judicial separation may well have been granted at the termination of the trial because the defendant was found to have maliciously deserted the plaintiff and the desertion was extant at the time: but if as a result of the restitution order I hold that the defendant has restored conjugal rights it seems to me that the desertion comes to an end and that the plaintiff is precluded from now relying thereon ".

Again at page 636, the learned Judge said:—

" Although I find it unnecessary to decide whether the claim for judicial separation lapses in the sense that it is *res judicata*, I am inclined to agree that having elected to proceed with the claim for restitution the plaintiff cannot in the same action have resort to an order for judicial separation should the defendant comply with the restitution order".

I rule, therefore, that the amendment cannot be allowed.

Counsel for the defendant in the course of his argument asked for the dismissal of the application with costs on the attorney and client basis on the ground that the proceedings are vexatious. The special plea, however, merely asks for costs of suit, and consequently a variation of that claim should have been dealt with on a formal basis, viz. an application for amendment of the claim. In the Supreme Court it has been held that notice must be given of such a claim [see Genn *v*. Genn, 1948 (4) S.A. 430 (C)]. In the circumstances the defendant is entitled only to costs as between party and party.

The application for the amendment of the summons is dismissed with costs.

For Plaintiff: Mr. H. Helman.

For Defendant: Adv. D. M. Williamson, instructed by Messrs. Heiman & Maasdorp.

VERSLAE

VAN DIE

NATURELLE-APPÈLHOWE

1955 (2)

REPORTS

OF THE

NATIVE APPEAL COURTS

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CENTRAL NATIVE APPEAL COURT.

NKUTA *v.* MATHIBU.

N.A.C. CASE No. 23 OF 1954.

KROONSTAD: 19th April, 1955. Before Menge, Acting President, Mahoney and Fyvie, Members of the Court.

PRACTICE AND PROCEDURE.

Rescission of default judgment—Good and bona fide defence—Effect of judgment in matrimonial case on dowry holder.

Summary: Respondent obtained a decree of divorce from his wife on the ground of malicious desertion and then obtained judgment by default against her father for refund of dowry paid. The default was not wilful. Appellant sought to have the default judgment rescinded, setting up adultery on the part of respondent as his defence. The Native Commissioner refused to rescind the judgment and appellant appealed.

Held: Where a decree of divorce has been granted by reason of the wife's malicious desertion and a defence based on the husband's adultery failed or was not raised, the woman's father is not debarred from resisting a claim to a refund of the dowry on the ground of the alleged adultery.

Cases referred to:

Mosina *v.* Ndebele, 1943 N.A.C. (T. & N.) 2 and Raphela *v.* Ditchaba, 1940 N.A.C. (T. & N.) 29 discussed.

Anderson Fuzile *v.* Thomas Ntloko, 1944 N.A.C. (C. & O.) 2 applied, as also Brown *v.* Chapman, 1938 T.P.D. 320.

Appeal from the Court of the Native Commissioner, Vrede.

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

This is an appeal against the refusal of the Native Commissioner, Vrede, to rescind a default judgment in terms of which the respondent was awarded the return of 18 head of cattle or their value, £90, in respect of dowry paid to the appellant for his daughter, Trifina Mathibu.

The respondent and the appellant's daughter were married in 1943. In 1953 respondent obtained a decree of divorce on the ground of his wife's malicious desertion. On the 10th June, 1954, he sued the appellant for the return of the dowry paid and obtained judgment by default. The circumstances indicate clearly that the appellant was not wilfully in default and when on 21st July, 1954, the appellant applied to the Native Commissioner for a rescission of the judgment the respondent did not, according to the Native Commissioner, oppose the application on this ground. He opposed the application on the grounds that the appellant had not shown good cause.

The appellant in his application for the rescission of the judgment stated in affidavit that the respondent had committed adultery; that his daughter did allege this by way of counterclaim in the divorce action; but that she was handicapped by the death of an essential witness on whom she relied, and that he, appellant, is in a position to adduce other evidence in support of the allegation of adultery.

The respondent in a replying affidavit denied the allegation and pointed out that his divorce action was undefended up to the time of the return day of the restitution order. In fact, the summons and restitution order were served on the appellant, and published in a newspaper. The final order was granted in respondent's favour after a number of postponements had been granted at the instance of his wife. In conclusion he denies that the applicant has a good and bona fide defence.

The only issue before the Native Commissioner was, therefore, whether the applicant had a good and bona fide defence. After hearing argument on behalf of both parties he decided that the appellant had no such defence and dismissed the application for rescission of the default judgment with costs.

The present appeal is against this dismissal.

From the reasons for judgment furnished by the Native Commissioner one gathers that he refused rescission for two reasons. Firstly, he pointed out that the application for rescisssion omits to state how the allegation of adultery affects the respondent's claim. "If", he says, "defendant maintains that his daughter deserted the plaintiff on account of the latter's misconduct then he should have made such an allegation and also have stated that he denied plaintiff's right to the return of the cattle . . ." This objection is too technical. It is true there is that omission; but anyone who reads the affidavit of appellant can only come to the conclusion that he wishes to prove adultery with the object of being absolved from liability to restore the dowry.

Secondly the Native Commissioner considers that the adultery issue should have been raised at the divorce trial, of which, he rightly points out, the applicant was fully aware. He cites the following passage from the case of Mosina *v.* Ndebele, 1943, N.A.C. (T. & N.) 2, underlining the last sentence: —

> "Although the respondent succeeded in obtaining a divorce on the ground of his wife's desertion (and on referring to the divorce record we find that she did not defend the action although served with a copy of the summons and restitution order) yet it would appear that in a subsequent action for the return of *lobolo* brought in a Native Commissioner's Court against her father, the defendant would not be debarred from pleading that the woman had left her husband because of his wrongful acts, and if he could clearly prove that such was the case then the husband would not be entitled to a refund of *lobolo* although he succeeded in the divorce action. *The proper time to raise such a defence should have been during the divorce proceedings if the defendant in this case was aware of such proceedings and omission to do so at that time would naturally cast a heavy onus on the defendant in the subsequent action and the Native Commissioner's Court would no doubt take such omission into consideration.*"

Whilst we respectfully agree with this judgment, we fail to appreciate the force of this underlined sentence. How could the defendant in that case raise the issue of the husband's wrongful acts in a case to which he was not a party, even if he was aware of the proceedings? Under the law as it then stood [i.e. prior to the amendment of section *ten* (1) of Act No. 9 of 1929, introduced by section *twenty-seven* (*a*) of Act No. 56 of 1949), he did not even have a right to intervene, whatever the position may be now; and if his daughter did not wish to raise that issue how could it effect him? The same confusion, we respectfully suggest, crept into the case of Raphela *v.* Ditchaba, 1940, N.A.C. (T. & N.) 29, where the learned President censures defendant's daughter for setting up a defence not raised in her previous action. How can she be said to set up a defence and to call her father as witness when her father and not she is the defendant?

It is settled law that a Native cannot recover dowry when his marriage is dissolved by reason of his adultery [see the authorities cited at page 4 of the case Anderson Fuzile *v*. Thomas Ntloko, 1944, N.A.C. (C. & O. 2]. The question is, therefore, whether the decree of divorce based on the wife's malicious desertion, and the fact that the adultery issue failed or was not raised, in itself materially affects her father's right to resist a refund of the dowry on the grounds of the alleged adultery.

The decree of divorce is a judgment *in rem* and is *res judicata* against all and everyone. But the adultery issue, even if it was raised, by way of defence or counterclaim, and decided in respondent's favour, in *res judicata* only between the parties to the divorce action. Even the grounds upon which the decree is based, i.e. the malicious desertion of the woman, cannot be binding on anyone but the parties to the action. In Phipson on Evidence (9th edition) at page 424, it is stated that a judgment *in rem* " is also, as between parties and privies, conclusive of the *grounds of the decision* where these have been judgment in issue and actually decided by the Court; but as between strangers, or a party and a stranger, it is no evidence of the truth of such grounds." As stated in the headnote to Armstrong *v*. Bennett, 1915, 36 N.L.R. 84: " Allegations pleaded as a result of the judgment cannot be accepted as facts merely because of the judgment ".

It is clear, therefore, that the appellant is free to dispute the malicious desertion and to adduce proof of respondent's adultery. All that binds him is that the parties are divorced. What his chances of success against his daughter's former husband may be cannot and should not be determined at this stage. What is meant by showing good cause has been defined in Brown *v*. Chapman, 1938, T.P.D., 320, where Murray, J., expressed himself as follows (page 325):—

> " But it does not seem to me that it was necessary at this stage for the applicant to . . . convince the Magistrate on the merits of the case . . . that actually the probabilities lay with him; in my view it was sufficient if he made out a *prima facie* case in the sense of setting out averments which, if established at the trial, would entitle him to the relief asked for ".

Millin, J., in that case added the following:—

> " The Court does not have to decide whether the applicant has definitely shown that he is in the right; all that the Court has to be satisfied about, as far as the merits are concerned, is whether the case which the applicant wishes to set up appears to be hopeless, or whether, as I would like to put it, the petition discloses the existence of an issue which is fit for trial."

Having regard to these dicta the present appellant has shown that he has good cause and the rescission should have been granted, especially as the Courts, if in doubt, should lean towards re-opening.

The appeal is allowed with costs. The judgment of the Native Commissioner is set aside and the matter referred back to him for further action.

For Appellant: Mr. H. Gersohn.

Respondent: In default.

NORTH-EASTERN NATIVE APPEAL COURT.

GWALA *v.* GWALA.

N.A.C. CASE No. 10 OF 1955.

PIETERMARITZBURG: 27th April, 1955. Before Steenkamp, President, Ashton and Stokes, Members of the Court.

NATIVE LAW AND CUSTOM.

Disposition by kraalhead to his illegitimate son: Death of kraalhead and succession of general heir to house to which the girl, the subect of the disposition, belonged; Implementation of kraalhead's disposition by heir.

Held: That while the disposition of the kraalhead may or may not have been valid the property rights in the daughters became the kraal property of the defendant heir and he was entitled to use their *lobolo* for such purposes as he liked (subject to limitations not here relevant). Plaintiff (the illegitimate son) had the right to enforce an undertaking by the heir to carry out the kraalhcad's intentions.

Appeal from the Court of the Native Commissioner Bulwer.

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

In the Court of the Native Commissioner, Bulwer, plaintiff claimed fourteen hcad of cattle from the defendant. He based his claim on the allocation to him and another of a girl by his late father which allocation he averred the defendant subsequently ratified.

The defendant did not enter appearance nor did he file a plea but the Native Commisisoner, after an adjournment to enable the parties to settle which proved abortive, called upon the plaintiff to lead his evidence and at the close of his case called upon defendant to proceed with his case. Even then defendant did not give his evidence first in order but last.

It may, however, be assumed that defendant's plea would have been a denial of the allocation of his half sister to plaintiff and of his subsequent agreement to implement his late father's wishes because the opening sentence of his evidence was "I deny liability, nobody told me about this".

The Native Commissioner gave judgment for plaintiff as prayed with costs and defendant has appealed against that judgment to this Court on the following grounds:—

"1. Plaintiff is not a member of Defendant's house or family and as shown by the evidence of the woman Maradebe Gwala, plaintiff is the illegitimate son of the late Chief Siqoza Gwala. Because of the plaintiff's lack of status in the family or kraal he has no proprietary rights whatsoever in any of the houses of the late Chief Siqoza.

2. The alleged disposition, even if it could have been madc by the late Chief Siqoza, could only be opcrative if given effect to by him during his lifetime and the property rights in both the girls Funani and Mlunga would be house property, and the use of their lobolo cattle for someonc outside the house, would have created a debt in favour of their house (Fourth house).

3. After the death of the late Chief Siqoza the property and rights belonging to the 4th (heirless) house, to which the women Funani and Mlunga belonged, vested as kraal property in the defendant, and there was no obligation upon him to implement any alleged allocation by the last Chief Siqoza, even if it was made.
4. Plaintiff's failure to press a claim at the time the *lobolo* of the girls Funani and Mlungu were paid to defendant raises a presumption that no allocation was made regarding the *lobolo* of either girl or if made, that plaintiff realised that he could not enforce it."

To deal with paragraphs Nos. 1, 3 and 4 of the grounds of appeal, it is quite correct from the evidence that as stated in Paragraph No. 1 plaintiff was the illegitimate child of his late father and has no proprietary rights to any of the houses of his wives; in regard to paragraph No. 3 it is also quite correct that the girl who was said to have been allocated to plaintiff was in the fourth house in which there was no son and that accordingly defendant, who was his father's general heir became heir to that house; it is also correct to say that there was no legal obligation upon him to implement his late father's allocation; the reasoning in paragraph No. 4 is not sound and the failure to press his claim at the time *lobolo* was received raises no presumption and even if it did the presumption would be a rebuttable one; but nothing contained in these paragraphs avails to impugn the Native Commissioner's judgment.

Now in regard to paragraph No. 2 of the reasons for judgment the statements it contains only partly set out the correct position. The disposition if carried out in the lifetime of the father of the parties may or may not have been a valid one. But after his death the property rights in the daughters of the house became the kraal property of the defendant and he could use their *lobolo* as he liked (with certain limitations not here relevant). It was therefore within his power to donate the *lobolo* (or part of it) of either or both of the girls in question to plaintiff. The evidence clearly shows that he promised to do so and the plaintiff was entitled to succeed.

It is ordered accordingly that the appeal be and it is hereby dismissed with costs and the judgment of the Native Commissioner is upheld.

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

For Respondent: Adv. D. L. L. Shearer instructed by J. R. N. Swain.

NORTH-EASTERN NATIVE APPEAL COURT.

GAMA *v.* NDAWO.

N.A.C. CASE NO. 13/55.

PIETERMARITZBURG: 27th April, 1955. Before Steenkamp, President, Ashton and Stokes, Members of the Court.

COMMON AND STATUTE LAW.

Laesio enormis—*Abolition of privilege by Statute—Section* 25 *of Act No.* 32 *of* 1952—*Interpretation of Statutes—Text in which statute signed.*

Summary: In an action which was commenced before Act No. 32 of 1952 came into force, plaintiff sought a declaration that the agreement entered into between his late father and defendant be regarded as cancelled as the purchase price was less than half the value of the property sold.

Held: That the statute took away from the Courts with effect from the date of its promulgation the right to declare a contract as void or voidable on the doctrine of *laesio enormis.*

Cases referred to:

Gangat *v.* Bejorseth, N.O. 1954 (4), S.A. 145 (N.P.D.)

Statutes, etc., referred to:

Section *twenty-five* of Act No. 32 of 1952.

Section *two* of Act No. 12 of 1884 (Natal).

Table B (items 4 and 5), N.A.C. Rules G.N. 2887 of 9.11.51.

Appeal from the Court of the Native Commissioner, Kranskop.

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

Thomas Gama (hereinafter referred to as plaintiff's father), on 12th November 1951, issued a summons against the defendant to appear in the Native Commissioner's Court on 29th November, 1951, to answer a claim, which will be set out later.

On this date the case was postponed *sine die* at the request of plaintiff's attorney.

No further action was taken until 23rd January, 1954, when an application was filed for the substitution of the name of Henry McGregor Gama as plaintiff, his father who had issued the summons having died and the applicant having been duly appointed representative of the estate.

In the application was embodied a request for the amendment of the claim. The application was duly granted on 25th March, 1954, and also an amendment applied for verbally. The claim thereafter reads as follows:—

"1. On the 17th day of November, 1950, plaintiff and defendant entered into a written agreement of sale in terms of which the plaintiff sold to defendant certain immovable property at Edendale, District of Pietermaritzburg, described as Lot No. 324, Edendale, in extent 9 acres 0 roods 2·39 perches for the sum of £80.

2. The aforesaid price of £80 is considerably less than half the value of the aforesaid property and the plaintiff is accordingly entitled to claim cancellation of the contract on the grounds of *laesio enormis,* and tenders refund of such amount of purchase as has been paid, and payment of necessary and beneficial expenditure incurred."

"3. By reason of the fact that since issue of summons transfer of the property concerned has been registered in the name of the defendant, the plaintiff further claims an order for re-transfer of the property into the name of the plaintiff at the expense of the defendant, failing repayment of the excess."

Although a written plea was filed, this was withdrawn at the pre-trial conference held on 25th March, 1954, and the following plea substituted:—

"1. The defendant objects that the summons discloses no cause of action because section *twenty-five* of Act No. 32 of 1952 abolishes all claims based on *laesio enormis.*

2. In the event of the foregoing objection being overruled, defendant pleads as follows:—

(*a*) He denies that the contract was entered into on the 17th November, 1950 and alleges that the contract was entered into verbally on the 9th April, 1947 and confirmed in writing by plaintiff on the same date and ratified by part performance by a payment of £15 on the same date and by the granting of occupation of the property on the same date. Wherefore defendant pleads that the action is prescribed.

(*b*) Alternatively defendant denies that the consideration paid is less than half the value of the property.

(*c*) Defendant avers that in any event plaintiff was at all time fully aware of the true value of the property and if it be held that the property was of greater value than £80 then the defendant avers that it was plaintiff's intention to make a donation in respect of the excess."

The Native Commissioner granted an absolution judgment with costs and against that judgment an appeal has been noted to this Court on the following grounds:—

"1. That the learned Native Commissioner erred in finding that the agreement of sale between plaintiff and defendant had been entered into on the 9th April, 1947.

2. That the learned Native Commissioner erred in accepting the evidence of the defendant with relation to the execution of the contract of sale and should have held that defendant's version was unacceptable and should have rejected his evidence *in toto*.

3. That the probabilities of the case and the weight of evidence supported plaintiff's contention that the sale had taken place on the 17th November, 1950.

4. That the learned Native Commissioner erred in finding that there was no evidence as to the true value of the property at the time and place of sale.

5. Alternatively to paragraph 4 above that it was not necessary for plaintiff to provide the true value of the property at the place where it was sold.

6. That the learned Native Commissioner had already given a preliminary ruling to the effect that plaintiff was entitled to claim his remedy based on the doctrine of *laesio enormis* and was, therefore, not entitled to consider it anew after his ruling.

7. Alternatively to paragraph 6 that the learned Native Commissioner's judgment on this point was bad in law."

The first question to be decided is whether the cause of action which was commenced on 12th November, 1951 and which is based on *laesio enormis* was abolished by section *twenty-five* of Act No. 32 of 1952.

The Afrikaans text of this Act was signed by the Governor-General (assented to 12th May, 1952), and for the purpose of this judgment it is advisable to quote "Artiekel *vyf-en-twintig*" which reads as follows:—

"In die provinsies Natal en Transvaal is geen kontrak nietig of vernietigbaar om rede slegs dat daar *laesio enormis* deur een of ander van die partye by so 'n kontrak verduur is nie."

Both Counsel have quoted the case of Gangat *v.* Bejorseth N.O. 1954 (4), S.A. 145 (N.P.D.), and both have admitted that the facts in the instant appeal are on all fours with that case but Counsel for Appellant (plaintiff in the Court below), has submitted with due deference that the Natal Provincial Division of the Supreme Court has overlooked the provisions of section *thirteen* of the Interpretation Act No. 5 of 1910.

The opening words of the section reads:—

"Where a law repeals"

and right through that section the word "Law" is used. Now "law" is defined in section *three* of that Act as follows:—

"'Law' shall mean and include any law, Proclamation, ordinance, Act of Parliament or other enactment having the force of law."

From the wording of the sections quoted we are of opinion that if a common law provision is repealed it takes effect immediately and it will not be incumbent on any Court of law to declare that a benefit which previously existed but has now been abolished, should still be taken advantage of in transactions completed before the abolition of what may be termed a privilege.

There is another aspect and that is that only a Court of law has the power to declare, apart from the mutual agreement of the parties concerned, a contract as void or voidable and we hold the view that section *twenty-five* of Act No. 32 of 1952 has as from the date of its promulgation taken the right away from the Court to declare a contract as void and voidable on the doctrine of *laesio enormis.*

Counsel for Appellant has conceded that this Court has the right to give a ruling on the question as to whether the doctrine of *laesio enormis* is applicable, notwithstanding that the Native Commissioner had at first given a ruling and afterwards changed his mind. The Native Commissioner's act is therefore not a good ground for appeal.

It follows from the above remarks that grounds 6 and 7 are not well taken.

The other grounds of appeal may be treated together and are based on paragraph 2 of the Plea.

If this Court comes to the conclusion that the Deed of Sale was entered into on 9th April, 1947, then the plea of prescription is well taken whereas if the contract was entered in on 17th November, 1950, then that plea cannot succeed.

It is true there is no evidence as to the value of the property in 1947 but the appellant relied on a Deed of Sale signed in 1950 and therefore it was only necessary for him to lead evidence as to the value of the property at this date. It makes no difference what the value was in 1947 as Appellant was debarred in view of the plea of prescription from succeeding in a claim based on a 1947 agreement.

There was handed in a document (Exhibit K), purporting to be an undertaking by plaintiff's late father selling to defendant (now Respondent), the ground in question for £80 plus Transfer costs. There was also handed in a receipt (Exhibit L), signed by plaintiff's late father acknowledging the receipt of £15 on 9th April, 1947, for Estate late John Gama (plaintiff's grandfather).

It is necessary here to pause and mention that when the ground was sold to the defendant, it had not yet been transfered to plaintiff's father and before defendant could receive transfer the ground had to be transferred into the name of plaintiff's father. This is touched on in Exhibit " K " already referred to.

It is not denied that Exhibit " K " is in the handwriting of plaintiff's father and this coupled with the receipt " L " is a clear indication that a sale not inconsistent with any other contract as envisaged in section *two* Act 12 of 1884 (Natal) was entered into. For all intents and purposes a valid agreement of sale was entered into during 1947, but this was open to question as argued by Counsel for Appellant, in view of a subsequent Deed of Sale signed by the parties on 17th November, 1950 (Exhibit " G ") and the Declaration by Purchaser (Exhibit " D "). It was argued by Counsel for Appellant that the Deed of Sale of 17th November, 1950, was the true Deed of Sale especially in view of Respondent's affidavit in which he under oath testified for transfer duty purposes that he had bought the property on 17th November, 1950 and not before.

We hold the view that the Deed of Sale of 17th November, 1950, was only a repetition of the previous agreement especially as there is evidence on record that this was done on legal advice. We can quite understand that the Attorney who gave the legal advice might have had a doubt in his mind as to the legality of the previous agreement but it does not follow that because he had a doubt this Court must subscribe thereto. We can find nothing wrong with the 1947 agreement and hold there was a valid agreement of sale at that date and therefore the plea of prescription was well taken as was decided by the Native Commissioner.

The appeal is dismissed with costs. Both Counsel have applied for costs of appeal on the Higher Scale as provided for in Table B (items 4 and 5) of the Native Appeal Court Rules. We are of opinion that the issues concerned were not such that a higher fee is justified.

For Appellant: Mr. L. A. Weinberg of Cecil Nathan & Co., Ltd.

For Respondent: Adv. J. A. Meachim, instructed by Nel & Stevens.

NORTH-EASTERN NATIVE APPEAL COURT.

MDHLULI *v.* MDHLULI.

N.A.C. CASE No. 2 OF 1955.

DURBAN: 11th May, 1955: Before Steenkamp ,President, Ashton and Cowan, Members of the Court.

ESTATES.

Procedure at Enquiry by a Native Commissioner in terms of Government Notice No. 1664 *of* 1929 *as amended—Evidence.*

Summary: An estate was reported to the Assistant Native Commissioner who took affidavits and declared who the heir was; thereafter a dispute regarding the heirship arose and the Assistant Native Commissioner, after taking further affidavits declared who the heir was; no cross-examination of the persons whose statements were taken was allowed.

Held:

(*a*) That an enquiry under section No. 3 (3) of Government Notice No. 1664 of 1929 must be conducted as far as possible in the same manner as judicial proceedings.

(*b*) That an enquiry held in the absence of the parties concerned is irregular.

(*c*) That all contestants to an heirship must be granted an opportunity to cross-examine all the witnesses called, by the officer holding the enquiry.

Cases referred to:

Ndhlovu *v.* Ndhlovu, 1934, N.A.C. (T. & N.), 28.

Poswayo *v.* Tshatshu, 1947, N.A.C. (C. & O.), 109.

Statutes etc., referred to:

Section *three* (3) Government Notice 1664 of 1929.

Section *twenty-three* (4) of the Native Administration Act No. 38 of 1927.

Appeal from the Court of the Native Commissioner, Mapumulo.

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

On 2nd November, 1953, the Assistant Native Commissioner, Mapumulo, took an affidavit from Lolo Mdhluli in connection with the Estate of the late Tolana Mdhluli.

The heading to this affidavit reads:—

"Enquiry into Dispute: Estate late Tolana Mdhluli."

There is no indication that any other person or contestant to the heirship was present but the Presiding Officer in his reasons for judgment states that he decided the most practical procedure to adopt would be to interview and take affidavits from each witness in turn as his/her identity became known in the course of the enquiry and as and when their attendance could be secured. He goes on and states:—

"I accordingly made every effort to procure the attendance of persons who were known and considered to be in a position to assist in arriving at a just decision of the matter as expeditiously as possible and without the knowledge of either party to the dispute, where necessary, to ensure, as far as possible, that neither party could interfere with the witness. For the same reason no other person known to the parties was present when the affidavits were taken. This ensured that neither party could brief any witness sufficiently well to avoid contradicting one another on material points."

This procedure adopted by the Presiding Officer does not commend itself to this Court and here it is necessary to quote the undermentioned cases:—

Ndhlovu v. *Ndhlovu*, 1934, N.A.C. (T. & N.), 28, in which it was held that an equiry under section *three* (3) of Government Notice 1664 of 1929, being of a semi-judicial nature, should be conducted as far as possible in the same manner as judicial proceedings.

That judgment and the rider by Nicholson (M.) give a clear indication how enquiries of this nature should be conducted.

In *Poswayo* v. *Tshatshu*, 1947, N.A.C. (C.O.), 109, it was definititely laid down that an enquiry held in absence of the parties concerned is irregular.

The Assistant Native Commissioner has apparently overlooked these two decisions otherwise he would not have conducted the enquiry in the manner he did.

It should not be overlooked that section *twenty-three* (4) of the Native Administration Act and section *three* (3) of Government Notice 1664 of 1929 as amended envisage an enquiry and not an investigation as presumably the Presiding Officer undertook.

Neither contestant to the heirship was given an opportunity to cross-examine the witnesses called by the officer holding the enquiry and this in itself is such an irregularity that relief must be granted.

We feel constrained to remark that it is not becoming in a presiding officer when furnishing his reasons for judgment to express himself in inelegant and extravagant terms and to adversely criticise a party or his attorney for appealing against his judgment as the Assistant Native Commissioner did in this case. This is the more so when the presiding officer is not without blame himself because however admirable the motives were for adopting the procedure he did the Assistant Native Commissioner was obviously quite wrong.

The appeal was noted late and before the application for condonation of the late noting was argued both Counsel agreed to the condonation and while any consent on the part of the Respondent does not bind this Court to grant condonation we hold that in the circumstances as disclosed above condonation should be granted.

Both Counsel have further agreed that the appeal should be allowed and by consent each party must pay its own costs and the proceedings referred back for a fresh enquiry.

It is ordered that the proceedings before the Assistant Native Commissioner, Mapumulo, be and are hereby set aside. It is further ordered that a fresh enquiry be instituted preferably before a different officer.

At the request of both Counsel it is suggested that the enquiry be held as soon as possible as the parties are anxious to reach finality and also that they be given an opportunity at the fresh enquiry to cross-examine witnesses either personally or through a legal representative.

For Appellant: Advocate R. G. L. Hourquebie instructed by Cowley & Cowley.

For Respondent: Mr. A. D. G. Clark of Clark & Robbins.

SOUTHERN NATIVE APPEAL COURT.

MPAHLWA *v*. MJIKULU AND ANO.

N.A.C. CASE No. 17 OF 1955.

BUTTERWORTH: 13th May, 1955. Before Israel, President, Warner and Harvey, Members of the Court.

DEFAMATION.

Certain words not defamatory when used merely for purpose of enforcing an argument and not with intention of defaming a person's character.

Summary: Defendants, during the course of collecting public subscriptions for local school purposes, called at plaintiff's house and demanded one shilling from her. She told them that she had no money in the house at the time, whereupon second defendant said to her: " you are a liar. It is not possible that you do not have twelve pennies." First defendant then joined in and also called her a liar. As a consequence, plaintiff sued defendants for £50 as damages for defamation.

Held: The words, " you are a liar. It is not possible that you cannot have twelve pennies " mean no more than, " you are not telling the truth because you are saying something which is impossible." The circumstances show that the words were used for the purpose of enforcing an argument and not with the intention of defaming plaintiff's character.

Cases referred to: Whitlock *v*. Smith, 1943, C.P.D., 321.

Works referred to: Law of Defamation in South Africa (Nathan).

Appeal from the Court of the Native Commissioner, Willowvale.

Warner (Member):—

Plaintiff, a widow, claimed from defendants £50 as damages for defamation. In her particulars of claim, she stated that on 23rd September, 1954, defendants came to her dwelling in Nbozi Location, in the district of Willowvale, and demanded from plaintiff payment of an amount of 1s. for school purposes, that

plaintiff told them that she had no money in the house at the time, that thereupon defendants using vulgar terms abused and swore at plaintiff and accused her of lying and stated that she was well known as a trouble maker and that the statements were overheard by E. Mjaba who was in a neighbouring room at the time, and plaintiff's children were also within hearing.

In their plea, defendants admitted that they called at plaintiff's dwelling but denied the remaining allegations in plaintiff's particulars of claim. They also pleaded that the words plaintiff complained of were not defamatory.

At the close of plaintiff's case defendant's attorney successfully applied for a judgment of absolution from the instance with costs and plaintiff has appealed on the following grounds:—

1. The judgment is against the weight of evidence adduced.
2. The judicial officer erred in law in holding (as he did in his verbal reasons) that there was an onus upon plaintiff to prove express malice.
3. The judicial officer correctly found that the words complained of were "liar" and "troublemaker in the location" but erred in law in holding that such words were not defamatory *per se* in the context in which they were alleged to have been used.

The first ground of appeal is not understood. As evidence was led for plaintiff only, the weight of evidence does not come into the matter. The second ground refers to a verbal summing up which does not form part of the record. These grounds will, therefore, be disregarded.

In her particulars of claim, plaintiff stated that defendants said that she was well known as a trouble maker. In her evidence, however, she said that they used the words "You are a trouble maker in the location." Her witness, Edgar Mjaba, did not mention these words in his evidence in chief or in cross-examination but in answer to the Court he stated that he heard defendants say that she was a trouble maker in the location. Be that as it may, plaintiff has not attempted to show that the words were spoken with any special meaning and, in my opinion, they are not defamatory *per se*.

According to plaintiff, a man named Joseph Goniwe had come to her two days previously to collect 1s. from her for school concert funds and she had told him that she did not have any money. On the day in question defendants came to her and said that they had been sent by the headman of the location to collect 1s. from her for these funds and she again said that she had no money. Defendant No. 2 then said "You are a liar. It is not possible that you do not have twelve pennies." Defendant No. 1 then joined in and also said "You are a liar." She then called Mjaba who was in another room and he advised defendants to convey plaintiff's reply to the headman and they left.

Mjaba says that he is a teacher and boards with plaintiff and occupies a room in her house. On the day in question he was working in his room and heard defendants arrive. He heard them tell plaintiff that they had been sent by the headman to collect 1s. for school funds. Plaintiff said that she did not have the money and defendant No. 2 said: "You are a liar. It is not possible that you cannot have twelve pennies." He continued calling plaintiff a liar. Plaintiff came and knocked on the door of the room of the witness and called him. When he was being called defendant No. 1 joined defendant No. 2 and both speaking, called plaintiff a liar.

This, then, is the gist of the evidence on which plaintiff bases her claim for damages. She would have no right of action in Native Law and the question is whether the words complained of, spoken in the circumstances indicated, would found an action under the Common Law, or, in other words, whether plaintiff has established a case for defendant to meet.

In Nathan's Law of Defamation in South Africa the learned author states, on page 65, that the general current of opinion is that, unless it is intended to describe a person's general character as being that of a liar, the mere use of the word "liar" to contradict or deny an assertion by the person so addressed is not defamatory: In other words, the Court will examine the circumstances of each case, and determine whether the defendant intended to defame the plaintiff's character by the use of the word, i.e. whether he had *animus injuriandi*. In the case of Whitlock *v*. Smith, 1943, C.P.D., 321, Sutton, J., stated (on page 324) that the words "You are a liar," or similar words, have on a number of occasions been considered by the Courts as to whether they are defamatory or not. The learned Judge reviewed the authorities and came to the conclusion that they show that one must consider all the circumstances of the case, and when one has done so one may come to the conclusion that the word "liar" is not, in the circumstances, defamatory.

In the instant case, there is no evidence to show that defendants intended to convey that plaintiff's general character was that of a liar. In my opinion, the words "you are a liar. It is not possible that you cannot have twelve pennies" mean no more than "You are not telling the truth because you are saying something which is impossible." In other words, the circumstances show that the words were used for the purpose of enforcing an argument and not with the intention of defaming plaintiff's character. Plaintiff and her witness state that they understood defendants to mean that her statement was a lie.

I come to the conclusion, therefore, that plaintiff has not established a case for defendants to meet and the appeal should be dismissed with costs.

M. Israel, President: I concur.

K. G. Harvey, Member: I concur.

For Appellant: Mr. J. L. Wigley, Willowvale.

For Respondent: Mr. L. D. Dold, Willowvale.

SOUTHERN NATIVE APPEAL COURT.

MGIJIMI *v*. MGIJIMI AND ANO.

N.A.C. CASE No. 4 OF 1955.

PORT ST. JOHN'S: 20th May, 1955. Before Israel, President, Warner and Doran, Members of the Court.

PRACTICE AND PROCEDURE.

A finding that does not have the effect of a final judgment not appealable—Piece-meal appeals not encouraged.

Summary: In an action for the delivery of certain stock or their value, the preliminary question of plaintiff's legitimacy and his right of succession as heir was raised. A finding was given on this question and the major issue was postponed *sine die*. Plaintiff appealed against the finding before the principal matter was disposed of.

Held: The finding given by the Native Commissioner was not a judgment nor was it an order having the effect of a final judgment, and is therefore not appealable in terms of section 81 (2) of the Native Commissioners' Court Rules.

Cases referred to: Zwane *v.* Myeni, 1937, N.A.C. (N. & T.), 71.

Legislation referred to: Section 81 (2) of Native Commissioners' Court Rules published under Government Notice No. 2886, dated 9th November, 1951.

Appeal from the Court of the Native Commissioner, Bizana.

Warner (Member):—

Plaintiff claimed from defendant the delivery of 10 head of cattle and 15 sheep or payment of their value the sum of £130. He alleged that 4 of the cattle were his personal property and the remainder of the stock comprised the estate of the late Mgijimi Ndzipo and had become his (plaintiff's) property by virtue of the fact that he was heir to this estate.

In their plea, defendants denied that plaintiff was the heir to the estate of the late Mgijimi Ndzipo. It was admitted that plaintiff was born to the wife of Mgijimi during the subsistence of a customary union between her and Mgijimi but it was alleged that Mgijimi was absent from home for a long period and, during his absence, his wife committed adultery as a result of which plaintiff was born so that, as plaintiff is an adulterine child, he cannot succed to Mgijimi's estate.

At the hearing of the case, it was decided that evidence should first be led on the question of plaintiff's legitimacy. After this evidence had been heard the Assistant Native Commissioner gave a finding that second defendant was heir to the estate and plaintiff was an illegitimate (adulterine) child. The case was then postponed *sine die* for evidence to be heard in regard to the stock claimed by plaintiff as his personal property.

Plaintiff has now appealed against that "preliminary part of the judgment declaring second defendant Mbuyelwa Mgijimi heir of the late Mgijimi".

The finding given by the Native Commissioner was not a judgment nor was it an order having the effect of a final judgment. It is, therefore, not appealable in terms of section 81 (2) of the Native Commissioners' Courts Rules.

In the case of Zwane *v.* Myeni, 1937, N.A.C. (N. & T.), 71, it was stated that the Court would not encourage piece-meal appeals and that it was better to wait till the final stage before appealing when the parties were entitled to raise on appeal any question raised at any time during the course of the case.

The appeal should be struck off the roll with costs.

M. Israel (President): I concur.

H. N. Doran (Member): I concur.

For Appellant: Mr. F. C. W. Stanford, Flagstaff.

For Respondent: Mr. H. H. Birkett, Port St. John's.

SOUTHERN NATIVE APPEAL COURT.

SAGWITYI *v.* MVAKWENDLU.

N.A.C. CASE No. 5 OF 1955.

PORT ST. JOHN'S: 23rd May, 1955. Before Israel, President, Warner and Doran, Members of the Court.

PRACTICE AND PROCEDURE.

Interpleader action—Irregularity in preparation of process—Application of rule omnia praesumuntur rita esse acta*—Judgment not to be disturbed unless substantial prejudice has resulted from irregularity.*

Summary: The judgment creditor appealed against the judgment in this interpleader action on the grounds that the claimant had no *locus standi in judicio* to sue as the property claimed was attached by the Messenger of the Court in execution under process of the Court, and the latter was the proper person to sue out the interpleader summons in terms of section 70 (2) of the Native Commissioners' Court Rules published under Government Notice No. 2886, dated 9th November, 1951.

Held: That as no evidence was brought to show that the summons was not prepared by the Messenger of the Court and as the summons was substantially in the form provided by the Rules,

(*a*) the rule *omnia praesumuntur rita esse acta* should be applied, and

(*b*) even if there has been an irregularity as alleged, the judgment should not be disturbed on that ground unless there has been substantial prejudice, in view of the provisions of section *fifteen* of Act No. 38 of 1927.

Legislation referred to:

(1) Sections 70 (2) and 70 (5) (*b*) of Native Commissioners' Courts Rules published under Government Notice No. 2886, dated 9th November, 1951.

(2) Section *fifteen* of Act No. 38 of 1927.

Appeal from the Court of the Native Commissioner, Port St. John's.

Warner (Member):—

This is an interpleader case brought to be determined whether certain eleven head of cattle attached by virtue of a Warrant of Execution issued in an action in which Mrauzeli Sagwityi (Judgment Creditor) obtained judgment against Nyengele and another for £100, were executable or not, the cattle having been claimed by Matyolweni Mvakwendlu (Claimant) as being his property.

The Judgment Creditor filed the following objection:—

"To the whole of claimant's action judgment creditor excepts that the summons discloses no cause of action in that claimant has no *locus standi in judicio* to sue as the property claimed was attached by the Messenger of the Court in execution under process of the Court, and the proper person to sue out interpleader summons is the Messenger of the Court himself in terms of sub-rule (2) of Rule 70 of the Regulations for the Courts of Native Commissioners published in Government Notice No. 2886 of the 9th November, 1951."

On the day of hearing the objection was over-ruled and the Court proceeded to hear evidence, at the conclusion of which it made the following order:—

"Cattle declared not executable with costs.".

The Judgment Creditor has appealed against this judgment on the following grounds:—

"1. That the judgment is bad in law in that the whole procedure employed in instituting the action is illegal and the summons discloses no cause of action as the claimant has no *locus standi in judicio* to sue as the property claimed was attached by the Messenger of the Court in execution under process of the Court and the proper person to sue out interpleader summons is the Messenger of the Court in terms of sub-rule (2) of Rule 70 of the Regulations for the Courts of Native Commissioners' published in Government Notice No. 2886 of the 9th November, 1951.

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

Section 70 (2) of the Rules of Native Commissioners' Courts provides that, in a case such as the present one, the Messenger of the Court shall prepare and sue out a summons substantially in the Form No. 39 of the Second Annexure of the Rules and section 70 (5) (*b*) of the Rules provides that the Clerk of the Court shall sign and issue the interpleader summons. In the present case, no evidence was brought to show that the summons was not prepared by the Messenger of the Court and the summons was substantially in the form provided by the Rules.

Mr. Vabaza, who appears for appellant in this Court states that he bases his statement that the summons was not drawn up in accordance with the provisions of Rule 70 (2) on the fact that it has been signed by claimant's attorney. I am of opinion, however, that the rule *omnia praesumuntur rita esse acta* should be applied.

In any case, even if there has been an irregularity, this Court would not be entitled to disturb the judgment on that ground unless there has been substantial prejudice, in view of the provisions of section *fifteen* of Act No. 38 of 1927. The parties came before Court and evidence was led as to whether the cattle attached were executable or not, after which the Native Commissioner gave his decision. The record does not disclose that any substantial prejudice was suffered by appellant nor has any been pointed out in argument in this Court.

Mr. Vabaza has withdrawn the second ground of appeal in this Court and as the first ground fails, the appeal should be dismissed with costs.

M. Israel (President): I concur.

H. N. Doran (Member): I concur.

For Appellant: Mr. Vabaza, Libode.

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

NOORD-OOSTELIKE NATURELLE-APPÈLHOF.

DHLAMINI *teen* TELA.

N.A.H. SAAK No. 9/55.

PRETORIA: 13 Junie 1955. Voor Steenkamp, President, Ashton en Davis, Lede van die Hof.

NATURELLEREG EN -GEWOONTE.

Beginsel van contra bones mores *en* in pari delicto—*Appèlhof geregtig* mero motu *om kennis daarvan te neem—Betaling van* lobolo *vir 'n vrou wat op daardie tydstip reeds 'n ander man se vrou volgens Naturellegewoonte was.*

Opsomming: Eiser het *lobolo* aan verweerder betaal vir verweerder se suster, wat reeds 'n ander man se vrou volgens Naturellegewoonte was. Verweerder is nie die regte persoon om *lobolo* vir die vrou te kry nie; eiser beweer dat hy sewe beeste as lobolo aan verweerder betaal het maar voor die huweliksformaliteit kon plaasvind het die vrou hom afgesê.

Beslis: Dat die Appèlhof geregtig is om *mero motu* kennis te neem van die pleidooi *contra bones mores* of *in pari delicto.*

Verder beslis: Dat dit *contra bones mores* is om *lobolo* vir 'n ander man se vrou te betaal.

Verder beslis: Dat onder die omstandighede die betaler nie die betaalde *lobolo* terug kan eis nie.

Sake aangehaal:

Lutuli *v.* Ndaba, 1937, N.A.H. (T. & N.), 108.

Mlaba *v.* Cilize, 1, N.A.H., 391 (N.E.).

Appèl van die Hof van die Naturellekommissaris, Piet Retief.

Uitspraak van die Hof soos gelewer deur Steenkamp (President):—

In die Naturellekommissarishof eis die eiser van die verweerder die terugbetaling van 7 beeste of hulle waarde, £35.

In sy verklaring beweer die eiser dat hy sewe beeste aan verweerder as *lobolo* vir verweerder se suster, Mhlalose, betaal het, maar voor die huweliksformaliteit kon plaasvind, het sy hom afgesê.

Verweerder se pleidooi is 'n ontkenning dat eiser te enige tyd aan hom sewe beeste as *lobolo* vir Mhlalose betaal het. Hy beweer verder dat Mhlalose volgens Naturellereg getroud was met Ezron Zwane, dat eiser haar omgehaal het om Ezron te verlaat en dan by hom te kom woon en dat hy (eiser) op sy eie aan Ezron een koei en £5 vir sy onwettige daad betaal het.

Die Naturellekommissaris se uitspraak was ten gunste van eiser vir 5 beeste of hulle waarde, £25, en koste. Verweerder het nou op hoër beroep gegaan na die Hof en sy redes vir appèl lui as volg:—

„1. The judgment of the Court is against the weight of the evidence and the probabilities of the case.

2. That Gustav Tela should have been sued, and not the defendant, on the grounds that—

(*a*) Gustav is the eldest brother of defendant and Mhlalosi;

(*b*) When Ezron Zwane lobolaed Mhlalosi he dealt only with Gustav and paid eleven head of cattle, which were in Natal, as *lobola* to Gustav;

(*c*) any action of whatsoever nature concerning Mhlalosi or her *lobola* should be directed against Gustav Tela;

(*d*) the plaintiff did at all times know that Gustav was Mhlalosi's guardian and that defendant acted as agent for Gustav."

Die tweede grond van appél moes liewer as 'n afdoende pleidooi gelewer gewees het voordat die verweerder 'n pleidooi op die feiteverskil gelewer het. In elk geval, eiser se onderhandelinge was uitsluitlik met die verweerder aan wie hy die beeste betaal het en hy is vir dié rede geregtig daarop om die terugbetaling van eiser te eis.

Toe eiser onderhandelinge met verweerder bespreek het om met Mhlalose te trou het hy geweet sy is 'n ander man se vrou.

In sy getuienis beweer eiser dat voor hy haar (Mhlalose) *lobola* het was sy getroud met Ezron Zwane. Verder verhaal hy dat hy haar op Moolman ontmoet het en nie geweet het dat sy 'n getroude vrou is nie.

Enige twyfel wat mag bestaan sover eiser se getuienis aangaan, is verwyder deur die getuienis van eiser se broer waar hy verklaar dat verweerder gesê het dat hy eers alles wil regmaak en Ezron se beeste terugbetaal.

'n Ander getuie, eiser se vader, verklaar dat hulle geweet het dat Mhlalose met 'n ander man getroud was toe eiser haar *lobola* het. Hy gaan verder in sy getuienis en verklaar dat verweerder drie beeste aan Ezron betaal het om haar te bevry sodat eiser haar vir hom kan *lobola*. Verder verklaar die getuie dat verweerder en sy oom gesê het dat hy 8 beeste moet betaal, want hulle wil die saak met Ezron gaan skik.

Daar is dus geen twyfel dat eiser terdeë daarvan bewus was dat hy beeste oorhandig het vir 'n ander man se vrou en so 'n ooreenkoms kan nie die goedkeuring van die Hof wegdra nie.

Dit is nodig om na die volgende sake te verwys om te toon dat so 'n ooreenkoms ongeldig, ongeregtelik, of *contra bones mores* is. Lutuli *v.* Ndaba, 1937 ,N.A.H. (T. & N.), 108, is 'n saak waarin *lobolo* vir 'n ander man se vrou betaal was en die Hof het besluit dat so 'n ooreenkoms teenstrydig is met staatsgedragslyn en Naturelle-gewoonte.

In die saak Mlaba *v.* Ciliza, 1, N.A.C., 391 (N.E.), was die leerstuk *in pari delicto* toegepas en daarin is besluit dat as 'n Naturel, alreeds getroud volgens siviele reg, onderhandel vir 'n gewoonte-verbintenis met 'n vrou nie sy eggenoot nie, hy nie die terugbetaling van die *lobolo* kan eis nie.

Alhoewel die man in daardie saak alreeds getroud was volgens siviele reg, bly die beginsel tog dieselfde en is van toepassing in die huidige appèl.

Die pleidooi van *contra bones mores* of *in pari delicto* was nie geneem in die laer Hof of aangeteken as 'n grond van appèl nie maar die Hof is geregtig *mero motu* om kennis te neem van enige geval wat teenstrydig is met sulke beginsels en argument in hierdie Hof was beperk tot bogenoemde beginsels.

In die omstandighede word die appèl toegelaat en die Naturellekommissaris se uitspraak word verwerp.

Die beval van die Hof is: Die appèl word gehandhaaf en die Naturellekommissaris se uitspraak word verander om te lees:—

„Dagvaarding van die hand gewys; elke party betaal sy eie koste."

Die koste in hierdie Hof moet ook deur elke party betaal word.

Vir Appellant: Adv. F. C. Kirk-Cohen, in opdrag van H. Olmesdahl.

Vir Respondent: Adv. G. Viljoen, in opdrag van Smit en Vorster.

NORTH-EASTERN NATIVE APPEAL COURT.

ZULU *v.* ZULU.

N.A.C. CASE No. 26 OF 1955.

VRYHEID: 29th June, 1955. Before Steenkamp, President, Ashton and McCabe, Members of the Court.

PROCEDURE: RULES OF CHIEFS' COURTS.

Appeal from Chief's to Native Commissioner's Court—Chief's reasons for judgment—Discretion to dispense with reasons.

Summary: Defendant appealed from a Chief's to the Native Commissioner's Court and the Native Commissioner heard the appeal despite the fact that no reasons for his judgment had been furnished by the Chief.

Held:

(*a*) That the Chief must furnish his reasons for judgment and they must form part of the record of the case unless the Native Commissioner dispenses with them.

(*b*) That the Native Commissioner has a discretion to dispense with a Chief's reasons but he must exercise that discretion judicially.

(*c*) That the Native Commissioner is not entitled to ignore the fact that the Chief's reasons are not before him and in order to show that he has not done this he must record the fact and the circumstances and the reasons for his proceeding or not proceeding with the case.

Cases referred to:

Zwane *v.* Sitoli, 1947, N.A.C. (T. & N.) 30.

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

Statutes, etc., referred to:

Section 11, Chiefs' Courts Rules, G.N. 2885 of 9.11.51.

Section 7, Old Chiefs' Courts Rules, G.N. 2255 of 21.12.28.

Appeal from the Court of the Native Commissioner, Nongoma.

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

This case came before Chief Pumanyova Zulu in the first instance and the claim was set out as being one for "twenty-six head of cattle used by defendant out of Estate of Bejana Zulu to pay *lobolo* for his wives Ntshangase and Nxumalo. Plaintiff is heir to the Estate."

The defendant's reply to the claim was "Not liable. 11 head were paid for first by Bejane, 15 head were received as *lobolo* for Hlingzumuntu's sister and are not repayable to plaintiff."

The Chief gave judgment for the plaintiff for 26 head of cattle and costs 27s. 6d. and the defendant gave notice of appeal.

Section 11 of the Rules for Chiefs' Courts (Government Notice No. 2885 of the 9th November, 1951) lays down that the Chief shall furnish his reasons for judgment not later than fourteen days after receiving notification of an appeal; that if the Chief fails to furnish his reasons for judgment the Native Commissioner may issue an order upon him to do so and finally that the Court of the Native Commissioner may in its discretion proceed with the hearing without the Chief's reasons for judgment.

In section No. 7 of the old Rules for Chief's Courts (Government Notice No. 2255 of the 21st December, 1928) it was laid down that the Chief had to report forthwith his reasons for judgment to the Clerk of Court by whom they were to be recorded.

This Court gave many decisions as to necessity for compliance with the requirements that the Chief's reasons be furnished in terms of Rule 7 of the old Rules and held that they formed part of the record. In the case of Zwane *v.* Sitoli, 1947, N.A.C. (T. & N.), 30, it was held that the appeal was not properly before the Court if the provisions of the rules were not complied with and that if the case were not properly before the Court the proceedings would be null and void.

Those decisions were based on the old Rules but they are applicable to the present rules except that under the latter the Court of the Native Commissioner may in its discretion proceed with the hearing without the Chief's reasons for judgment. On the new Rules there have also been rulings regarding the necessity for a Chief's reasons to be filed and in Gumede *v.* Nxumalo, N.A.C., 1953, 191 (N.E.) it was emphasized that a Chief's reasons are a *sine qua non* in all appeals from Chiefs' Courts and if the Native Commissioner exercises his dicretion—which is a judicial and not an arbitrary one— in dispensing with them he must make a note on the record of the circumstances and his reasons for such dispensation.

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It follows that when the Chief's reasons are not furnished when an appeal comes before the Native Commissioner he may use his discretion as to whether he will proceed with the hearing and he must exercise that discretion judicially. He is not entitled to ignore altogether the fact that the reasons are not before him and in order to show that he has not done this he must record the fact and the circumstances and the reasons for his proceeding or not proceeding with the case.

In the case now before this Court the Native Commissioner apparently was unware of or ignored the fact that the Chief's reasons were not on the record and the case was consequently not properly before him.

The appeal to this Court cannot therefore be properly considered and to remedy the matter it is ordered as follows:—

"The judgment of the Native Commissioner is set aside; the Chief shall be called upon by the Native Commissioner to furnish his reasons for judgment within fourteen days of the date of a suitable notice served upon him. The Native Commissioner shall then, if the reasons are furnished take such reasons into consideration and if no reasons are furnished exercise his judicial discretion according to the rules in dispending with them and thereafter give a fresh judgment. If this judment is still adverse to the plaintiff the Native Commissioner shall remit the record to this Court for the consideration of the appeal on the merits at the next hearing of the Court at Vryheid on 4th October, 1955. The Native Commissioner shall inform the parties of the action taken.

Costs of the appeal so far to be costs in the cause."

For Appellant: In person.

For Respondent: In person.

SOUTHERN NATIVE APPEAL COURT.

NYEMBEZI *v.* NYEMBEZI AND ANO.

N.D.C. CASE No. 77 OF 1955.

PORT ST. JOHN'S: 18th May, 1955. Before H. W. Warner, Esq., Presiding Officer.

Native Divorce Court has no jurisdiction to try an action for damages against a co-defendant.

Summary: Plaintiff sued his wife, first defendant, for divorce on the ground of her adultery with second defendant, and claimed damages in the sum of £100 against second defendant.

Second defendant pleaded that the Native Divorce Court has no jurisdiction to hear and determine an action for damages for adultery.

Held: A claim for damages is not a question arising from a divorce, and the Native Divorce Court has no jurisdiction to hear and determine an action for damages for adultery.

Cases referred to: Van Wyk *v.* Van Wyk and Another, 1952 (1) S.A. 760 (N).

Legislation referred to: Section *ten* (1) of Act No. 9 of 1929, as amended by section *twenty-seven* of Act No. 56 of 1949.

Warner (Presiding Officer):—

In this case plaintiff sued his wife, the first defendant, for a divorce, on the ground of adultery which, it is alleged, she committed with second defendant, custody of the minor children of the marriage and forfeiture of the benefits arising out of the marriage. As against the second defendant he claimed damages in the sum of £100 and costs.

Second defendant has pleaded that this Court has no jurisdiction to hear and determine an action for damages for adultery and has asked that the claim against him be dismissed with costs.

Section ten (1) of Act No. 9 of 1929, as amended by section *twenty-seven* of Act No. 56 of 1949, reads as follows:—

> " Notwithstanding anything in any other law contained, the Governor-General may by proclamation in the *Gazette* establish Native Divorce Courts which shall be empowered and have jurisdiction to hear and determine suits of nullity, divorce and separation between Natives domiciled within their respective areas of jurisdiction in respect of marriages and to decide any question arising therefrom."

The Native Divorce Court is a creature of statute and is bound by the statute which created it.

It has been argued that a claim for damages for adultery is a question arising from a divorce but I am unable to agree with this contention.

When a decree of nullity, divorce or separation in respect of a marriage is granted this has the effect of changing the conditions under which the partners of the marriage have been living. The decree provides that they should, in future, live apart and it then becomes necessary to make provision for the custody and maintenance of the children of the marriage and division of the property brought into the marriage. These are questions which arise from the nullity, divorce or separation.

The claim for damages against second defendant is, however, on a different footing. A husband can claim damages on the ground of the injury or *contumelia* inflicted on him without suing his wife for divorce. The fact that, when he obtains a divorce, he can claim further damages on the ground of the loss of the comfort, society and services of the wife does not, in my opinion, mean that this is a question arising out of the divorce.

In the case of Van Wyk *v.* Van Wyk and Another, 1952 (1), S.A., 760 (N), De Wet, J., stated (on page 762): " Normally one cannot join two persons in an action in which the relief sought against each of them is different. A co-respondent is not a necessary or proper party to an action for divorce. He is not the party to be divorced. The relief sought against him is of a different nature altogether." The learned judge also pointed out that section *two* of Law No. 13 of 1883 (Natal), was enacted to meet that difficulty. In respect of the Native Divorce Court there is no provision of a similar nature.

I find, therefore, that this Court has no jurisdiction to try the action against second defendant and it is dismissed with costs.

For Plaintiff: Mr. J. G. S. Vabaza, Libode.

For Defendant: Mr. H. H. Birkett, Port St. John's.

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CORRIGENDUM:

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Substitute the word " unobtainable " for the word " obtainable ".

VERSLAE

VAN DIE

NATURELLE-APPÈLHOWE

1955 (3)

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