs and the Bantu Affairs Commissioner's judgment is altered to "For the Defendant for the five head of cattle allegedly the progeny of the *ngqutu* beasts of Puzani and Kadenzeka. Defendant is absolved from the instance in respect of the two head of cattle allegedly the progeny of the *ngqutu* beast of Plaintiff's daughter Lena. Plaintiff to pay costs."

Cowan, President, and Parsons, Member, concur.

For Appellant: Adv. P. Roux instructed by Cowley & Cowley.

For Respondent: Adv. W. O. H. Menge instructed by Randles, Davis & Wood.

NORTH-EASTERN BANTU APPEAL COURT.

MBATA AND OTHERS vs. KUBEKA.

B.A.C. CASE No. 41 OF 1964.

PIETERMARITZBURG: 6th August, 1964. Cowan, President, Craig and Parsons, Members.

BANTU LAW.

Damages for assault — attempted forcible removal of a wife from the kraal of her father at which she had sought sanctuary — means to be employed to recover wife.

Summary: Plaintiff was awarded damages as the result of an assault committed by the Defendants when they attempted to remove forcibly the customary union wife of one of them from her father's (Plaintiff's) kraal at which she had sought sanctuary.

Held: That Defendants not entitled to remove the woman forcibly but should have sought her return to her husband by litigation.

Held: That damages correctly awarded to the Plaintiff, father of the wife, who was injured in the ensuing fracas.

Laws referred to:

The Natal Bantu Code Section 27 (2).

Appeal from the Court of the Bantu Affairs Commissioner, Ladysmith.

Cowan, President:—

This matter came before this Court by way of an application for the late noting of the appeal and this was granted.

The reasons for judgment furnished by the Assistant Bantu Affairs Commissioner, which were strongly attacked by the Appellants' counsel, are most unsatisfactory and unhelpful but this Court has not been persuaded that he erred in finding in favour of the Respondent. There were, indeed, discrepancies in the evidence adduced by the Respondent, as was pointed out by the Appellant's counsel, but these are only to be expected in the testimony of witnesses to a *fracas* of this nature and the probabilities favour his version that he was assaulted by the Appellants when he went to the assistance of his daughter who was being forcibly abducted by the second and third Appellants at a time when she was living at his, the Respondent's, kraal. She was the wife of the second Appellant and the evidence discloses that she had returned to her father as she had some "trouble" with her husband.

Section No. 27 (2) of the Natal Code reserves independent powers to a Bantu female in respect of her own person and I am unable to agree with the view of the Appellants' counsel that unless the Respondent's daughter had good cause for leaving her husband — which the record does not disclose — he was entitled

to forcibly remove her from her father's kraal where she had sought sanctuary. By leaving her husband she may or may not have committed a matrimonial offence but, if she did, his remedy was to claim her return from her father failing which the refund of the cattle paid as *lobolo* for her.

The appeal is dismissed with costs.

Craig and Parsons, Members, concurred.

For Appellants: Adv. T. Juul (instructed by Macaulay & Riddell).

For Respondent: Mr. R. P. Jenkins (instructed by H. L. Kidman & Botha).

CENTRAL BANTU APPEAL COURT.

IDA BUTHELEZI d.a. vs. KATE MSIMANG d.a.

CASE No. 13 OF 1964.

JOHANNESBURG: 30th October, 1964. Before Gold, President, Thorpe and Oelschig, Members of the Court.

CONFLICT OF LAWS.

The system of law to be applied in assessing damages must be the same as that applied to the cause of action.

DAMAGES.

There is no room under Bantu law and custom for special damages in delict, though the award of money damages in appropriate cases is now part and parcel of that system.

Summary: Defendant uttered words which imputed witchcraft to Plaintiff. A fairly numerous Bantu audience was present, and at least some of them believed in witchcraft. As a result of this imputation, Plaintiff was shunned by members of the public at her crêche and at her place of business. Plaintiff gave evidence of special damages allegedly suffered through loss of wages and loss of profits. The Bantu Affairs Commissioner applied Bantu law and custom to the cause of action and common law to the assessment of damages.

Held: The decision of the Bantu Affairs Commissioner to apply Bantu law and custom should not be disturbed.

Held further: The system of law to be applied in assessing damages must be the same as that applied to the cause of action.

Held further: There is no room under Bantu law and custom for special damages in respect of delicts.

Cases referred to:

Ntabenkomo versus Jente and Ano., 1946, N.A.C. (C. & O.) 59.

Daniel and Ano. versus James Jack, 2 N.A.C. 29.

Mziyonke Mgadi versus Nondiya Magwaza, 1945, N.A.C. (N. & T.) 87.

Fundzana Zuwani versus Mamhaga Golozeleni, 1947, N.A.C. (C. & O.) 28.

Mtembu and another versus Zungu, 1953, N.A.C. 196.

Mvelase versus Njokwe and two others, 1961, N.A.C. 46.

Mamisi and Khei Ngcobo versus Mzonakele Ngcobo, 1960, N.A.C. 7.

Appeal from the Court of the Bantu Affairs Commisioner, Johannesburg.

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

Plaintiff (now Respondent) a married Bantu woman, assisted by her husband, sued Defendant (now Appellant) a Bantu woman assisted by her partner in a customary union, claiming a sum of R1,000.00 as and for damages for alleged defamation.

The summons, after amendments made during the course of the proceedings, reads:—

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

2. On or about the 9th day of February, 1962, and at 248, Central Western Jabavu, in the district of Johannesburg, the Defendant speaking in the Zulu language and in the presence and hearing of Emmy Radebe, Betty Shongwe and Ruth Maponye, who are all conversant with the Zulu language, uttered the following words of and concerning the Plaintiff:—

'Akeze umthakathi omdala kudala engithakatha namhlanje ngizomkhiphela obala.'

3. A correct translation of the said words is:—

'Let the old witch come, she has long been bewitching me and today I shall expose her in public'.

4. The said words were false and defamatory of the Plaintiff and their publication by the Defendant was false and malicious.

5. *Alternatively to paragraph* 4:

The said words were false and defamatory of the Plaintiff and were intended by the Defendant to mean and were understood by the aforesaid persons to mean:—

(i) That the Plaintiff was an evil and undesirable person.

(ii) That the Plaintiff was a person of bad moral character.

(iii) That the Plaintiff was a person who harmed others.

(iv) That the Plaintiff was a person with whom ordinary decent persons should not associate.

6. By reason of the said words the Plaintiff has been injured in her good name and reputation and has sustained damage in an amount of R1,000.00."

Defendant's plea was:—

"1. *Ad paragraph* 1:

The contents of this paragraph are admitted.

2. *Ad paragraph* 2:

The Defendant denies each and every allegation contained in this paragraph.

3. *Ad paragraph* 3:

Defendant denies that the translation as given is correct and puts the Plaintiff to the proof thereof.

4. *Ad paragraph* 4:

Defendant denies each and every allegation contained in this paragraph.

5. *Ad paragraph* 5:

The Defendant denies each and every allegation contained in this paragraph, in particular Defendant denies the words were false and defamatory of the Plaintiff or were understood to mean the allegations set out in this paragraph.

6. *Ad paragraph* 6:

Defendant denies each and every allegation contained in this paragraph, in particular that the Defendant has been injured in her good name and reputation and that she has suffered damages in an amount of R1,000.00 or any amount whatsoever."

After hearing the evidence tendered by the parties, the Bantu Affairs Commissioner entered judgment:—

"For the Plaintiff for costs and—

Loss of Wages	R200.00
Defamation	R 10.00
Loss of Profits	R240.00
	R450.00".

Appeal is noted on the following grounds:—

" 1. *Facts Appealed Against.*

(*a*) The judgment was against the evidence and the weight of evidence is that the learned Commissioner should not have found that the words were uttered.

(*b*) The amount of damages was excessive in all the circumstances.

2. *Points of Law Appealed Against.*

(*a*) The learned Bantu Commissioner erred in finding that Bantu law and custom was applicable instead of common law.

(*b*) The learned Bantu Commissioner erred in finding that Bantu law and custom applied and consequently awarding damages under common law, for if Bantu law and custom applied to the granting of judgment, the same law should have applied to th award of damages.

(*c*) The learned Bantu Commissioner erred in finding that the alleged words were defamatory."

The President, after dealing with the facts, proceeded:—

The Bantu Affairs Commissioner applied Bantu law and custom to the action. Mr. Wentzel argued that the fact that the parties are educated, urbanised Bantu of the middle class strongly favoured the application of common law. He did not press the point, however, and this Court is satisfied that the reasons given by the Bantu Affairs Commissioner for his decision to apply Bantu law and custom are sound. It cannot say that he has not exercised his discretion judicially.

Having applied Bantu law and custom and having found for respondent, the Bantu Affairs Commissioner decided to assess the damages under common law. It is against this decision that Mr. Wentzel, who conceded that under Bantu law and custom the respondent had a good cause of action and that the words were *per se* defamatory, directed his main attack.

The Bantu Affairs Commissioner, dealing with this point in his reasons for judgment, says:

> " 16. In this case the damages could only be assessed on a common law basis. This is true even of the R10.00 awarded for the actual defamation because money was unknown in Bantu law—Compare Seymour page 225, note 10, where it is stated that the authorities do not explain how a man was compensated in original Native law if. for example, his huts had been burnt down; he may now claim in money. (I have not been able to obtain any of the cases quoted in note 10 on that page).
>
> 17. In my opinion there is nothing wrong or illogical in a finding that the cause of action lies under Bantu law and custom but that the damages fall to be assessed under the common law."

Whatever the position may have been under pristine custom, Courts administering Bantu law and custom in this country have from the earliest times awarded damages sounding in money, either alone or as an alternative to cattle. The award of money damages in appropriate cases is now part and parcel of Bantu law and custom.

In Ntabenkomo versus Jente and another 1946 N.A.C. (C. & O.) 59, the Court pointed out that damages in actions under Bantu law and custom are in reality fixed fines; once the wrongful conduct is established, the prescribed damages automatically follow and there is no need to prove them. Obviously, there can be no room under such a system for special damages, which are, in fact, unknown to Bantu law and custom.

In the case of the relatively few wrongful acts for which Bantu law and custom does not prescribe a fixed number of cattle as damages, the Court must assess damages as best it can on the basis of the facts disclosed by the evidence in each particular case.

[*Daniel and Ano. versus James Jack,* 2 N.A.C. 29.

Mziyonke Mgadi versus Nondiya Magwaze, 1945, N.A.C. (N. & T.) 87.

Fundzana Zuwani versus Mamhaga Golozeleini, 1947, N.A.C. (C. & O.) 28.

Mtembu and another versus Zungu, 1953, N.A.C. 196.

Mvelase versus Njokwe and Two others, 1961, N.A.C. 46.].

In making these assessments, common law has never been invoked, because, as shown above, common law concepts are inapplicable. It is for this reason that it has been held that it is not necessary to itemise the damages claimed under Bantu law and custom. (Mamisi and Khei Ngcobo versus Mzonakele Ngcobo 1960 N.A.C. 7.)

It follows that the Bantu Affairs Commissioner erred in applying common law to the assessment of damages. He should have granted the remedy provided by the system of law that he applied to the cause of action.

The appeal must therefore be allowed, with costs, and the Bantu Affairs Commissioner's award of damages set aside.

To save further delay and expense to the litigants, this Court will itself assess the damages. It is in as good a position as the Court below to do so.

Apart from the gravity of the charge against Respondent, the evidence shows that it was unambiguously and publicly made to a numerous audience called for the special purpose of hearing it, that at least some of the audience believed in witchcraft and that, as a result, respondent was shunned by members of the public at her crêche and at her business.

In all the circumstances, this Court considers that an award of R50 will meet the demands of justice in this case.

The judgment of the Court below is therefore altered to read:

"For Plaintiff in the sum of R50, with costs".

Thorpe and Oelschig, Members, concurred.

NORTH-EASTERN BANTU APPEAL COURT.

MNGOMEZULU vs. MYENI.

B.A.C. CASE No. 18 OF 1964.

ESHOWE: 19th August, 1964. Before Cowan, President, Craig and Colenbrander, Members.

PRESUMPTIONS.

PRACTICE AND PROCEDURE.

Recall in subsequent proceedings of its own judgment by trial court—presumption of ownership of attached cattle—interpleader proceedings incompetent.

Summary: A default judgment was entered in favour of a Plaintiff on appeal to the Bantu Affairs Commissioner from a Chief's court. An attachment was made and the cattle seized were handed over to Plaintiff by the Messenger. Thereafter interpleader proceedings were instituted and the Bantu Affairs Commissioner declared the cattle executable. On appeal to this Court the Commissioner furnished no "Reasons for Judgment" but submitted a report to the effect that the execution was irregular as there was no provision for the procedure he adopted when granting the default judgment and that the Appeal must succeed. It was not clear whether the Commissioner is giving judgment on the interpleader claim had had regard to the presumption of ownership raised by the Claimant's possession of the cattle at the time of their attachment.

Held: That the Bantu Affairs Commissioner's Court had no jurisdiction to recall its own judgment on the ground of irregularity.

Held: That interpleader proceedings were incompetent.

Cases referred to:

Gumede versus Mkwanazi, 1959, N.A.C. 24.

Bitya versus Kabinyanga, 1, N.A.C. (S.D.) 184 (1950).

Nkosi versus Nsele, 1963, N.A.C. 56.

Appeal from the court of the Bantu Affairs Commissioner, Ingwavuma.

Craig and Colenbrander, Members, concurred.

For Appellant: Mr. F. P. Behrmann.

For Respondent: Mr. B. Wynne (instructed by A. E. Language).

Cowan, President:—

This is an appeal against a judgment in an interpleader action in which the Bantu Affairs Commissioner declared eighteen head of cattle which had been attached by the Messenger of the Court to be executable.

The Commissioner has furnished no reasons for judgment entered by him as he should have done but has contented himself with furnishing a report which reads as follows:—

> "This case came before this Court as a result of an appeal from the Chief's Court who gave judgment in favour of Plaintiff for 1 beast or its value of R16. Against this judgment the Plaintiff appealed because his claim was for 26 head of cattle.
>
> The matter was heard on 4th July, 1963, and again on 12th July, 1963, to enable Defendant to give his evidence but because he was in default on both occasions, default judgment was entered against him.
>
> In due course a warrant of execution was issued and the cattle attached. This resulted in an interpleader action before the Court and against this judgment the Claimant now appeals.
>
> In view of the fact that there is no provision for the default procedure which was adopted by the Court, (Gumede versus Mkwanazi 1959 N.A.C. 24), the execution was irregular and the appeal must succeed."

Neither the record of the proceedings in the Chief's Court nor the record of the proceedings on appeal in the Commissioner's Court are before this Court and it consequently has no knowledge of the nature of the "default procedure" adopted by the Commissioner when he heard the appeal. Whatever the nature of those proceedings was, the validity of the writ had not been attacked by the Claimant nor had the trial court any jurisdiction

to recall its own judgment on the ground of irregularity (*Bitya versus Kabinyanga,* 1, N.A.C. (S.D.) 184 (1950). The Commissioner should, therefore, have acted on the assumption that the writ was a valid one.

It is not clear whether the Commissioner, in giving his judgment, had regard to the presumption of ownership raised by the Claimant's possession of the cattle at the time of their attachment and both Counsel for the Appellant and the Respondent agreed that his judgment should not be allowed to stand but that the matter should be heard *de novo.* This Court agrees that the matter should be re-heard. As, however, the cattle were no longer in the Messenger's possession at the time the proceedings were instituted it was not competent to institute interpleader proceedings and the Claimant should have proceeded by way of a vindicatory action (see *Nkosi versus Nsele,* 1963, N.A.C. 56). For this reason this Court will set aside both the interpleader summons and the subsequent proceedings in the lower court.

The appeal is allowed with no order as to costs and the interpleader summons and subsequent proceedings are set aside.

SOUTHERN BANTU APPEAL COURT.

BUCWA vs. GEORGE.

CASE No. 19 OF 1964.

KING WILLIAM'S TOWN: 2nd November, 1964. Before O'Connell, President, Yates and Warner, Members of the Court.

CUSTOMARY UNION.

Bantu-marriage—man who is partner to a customary union contracting marriage with another woman—Effect—Must be regarded as having deserted wife—woman justfiied in leaving huband—her guardian not liable for refund of dowry.

Summary: This was an appeal from the judgment of a Bantu Affairs Commissioner's Court for Defendant in an action in which the Appellant (then Plaintiff) sued the Respondent (then Defendant) for the return of his customary union wife, Lilian, failing which the dissolution of the customary union, the delivery of three head of cattle or payment of their value R42.00 being 6 head of cattle paid as lobola less 3 deducted in respect of the three children born of the union, the return to him and the custody of the two surviving children of the union and costs. He averred in his summons that Lilian deserted him in June, 1961, and that she and the Defendant had, without his consent, removed the two surviving children from his custody during September, 1963.

In his plea, the Defendant admitted the customary union, the payment of lobola and that three children (one of whom had subsequently died) had been born of the union. He, however, denied all the other allegations in the summons and averred that it was the Plaintiff who was the deserting party.

At the conclusion of the trial on the 20th April, 1964, the Bantu Affairs Commissioner entered judgment for the Defendant with costs. Against this judgment the Plaintiff noted an appeal on the 16th May, 1964, on grounds which amount to its being against the evidence and the weight of evidence.

The appeal was noted one day late and the Plaintiff has applied for condonation of this late noting, stating in his application that the delay was due entirely to an error on the part of his attorney and that, for reasons set out by him, he has good prospects of success in the appeal.

Before granting such an application the Court requires to be satisfied *inter alia* that the applicant has a reasonable prospect of success in the appeal, i.e., that he has an arguable case.

In the present case, the Plaintiff admitted in cross-examination that he had, on the 5th January,1962, married by civil rites another woman named Nancy and he went on to say " I want both wives in my home. I expect Lilian to be satisfied with another woman in house ".

Held: That it is settled law that the celebration by the husband of a civil marriage with a woman other than the wife of his customary union automatically dissolves the union and he therefore forfeits the dowry and it follows that the present applicant has no prospects whatsoever of success on appeal.

The application for the condonation of the late noting of the appeal is therefore refused. There is no appearance for the Respondent and there will therefore be no order as to costs.

Referred to:

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

Appellant's Attorney: M. Anderson of Hutton & Cook, King William's Town, instructed by Z. J. B. Mbuqe of Port Elizabeth.

No appearance for Respondent.

NORTH-EASTERN BANTU APPEAL COURT.

XULU AND OTHERS vs. SIKAKANE.

B.A.C. CASE No. 31/64.

ESHOWE: 20th August, 1964. Before Cowan, President, Craig and Fourie, Members.

BANTU LAW.

PRACTICE AND PROCEDURE.

Alteration of basis of claim on appeal from Chief's Court— "Wrongful acts" under the Natal Bantu Code—Unnecessary prove damages under Bantu law.

Summary: The Defendants removed the Plaintiff's cattle from the grazing ground, retained them for a period, wounded them and then allowed them to return to Plaintiff's kraal. At the hearing the Plaintiff was permitted, despite protest by the Defendants, to introduce by means of a document a claim by virtue of which claimed *inter alia* that he had " suffered damages in the sum of R120 for contumelia . . . and for loss of amenities ".

Held: That the document which amended the basis of the claim should not have been admitted in its entirety.

Held: That the acts of the Defendants were "wrongful acts" as envisaged by the Natal Bantu Code and that under Bantu law it was unnecessary to prove damages.

Works referred to:

Stafford's "Principles of Native Law and the Natal Code".

Laws referred to:

The Natal Bantu Code—Section 130.

Appeal from the Court of the Bantu Affairs Commissioner, Mahlabatini.

Cowan, President, and Fourie, Member, concurred.

For Appellant: Mr. W. E. White (instructed by A. C. Bestall and Uys).

For Respondent: Mr. S. H. Brien (instructed by D. B. Theron).

Craig, Permanent Member:—

According to a Chief's written record filed with this record the Plaintiff sued one Absolom Magubane "For £60 damages on the fact that Defendant and his companions took my cattle from the grazing land and kept them in their possession milking and ploughing, was broken, 5 beasts returned wounded and cow dung for my manure was lost". Defendant denied liability on the ground that he was still waiting for the "trial of the case forwarded to the Police for the matter of the cattle". The Chief gave judgment "For Plaintiff for £10 with costs, £1-7-0, for reason of keeping Plaintiff's cattle unlawfully and they return wounded".

There were four Defendants concerned in this matter and it seems that the Chief tried all four cases as one and then registered a separate judgment in respect of each. It will be assumed that the claim and judgment against each Defendant was the same.

On appeal to the Bantu Affairs Commissioner's Court by agreement the four cases were tried together by joining the four Defendants. On this composite claim for £240 (R480) and in respect of which the Chief was regarded as having made a composite award of £40 (R80) the Bantu Affairs Commissioner gave judgment of:—

> "Appeal dismissed with costs. Chief's judgment altered to read 'For Plaintiff for R60 against the 4 Defendants jointly and severally, the one paying the others to be absolved.'"

An appeal to this Court has been noted as follows:—

> "Please take notice that the above-named Defendants hereby note an appeal against the whole judgment granted in the above case in the above Court on the 27th February, 1964, on the following grounds:—
>
> (1) The judgment is against the evidence and bad in law. Alternatively there is no evidence on record that the Defendants disputed Plaintiff's right to graze his cattle on the commonage, and consequently damages based on contumelia should not have been awarded to the Plaintiff.
>
> (2) The Court erred in rejecting the evidence tendered by the Defendants to the effect that the cattle were found trespassing in the mealie-lands in question.

(3) The Court misdirected itself in arriving at the conclusion that it could not test the credibility of the defence witnesses in that the Plaintiff was legally represented and cross-examination could and should have revealed any flaws or weaknesses in Defendants' version of the facts.

(4) The Court erred in holding that there was no obligation on Plaintiff to prove special damages under the headings of 'injury to property' and 'loss of amenities'. Furthermore the Court having found that Plaintiff's evidence as to the injuries inflicted on his cattle was exaggerated (vide paragraph 16 of written reasons for judgment), its award of R60 for contumelious damages was grossly excessive."

At the hearing of this case the Plaintiff's attorney handed in, despite a protest by Defendants' attorney, a document which purported to be "Particulars of Plaintiff's claim" as follows:—

"Plaintiff's claim against the Defendants is for the sum of R120 and costs, as follows:—

1. On or about the 24th January, 1963, in the kwaNkatha Area, in the District of Mahlabatini, the Defendants, acting together and in concert did one or the other or all of them wrongfully and unlawfully attack and assault the Plaintiff's herd-boys with sticks or similar instruments and did then and there wrongfully and unlawfully drive the Plaintiff's cattle from where they were grazing lawfully on the land of Chief Mpasobene Mpungose, to a place in the Nguqe Area.

2. Whilst so driving the said cattle the Defendants did one or other or all of them wrongfully and unlawfully injure the Plaintiff's cattle by striking them with sticks and/or mboko sticks or similar instruments thereby breaking a leg of each of three beasts, stabbing one beast in the neck and breaking the ribs of another beast, thereby injuring the Plaintiff in his property.

3. By reason of the foregoing the Plaintiff has suffered damages in the sum of R120 for contumelia, for injury to his property and for loss of amenities;

Wherefore Plaintiff prays for judgment against the said Defendants jointly and severally, the one paying the other to be absolved, for the sum of R120 and costs."

This document materially alters the basis of Plaintiff's claim by alleging, *inter alia,* that Plaintiff has "suffered damages in the sum of R120 for contumelia . . . and for loss of amenities" whereas such headings were never before the Chief's Court as is clear from his written record and from his "Reasons for Judgment" which read, *inter alia,* "I therefore gave judgment for the Plaintiff for R20 instead of R120 and costs R2.70 for wrongful, unlawful and malicious dispossession." The document should not have been admitted in its entirety and considered by the Commissioner as he obviously did and accordingly the arguments of Mr. White, who appeared for the Appellants, that damages for contumelia and loss of amenities are unkown to Bantu law fall away.

The acts of the Defendants in assaulting Plaintiff's herd-boy, in depriving Plaintiff of the possession of his cattle and in injuring some of the latter, which this Court accepts they did perpetrate were undoubtedly "wrongful acts" as envisaged by Section 130 of the Natal Native Code. It is unnecessary to prove damages under Bantu law as the so-called damages are really a fine imposed by custom (Stafford's Principles of Native law and the Natal Code at page 214).

This Court sees no reason to disagree with the Bantu Affairs Commissioner's finding in favour of Plaintiff.

It is not clear why the Bantu Affairs Commissioner, though he confirmed the Chief's judgment and the latter's assessment of damages entered a judgment for R60 damages. If this Court was correct in assuming that the Chief awarded a similar amount against each Defendant viz. £10 (R20) the Bantu Affairs Commissioner's award should have been a joint and several one for R80. There has, however, been no cross-appeal by the Plaintiff so the award of R60 will not be disturbed as this Court is not of the opinion that the award was excessive in view of the wanton acts of the Defendants.

The appeal is dismissed, with costs.

NORTH-EASTERN BANTU APPEAL COURT.

KANYILE vs. MABANGA.

B.A.C. CASE No. 39/64.

ESHOWE: 20th August, 1964. Before Cowan, President, Craig and Colenbrander, Members.

CONFLICT OF LAWS.

Bantu woman's right to sue for damages for seduction under the common law—when decisions to be made regarding system of law to be applied—discretion a judicial one.

Summary: The Plaintiff, a female, sued for damages for her seduction and pregnancy and for maintenance for the child born as a result. The Court held that the case was to be tried according to Bantu law as Plaintiff was not "detribalised" and that she had no capacity to sue under that system. The Bantu Affairs Commissioner struck the case off the roll and dismissed the summons with costs.

Held: That Plaintiff's capacity to sue was governed by statute and not by whether or not she was "detribalised".

Held: That the Bantu Affairs Commissioner acted injudiciously and prematurely in deciding at the stage at which he did that Bantu law should apply.

Cases referred to:

Ex Parte Minister for Native Affairs: In *re Yako versus Beyi,* 1948 (1), S.A.L.R. 388.

Mahlobo versus Luvano, 1952, N.A.C. 45.

Laws referred to:

Act No. 38 of 1927 (section *eleven* (3).

Appeal from the Court of the Bantu Affairs Commissioner, Eshowe.

Cowan, President, and Colenbrander, Member, concurred.

For Appellant: S. H. Brien.

For Respondent: B. Wynne (Wynne & Wynne).

Craig, Permanent Member:—

In the Bantu Affairs Commissioner's Court Plaintiff duly assisted by her father sued Defendant for R500 damages for her seduction and pregnancy and for R4 per mensem as maintenance for the child born to her as a result.

Defendant's plea was, in effect, a denial of Plaintiff's allegations regarding his responsibility and liability in the matter.

On the day of hearing and before evidence was led the following appears on the record:—

> "After having been informed of a probable ruling that the case is to be tried in accordance with Bantu law, Mr. Brien, for Plaintiff is called upon to commence with Plaintiff's evidence and calls . . ."

Plaintiff's father then gave evidence and without further ado and without giving Defendant an opportunity to cross-examine the Bantu Affairs Commissioner gave judgment of:—

> "Ruled that case is to be tried in accordance with Bantu law, Case struck off roll and summons dismissed with costs."

Plaintiff has brought the case on appeal to this Court on the following grounds:—

> "Please take notice that the Plaintiff hereby notes an appeal to the Bantu Affairs Appeal Court, North Eastern Division, against the judgment of the learned Bantu Affairs Commissioner in this case, pronounced on 28th May, 1964.
>
> Appeal is brought on the grounds that such judgment is not in accordance with law, in that:—
>
> 1. The Bantu Affairs Commissioner erred in deciding that the case fell to be decided by Bantu law.
> 2. That he erred, when deciding that the case should be tried under Bantu law, in basing his decision solely on the fact that the Plaintiff was detribalised, when other factors should also have been considered.
> 3. That he erred in his opinion that 'the parties had Bantu law in mind.'
> 4. That he erred in his opinion that a Bantu woman does not consider loss of virginity of much importance and that had a child not have been born, the Plaintiff would not have claimed damages.
> 5. That he erred, in introducing the question of whether a woman's prospects of marriage are impaired as a result of her having had a child by another man, into his judgment, and the reasons therefor.
> 6. That he erred in his opinion that because the Plaintiff was a minor, her father would *ipso facto* become the owner of any damages awarded to her.
> 7. That he erred in holding that all Bantu females are perpetual minors.
> 8. That he erred in any event in regarding the Plaintiff's being a perpetual minor as a factor in determining that the case should have been tried under Bantu law."

The appeal was out of time but condonation was granted as Plaintiff and his attorney were not blameworthy. In fact the Bantu Affairs Commissioner urged that it be granted " . . . in order to clarify the following points of law:—

(*a*) Is a Bantu woman in Natal, where a codified system of law exists, debarred from claiming damages under common law if she is not detribalised?"

(*b*) What are the essentials to be considered when determining whether a Bantu is detribalised?"

It is common cause that at a pre-trial conference the Bantu Affairs Commissioner intimated that he would probably try the case in accordance with Bantu law. The Bantu Affairs Commissioner persisted in his attitude and, after hearing evidence in which Plaintiff's father stated *inter alia* that he was a constable in the South African Police, that he and Plaintiff live in the Police Barracks at Eshowe, that his home kraal is at Empangeni under Chief Mthemba Mtetwa where his wife and other children live, that he considers himself to be a full member of his tribe and that he is not "detribalised" proceeded to give the ruling he did.

It is clear from his "Reasons for Ruling" that the Bantu Affairs Commissioner based his decision mainly on the fact that he found that Plaintiff and her father are not "detribalised." In this erred. Whether she be "detribalised" or not her capacity to sue is governed by section *eleven* (3) of Act No. 38 of 1927 and as to which Ex Parte Minister of Native Affairs: In *re Yako versus Beyi,* 1948 (1), S.A.L.R. 388 at pages 401 *et seqq.* The Code of Bantu law of Natal does not in any way affect her capacity nor is the action brought by her governed in any way by Bantu law (*Yako's* case at page 388). Under Bantu law she has no claim for damages nor for maintenance of the child *vide Mahlobo versus Luvano,* 1952, N.A.C. 45.

The discretion as to which system of law is to be applied is a judicial one and in the words of the learned judge in *Yako's* case quoted above "I think that he (the Bantu Affairs Commissioner) should only finally decide which system of law he is going to apply after considering all the evidence and argument as part of his eventual decision on the case. In deciding to apply Bantu law at the stage he did and for the reason he gives, the Commissioner acted prematurely and injudiciously as he was, at that time, in no position to reach a just decision between the parties."

The appeal must succeed with no order as to costs as they were not asked for, and the judgment and all proceedings subsequent to plea be set aside. In view of the opinions expressed by the Commissioner who tried this matter any subsequent hearing should be before a different judicial officer.

NORTH-EASTERN BANTU APPEAL COURT.

MAPENSE NG'COBO vs. MAHLAYIZANA ZULU.

B.A.C. CASE No. 40 OF 1964.

ESHOWE: 20th August, 1964. Before Cowan, President, Craig and Colenbrander, Members.

BANTU LAW.

Number of lobola cattle to be refunded on dissolution of customary union—deduction for marital services—adulterine children.

Summary: The Bantu Affairs Commissioner allowed a deduction of only one head for marital services where the parties had been married for eleven years and made no deductions for two adulterine children born to his wife, the first Defendant, during the subsistence of the marriage.

Held: That having regard to the period of the subsistence of the marriage two head should be allowed for "marital services."

Held: That one head should be allowed for each of the adulterine children.

Cases reffered to:

Mashapo versus Sisane, 1945, N.A.C. 57.

Works reffered to:

Stafford's "Principles of Native Law and The Natal Code."

Appeal from the Court of the Bantu Affairs Commissioner, Nkandla.

Cowan, President, and Colenbrander, Member, concurred.

For Appellant: Mr. S. H. Brien.

Respondent in person.

Craig, Permanent Member:—

In arriving at a decision regarding the number of cattle to be refunded to Plaintiff by Defendant No. 2 the Bantu Affairs Commissioner overlooked the fact that during the former's lifetime all children borne by his wife (Defendant No. 1) belong to him (George and Myeti Mashapo vs. Joel Sisane 1945 N.A.C. 57—Stafford at page 67). He should have deducted a beast for each of the two adulterine children born.

Further, in view of the period of eleven years that Plaintiff and his wife lived together a more generous deduction for "marital services" should have been made and this will be increased to two.

In the result a further reduction of three head will be made. Plaitiff (Respondent in the Court) conceded that he wanted no more than eight head of cattle back.

Accordingly the appeal is allowed and the award of eleven head of cattle to the Plaintiff is altered to one of eight head. The Appellant is awarded one-third of the costs of appeal which is all he asked for.

NORTH-EASTERN BANTU APPEAL COURT.

KHOZI AND ANOTHER vs. MSIMANGO.

B.A.C. CASE No. 49/64.

DURBAN: 30th September, 1964. Before Cowan, President, Craig and Van der Westhuizen, Members.

PRACTICE AND PROCEDURE.

Default judgment—rescission—Messenger of Court's return of service is merely prima facie *proof of the matters therein stated—meaning of "good cause".*

Summary: Default judgment was given against both Defendants. Second Defendant applied for rescission of the judgment granted against him and his application was refused by the trial court on the grounds that the summons had been served on him personally and that he had not shown good cause for rescission.

Held: That as the Messenger's return of personal service on second Defendant was merely *prima facie* proof that it had been served personally, that no real attempt had been made by the respondent on appeal to confirm the correctness of the return and that as Defendant's affidavit that the summons had not, in fact, been served upon him was the only substantial evidence on oath before the Court on the point the judicial officer erred in finding that the summons had been duly served on second Defendant (Applicant).

Held: That Applicant had shown "good cause" for rescission of the judgment against him by way of his "objection to the judgment" viz that the summons was not served upon him and that a default judgment was consequently entered against him at a time when he had no knowledge of the action.

Rules referred to:

19 and 74 (2)—Bantu Affairs Commissioner's Courts.

Cases referred to:

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

Appeal from the Court of the Bantu Affairs Commissioner, Durban.

Craig and Van der Westhuizen, Members, concurred.

For Appellants: Adv. G. Raftesath (instructed by O. K. Mofolo).

For Respondent: Adv. W. H. Booysen (instructed by T. N. Makiwane).

Cowan, President:—

The Appellant was the second of two Defendants who were sued by the present Respondent in the lower court. The first Defendant was alleged to be his daughter and he was also cited as assisting her in his capacity as her father and natural guardian. The relevant passages of the particulars of claim were the following:—

> "2. Defendants No. 1 and 2 wrongfully and unlawfully took possession of the Plaintiff's furniture, medicines, blankets, glassware, suitcases to the value of R1092.05 from the Plaintiff's residence at No. C.E. 18 Good Hope, Cato Manor, Durban.
>
> 3. Despite demand the Defendants Nos. 1 and 2 refuse, neglect or fail to refund the Plaintiff the said goods or their value in the sum of R1092.05.
>
> Wherefore Plaintiff prays for judgment against Defendants Nos. 1 and 2 for the return of the said goods or their value in the sum of R1092.05."

The summons was served by a Deputy-Messenger of the Court, at Umzimkulu, and the return of service reads:—

> "I certify that I have on this 4th day of February, 1963, duly effected service of this summons on both the Defendants at the address given. Handing a copy thereof to each Defendant (1) Eunice Khozi, (2) Wela Khozi and at the same time explaining to them the meaning and nature of the Process."

The record discloses that a Mr. P. S. Xabanisa, an attorney of Umzimkulu, entered an appearance to defend for the "Defendant" and had then filed what purported to be the pleas of the Defendants and a counterclaim by them.

The hearing of the action was set down for the 18th June, 1963, when a Mr. Makiwane is recorded as appearing for "Defendant" (presumably "Plaintiff" was intended) and a Mr. Singh for "Defendant". There is no note as to whether any of the parties themselves were present. Neither of the attorneys was ready to proceed with the case and it was postponed to the 5th September, 1963, on which day Mr. Makiwane appeared for the Plaintiff and the Defendants are recorded as being in default. Mr. Makiwane applied for a default judgment and costs and, without any evidence being led, the following judgment was then entered by the presiding officer:—

> "By default: Judgment for Plaintiff against Defendants Nos. 1 and 2 jointly and severally, the one paying the other to be absolved, for the return of goods claimed or their value R1092.05 and costs."

On the 28th January, 1964, the Appellant gave notice that an application for the rescission of this judgment would be made on the 12th March. This was accompanied by a supporting affidavit the relevant portions of which read as follows:—

> "2. I did not receive the summons issued against me be Plaintiff for the sum of R1092.05.
>
> 3. The first time I heard of the judgment taken against me was on Wednesday, the 22nd January, 1964, when the Messenger of the Court came to my kraal with a Warrant of Execution against my property.
>
> 4. I have never had any dealings with the Plaintiff and I am not liable to him in manner whatsoever.
>
> 5. I am verily informed that there were legal proceedings against my daughter, EUNICE, who is cited as Plaintiff No. 1 and against whom judgment was taken in default.
>
> 6. I am also informed that first Defendant instructed one Mr. Xabanisa of Umzimkulu to defend her and that I was also included in the defence.
>
> 7. I never instructed the said Attorney Mr. Xabanisa as I had no knowledge that civil action was being taken against me.
>
> 8. First Plaintiff was married to Griffiths Mzolo in 1946 by Christian Rites and is in law no longer my rensibility (responsibility) or liability.
>
> 10. Had I been duly informed of the proceedings against me I would have defended the action.
>
> 11. In the circumstances I respectfully submit that I was not in wilful default as I did not receive the summons."

Although his application was for the rescission of the default judgment it would seem, in view of the allegation in paragraph 8 of his affidavit, that he intended to apply for its rescission only in so far as it affected him.

A replying affidavit was filed by the Respondent in which he denied Paragraphs Nos. 2, 3, 4, 5, 6 and 7 of the Appellant's affidavit and went on to make other allegations. This affidavit may conveniently be dealt with immediately. In the main it carries no weight whatsoever as instead of deposing to facts within his own knowledge it is obvious that the Respondent has merely set out a series of conclusions at which he has arrived from a persusal of the record of the case. He does not, for example, say that he was present at the time of the service of the summons and, in the absence of such an allegation, he is in no position to deny the Appellant's asseveration that he did not receive the summons. Again, in the absence of any disclosure by him of the facts on which his information is based, his denial of the facts deposed to by the Appellant in paragraphs Nos. 6 and

7 of his affidavit can carry no weight at all. In fact, his only assertion which can have any substance in it is his denial of the Appellant's claim that he had never had any dealings with the Respondent and that he was not liable to him in any manner whatsoever.

The judicial officer found the following facts proved:—

1. Summons was served on both Defendants personally.

2. That Applicant did instruct an attorney and filed pleadings.

3. That Applicant did have knowledge of this action in January, 1963, i.e. after issue of summons.

He came to the conclusion that the Applicant had not shown a good defence, tha he applicaion was not *bona fide* and that no good cause had been shown. He accordingly refused the application for rescission with costs and it is against this judgment that his appeal has been brough.

In deciding that the summons had in fact been duly served on the Applicant the judicial officer was influenced thereto by the return of the Messenger of the Court and the fact that Mr. Xabanisa had fiiled a plea and counterclaim on the Applicant's behalf.

As regards the question as the whether or not the summons had been served on the Applicant, the judicial officer's reasons for judgment would seem to indicate that he has regarded the return of the Messenger of the Court as conclusive proof of its contents. In doing this he has misdirected himself as it is clear from Rule 19 that such a return is merely *prima facie* evidence of the matters therein stated and it was open, therefore, to the Defendant to impeach it. On the papers, the only substantial evidence on oath which he had before him on this point was that of the Applicant. No real attempt was made by the Respondent to confirm the correctness of the return and thereby refute the Applicant's asseveration that the summons had not in fact been served on him. Having regard to this I am of the opinion that the judicial officer erred in finding that the summons had been duly served.

The judicial officer also rejected the Applicant's contention that he had no knowledge that the action had been brought against him and he was influenced to this conclusion by his finding that Mr. Attorney Xabanisa had filed a plea and counterclaim on his behalf. Here again, the judicial officer would seem to have rejected without any sufficient reason the sworn statement of the Applicant that he had not instructed Mr. Xabanisa to do so, he having had no knowledge of the action. Here he would seem to have taken the line that as this allegation of the Applicant had been denied on oath by the Respondent further proof of its correctness should have been adduced by the Applicant but, as I have already said, this denial of the Respondent's carries no evidential weight whatsoever.

In deciding that the Applicant had not shown good cause for the rescission of the default judgment, the judicial officer had regard to a finding by him that the Appellant's affidavit did not disclose that he had a substantial defence to the action. In the case of *Silber versus Ozen Wholesalers (Pty.), Ltd.*, 1954 (2) S.A. 345 (A.D.) at page 52 is was held that the expression "good cause" (in the corresponding sub-rule of Magistrates' Courts) included but was not limited to the existence of a substantial defence and that this is so also appears from the wording of Rule 74 (2) which requires an Applicant to set out his grounds of defence to the action or his grounds of *objection to the judgment*. In the present case his grounds of objection to the judg-

ment appear sufficiently, in my view, from his affidavit, viz., that the summons was not served on him and that a default judgment was consequently entered against him at a time when he had no knowledge of the action. It follows that the original judgment was void *ab origine* and this in itself was good cause for its rescission.

For these reasons the appeal is allowed with costs and the judgment of the Bantu Affairs Commissioner is altered to read "The application for rescission of the default judgment against Defendant No. 2 is granted and he is given leave to enter an appearance to defend within twenty-one days of the 30th September, 1964. The costs of this application to be costs in the cause."

NORTH-EASTERN BANTU APPEAL COURT.

MBANJWA vs. MBANJWA.

B.A.C. CASE No. 57 OF 1964.

PIETERMARITZBURG: 18th November, 1964. Before Cowan, President, Craig and Reibeling, Members.

BANTU LAW.

Cattle—pointing out by father to son—outright gift for lobolo purposes or conditional on marriage.

Summary: Plaintiff claimed ownership of a certain heifer saying his father had given it to him for lobolo purposes. Evidence did not clearly indicate whether the beast was an outright gift to him conveying immediate ownership or whether ownership was dependent on his marrying.

Held: That the matter should be sent back to the Court a quo to ascertain the true position.

Works referred to:

Principles of Native Law and The Natal Code—Stafford and Franklin.

Appeal from the Court of the Bantu Affairs Commissioner, Pietermaritzburg.

Cowan, President, and Reibeling, Member, concurred.

For Appellant: Mr. F. Sithole.

For Respondent: Adv. W. O. H. Menge instructed by C. A. H. Manning.

Craig, Permanent Member:—

Plaintiff sued in the Bantu Affairs Commissioner's Court for the return of seven head of cattle or their value R640 stating that he was the rightful owner of them and that Defendant had removed them from his kraal. Defendant pleaded a denial of these allegations and after hearing evidence the Commissioner gave judgment for Plaintiff for the cattle or their value as claimed with costs.

The Defendant has brought the matter on appeal to this Court in respect of the judgment relating to only certain of the cattle on the ground:—

> "That the learned Additional Bantu Affairs Commissioner erred in holding that the mere pointing out of the grey heifer by First Plaintiff's late father for the purpose of providing lobola for First Plaintiff was sufficient to vest the ownership of the said beast in First Plaintiff."

The cattle concerned are allegedly the progeny of a grey heifer which Plaintiff says his father "gave" him for lobolo purposes." Plaintiff's mother first said "I know about a grey heifer. It was my late husband's heifer. He gave this heifer to First Plaintiff. It had progeny before it died." Later she added that it was given for lobolo purposes.

It is not clear from this evidence whether this beast was an outright gift to the Plaintiff or whether the passing of ownership was dependent on the Plaintiff's marriage (Stafford at page 155, paragraphs 10 to 11) and the Court should have been left in doubt as to what the true position was and have entered an absolution judgment.

In this Court, however, it was agreed by Counsel that should we arrive at this decision the case should be remitted to the Court below for the hearing of further evidence and that the costs of this appeal should be borne by the Appellant.

The appeal is accordingly allowed and that portion of the Bantu Affairs Commissioner's judgment in respect of the beast, including its progeny, allegedly gifted to the Plaintiff by his late father is set aside and the matter is referred back to the Court below for a fresh judgment to be given after the parties have adduced such further evidence as they may be advised. The Appellant to pay costs of this appeal.

NORTH-EASTERN BANTU APPEAL COURT.

MBANJWA vs. MBANJWA.

B.A.C. CASE No. 58 OF 1964.

PIETERMARITZBURG: 18th November, 1964. Before Cowan, President, Craig and Reibeling, Members.

BANTU LAW.

Ngqutu beast and progeny—ownership—condonation of late noting of appeal—prospects of success.

Summary: Plaintiff sued for certain cattle and proved they were progeny of her *ngqutu* beast and judgement was given in her favour. The Defendant, her eldest son, noted an appeal out of time and furnished acceptable reasons for so doing and sought condonation. He appealed on the ground that as he was Plaintiff's guardian he was entitled to remove the cattle from her kraal to his. He had not taken this point in the Court below.

Held: That the cattle were the absolute property of Plaintiff to deal with as she deemed fit.

Held: That as Defendant had no prospects of success on appeal the condonation of his late noting of appeal should be refused.

Cases referred to:

Qulo versus Qulo, 1940, N.A.C. (N. & T.) 4.

Appeal from the judgment of the Bantu Affairs Commissioner, Pietermarizburg.

Craig and Reibeling, Members, concurred.

For Appellant: Mr. F. Sithole.

For Respondent: Adv. W. O. H. Menge instructed by C. A. H Manning.

Cowan, President:—

The Plaintiff (Respondent) sued the Defendant (Applicant) in the Court of the Bantu Affairs Commissioner for the return of three head of cattle, or their value R60, which she claimed were her property and which she alleged had been wrongfully removed by the Defendant from her kraal. The Defendant denied these allegations in his plea.

It was common cause that the Plaintiff was the widowed mother of the Defendant, the eldest son and heir of her late husband, and that he had removed certain cattle, including the animals in dispute, from the kraal of his late father to the kraal which he had established for himself. The Commissioner accepted the evidence of the Plaintiff that the animals which she claimed were the offspring of her *ngqutu* beast and entered judgment in her favour on her claim.

The matter has now come before this court by way of an application for condonation for the late noting of an appeal on the following ground which was a point not taken in the Court below:—

> "That the learned Additional Bantu Affairs Commissioner erred in holding that the removal of Plaintiff's cattle by Defendant was unlawful and should have held that Defendant in his capacity as Plaintiff's guardian acted within his rights in removing the cattle claimed to his kraal in the exercise of the discretionary powers vested in him as Plaintiff's guardian."

The circumstances attending the late noting of the appeal were such that the Court would have been disposed to grant its indulgence had the appeal had any prospect of success. In the case of *Qulo versus Qulo,* 1940, N.A.C. (N. & T.) 4, however, it was held that a *ngqutu* beast becomes the absolute property of the mother of the bride and she may do with it and dispose of it as she may deem fit. It follows, therefore, that there is no substance in the ground on which it is desired to bring the appeal and no good purpose would therefore be served by granting condonation of its late noting.

The application for condonation is accordingly refused with costs.

NORTH-EASTERN BANTU APPEAL COURT.

BUTELEZI vs. BUTELEZI AND BUTELEZI.

B.A.C. CASE No. 60 OF 1964.

ESHOWE: 21st October, 1964. Before Cowan, President; Craig and Scheepers, Members.

BANTU LAW.

Estate cattle—ownership—minor heir—natural protector.

Summary: Plaintiffs sued the Defendant for certain cattle alleging they were the property of second Plaintiff, a minor, and not that of the Defendant who had taken possession of them. Judgment was given in their favour and on appeal Defendant attacked the judgment on legal grounds only.

Held: That ownership and possession of estate cattle vested in the minor heir, second Plaintiff, immediately on his father's death and that his mother was his natural protector.

Works reffered to:

Seymour: "Native Law in South Africa," 2nd Edition, page 143.

Appeal from the Court of the Bantu Affairs Commissioner, Nongoma.

Cowan, President, and Scheepers, Member, concurred.

For Appellant: Mr. S. H. Brien instructed by A. C. Bestall & Uys.

For Respondent: Mr. W. E. White.

Craig, Permanent Member:—

In this matter a widowed mother and her minor son, both assisted by the former's father, sued as Co-plaintiffs for the return of 14 cattle allegedly assets in the estate of the late Galaji Butelezi whose heir the second Plaintiff undisputedly is. Defendant is the younger brother in a different house. of late Galaji and it is alleged that he "removed these cattle, some to his kraal and disposed of others for his own financial benefit" and "that all this was done by Defendant with the express purpose of depriving their rightful owner, the second Plaintiff and minor heir to Galaji's estate of his rightful ownership and of defeating his further claim to them." The record is silent as to whether or not the Defendant is the sole living adult male relative of the late Galaji and thus guardian of the two Plaintiffs under Bantu law.

The cattle concerned were allegedly sisaed by Galaji at various kraals and Defendant denied knowledge of this and while admitting that he had removed them from the various kraals enumerated stated that they were his own property.

The Bantu Affairs Commissioner gave judgment for the Plaintiff for 13 head of cattle or their value R260, with costs and the matter was brought on appeal to this Court on the following grounds:—

"(1) The judgment is bad in law in that the Plaintiffs failed to prove their *locus standi* to sue for estate property of the late Galaji, in that the evidenee did not establish the form of marriage eontraeted by the first Plaintiff with the late Galaji.

(2) In any event the Defendant was not advised of the system of law whieh the Court applied in arriving at its judgment.

(3) Alternatively: The Plaintiffs are minors under Bantu law and eustom, and as sueh not entitled to litigate on behalf of the estate of the late Galaji.

(4) The judgment is against the evidenee and weight of the evidenee."

Mr. Brien, who appeared for the Appellant, coneeded that he was not in a position to attacked the judgment except on points of law. The evidence adduced supports the findings of the Commissioner and the appeal on Ground (4) must fail.

The *locus standi* of the Plaintiffs *vide* Ground (1) of appeal was not ehallenged in the Court below and no good reason was advaneed why the Appellant should be allowed to raise it for the first time in this Court and there is no substance in Ground (2).

In my view there is no substanee in the third ground of appeal. The two Plaintiffs have not litigated "on behalf of the estate of the late Galaji" but to vindieate the rights of ownership and possession of the cattle eoneerned whieh vested in the seeond Plaintiff immediately on the death of his father and of whieh he had been dispoiled by Defendant. Simultaneously with his assumption his mother viz first Plaintiff became the natural proteetor of his rights (Seymour, 2nd ed., at page 143).

In the result the appeal fails on all grounds and must be dismissed with eosts.