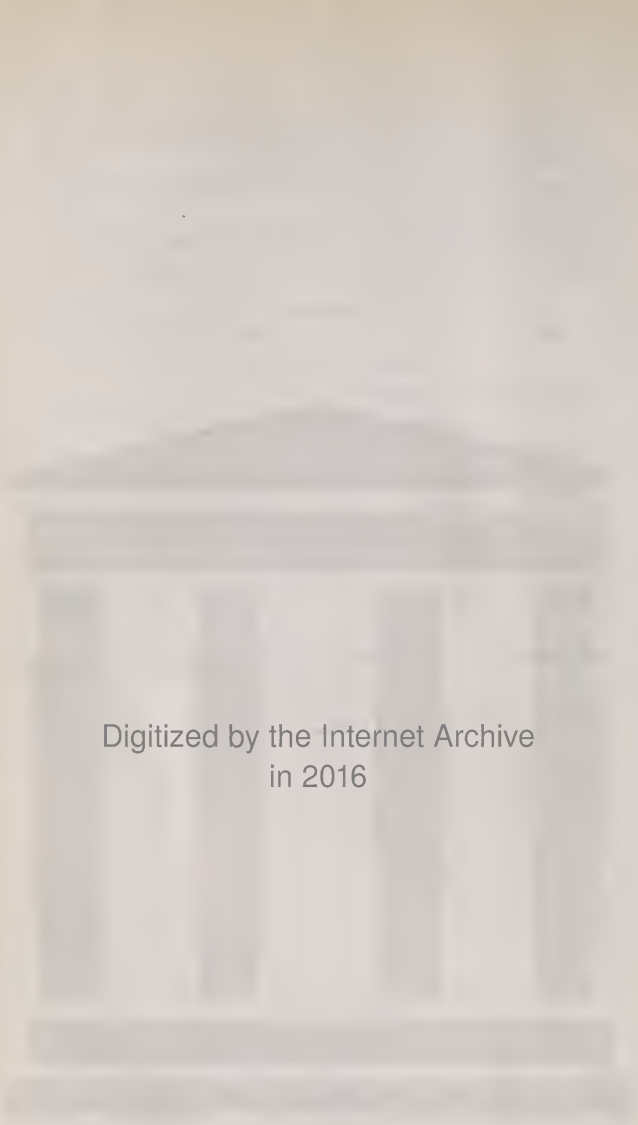

VERSLAE

VAN DIE

NATURELLE-APPÈLHOWE

1954 (3)

REPORTS

OF THE

NATIVE APPEAL COURTS

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NOORDOOSTELIKE NATURELLE-APPÈLHOF.

NCAMPALALA *v.* NCAMPALALA.

N.A.H. Saak No. 22/54.

VRYHEID: 29 Junie 1954. Voor Steenkamp, President, Ramsay en King, Lede van die Hof.

1. PROSESREG.
2. ZOELOE GEWOONTE.

Praktyk en prosedure—Appèl van Kaptein se Hof—Redes vir laat indiening moet verstrek word.

Kraal-hoof aanspreeklikheid—Reg van Kraalhoof om vergoeding vir skade berokken deur bewoner van sy kraal en deur kraalhoof betaal, van die bewoner te eis—Artikel 141 (2) *van Natalse Wetboek van Naturellereg.*

Opsomming: Eiser, 'n bewoner van die kraal van verweerder, het 'n meidjie verlei en twee beeste is deur verweerder, die kraalhoof as skadevergoeding betaal. Eiser beweer dat hy twee beeste gekoop het en hulle by verweerder laat staan het waar hulle tot 4 beeste vermeerder het. In die Kaptein se Hof is vonnis ten gunste van eiser vir vier beeste gegee. By die verhoor van die appèl deur die Naturellekommissaris is 'n teeneis deur verweerder ingedien maar geen redes waarom die teeneis nie minstens sewe dae voor die verhoor van die appèl ingedien is, is verstrek nie.

Beslis: dat reël 12 (3) van die Reëls vir Siviele Howe van Kapteins alleenlik toegepas mag word indien verweerder genoegsame redes kan voorlê waarom hy reël 12 (2) nie kon nakom nie.

Verder beslis: Dat die verantwoordelikheid wat in artikel 141 (2) (*b*) van die Kode gemeld word slegs van toepassing is tussen die Hoof van die kraal en die persoon wat die skade gely het, en dat as die Hoof die skade betaal het, meen dit nog nie dat hy nie op die persoon wat in sy kraal woonagtig is 'n beroep kan doen om hom te vergoed nie.

Statute, ens., aangehaal:

Reëls 12 (2) en (3) van die Reëls vir Siviele Howe van Kapteins.

Artikel 141 (2) (*b*) van die Natalse Wetboek van Naturellereg, 1932.

Appèl van die Hof van die Naturellekommissaris, Louwsburg.

Steenkamp (President), lewer uitspraak van die Hof.

Die Kaptein het uitspraak ten gunste van eiser in 'n eis vir 4 beeste toegeken. Die bewering in die Kaptein se Hof was dat eiser twee beeste gekoop het en hulle toe by verweerder laat staan het waar hulle tot 4 beeste aangeteel het.

Verweerder het voor die Kaptein die eis ontken en het na die uitspraak in hoër beroep gegaan na die Naturellekommissaris.

Die appèl was van die hand gewys en die Kaptein se uitspraak bekragtig.

Na eiser getuienis voor die Naturellekommissaris afgelê het maar voordat sy saak gesluit was, het die Hof daarop gewys dat die pleidooi soos dit aangegee word in die Kennis van Appèl, onvoldoende is. Die prokureur vir verweerder het toe 'n volledige pleidooi ingehandig. Die pleidooi lui as volg:—

„ 1. Verweerder ontken dat hy enige beeste aan eiser skuld en eis dat eiser se bewering bewys word.

2. Verweerder sê dat hy die eienaar is van die beeste wat geëis word.

3. Verweerder meld dat hy aan eiser twee beeste geleen het om skade te betaal en dat eiser hom £10 die waarde van een bees terug betaal het. Eiser bly nog een bees verskuldig.

4. Teeneis:—

Verweerder eis 1 bees van eiser of waarde £10, soos gemeld in paragraaf 3 van hoofpleit."

Prokureur vir eiser maak toe beswaar teen die teeneis vir een bees wat onder paragraaf 4 verskyn. Die Hof beslis toe dat die teeneis nie op daardie stadium toegelaat mag word nie.

Verweerder het nou appèl na dié Hof aangeteken op grond van:—

" 1. That the judgment is against the weight of evidence and contrary to Law.

2. That the Native Commissioner erred in accepting the plaintiff's evidence as against that of defendant.

3. That the Court should have allowed the counterclaim.

4. That in any event the Court should have set off 2 head of cattle for any debt found to be due."

Aangaande die teeneis, al wat die Naturellekommissaris in sy redes vir uitspraak meld is dat volgens sy insiens die teeneis nie op daardie stadium ingedien kon word nie.

Volgens Reël 12 (2) van die Regulasies vir Siviele Howe van Kapteins en Hoofmanne gepubliseer in Goewermentskennisgewing No. 2885 van 1951 soos gewysig deur Goewermentskennisgewing No. 1180 van 1953 mag die verweerder in Hof van die Kaptein, minstens sewe dae voor die datum vir die verhoor van die appèl vasgestel, 'n teeneis instel nieteenstaande dat so 'n eis nie in die Hof van die Kaptein ingestel was nie.

As ons volgens die artikel alleenlik wil optree dan is dit duidelik dat die indiening van verweerder se teeneis onreëlmatig was, maar die hof het te kampe met reël 12 (3) wat voorsiening maak dat die Naturellekommissaris kan, by of voor die verhoor van die appèl, toelaat dat die teeneis daar en dan aangeteken word ten spyte daarvan dat dit nie binne die voormelde tyd voorgelê is nie en hy moet van die eiser vereis dat hy teen die teeneis moet pleit.

Daar kan geen twyfel wees dat Reël 12 (3) alleenlik toegepas mag word indien die verweerder genoegsame redes kan voorlê waarom hy Reël 12 (2) nie kon nakom nie. 'n Verweerder mag goeie redes hê maar tensy sulke redes voor die Hof is kan ons nie sien hoe die Hof 'n verslapping van Reël 12 (2) kan toelaat nie.

Volgens die rekord in die saak is geen redes aan die Hof voorgelê waarom die teeneis nie ingedien was voor die verhoor van die saak nie.

Die gevolg is dat grond 3 van die kennisgewing van appèl van die hand gewys word.

Verweerder was die Hoof van die kraal en eiser het by hom gewoon, maar hy was geen familiebetrekking van verweerder nie. Die eiser het in die moeilikheid geraak en moes twee beeste as skadevergoeding betaal aan die vader van 'n meidjie wat hy verlei het. Die verweerder, as hoof van die kraal, het die beeste voorgeskiet en eiser beweer nou dat volgens naturellereg soos beskrywe in Artikel 141 (2) (*b*) van die Natal Kode die verweerder as hoof van die kraal verantwoordelik was vir die betaling van die skadevergoeding. Die Naturellekommissaris, in sy redes probeer sy uitspraak regverdig deur voor te lê dat dit nie waarskynlik was dat eiser ooreengestem het om die beeste terug te betaal aan verweerder nie aangesien verweerder aanspreeklik was vir die betaling van die skadevergoeding. So 'n bewering kan die Hof nie mee saamstem nie. Die verantwoordelikheid wat gemeld word in Artikel 141 (2) (*b*) van die Kode is net van toepassing tussen die hoof van die kraal en die persoon wat die skade gely het, maar as die Hoof die skade betaal het meen dit nog nie dat hy nie op die persoon wat in die kraal woonagtig is 'n beroep kan doen om hom te vergoed nie.

Die Naturellekommissaris, so blyk dit, het dit moeilik gevind om die feite vas te stel en alhoewel hy van mening was dat eiser se getuienis meer aanneemlik is, hy tog nie seker was nie, en het meer staat gemaak op 'n wetspunt soos hierbo gemeld en waarmee ons nie saamstem nie.

Die getuienis aan verweerder se kant kan wel net so waar wees wanneer hy beweer dat eiser hom £10 terugbetaal het vir die een bees wat hy voorgeskiet het om skadevergoeding te betaal en dat vir die £10 hy 'n vers vir £6 gekoop het en het nog £2 van sy eie geld bygesit en 'n bul gekoop. Die vers het 4 aanteel gehad waarvan twee nog lewe en die bul leef ook nog.

Elias Shangwe bevestig die verweerder se saak waar hy sê hy het nie die £2 vir die jas aan eiser betaal nie. Eiser sê hy het hierdie £2 gebruik vir die aankoop van 'n bees.

Aangesien gronde 1 en 2 van die Kennisgewing van Appèl slaag, val grond 4 weg.

Die appèl word gehandhaaf met koste en die Naturellekommissaris se uitspraak word as volg verander:—

> „Appèl van die Kaptein se Hof is gehandhaaf met koste en sy uitspraak word verander na een van absolusie van die instansie met koste."

Ramsay (Permanente lid): Ek stem saam.

King (Lid): Ek stem saam.

Vir Appellant: Mnr. H. L. Myburgh van Bennett en Myburgh.

Vir Respondent: Mnr. C. J. Uys in opdrag van S. E. Henwood en Kie.

NORTH-EASTERN NATIVE APPEAL COURT.

MIYA d.a. *v.* MSOMI d.a.

N.A.C. CASE No. 13 OF 1954.

VRYHEID: 30th June, 1954. Before Steenkamp, President, Ramsay and King, Members of the Court.

LAW OF DELICT.

Damages—Seduction—Factors to be taken into account to arrive at quantum of damages—Damages not limited to amount plaintiff's father might have been awarded under Native Law and custom.

Summary: Plaintiff, a minor, sued defendant, also a minor, for damages for seduction. Plaintiff was awarded damages in the amount of £15 in the Native Commissioner's Court, and thereupon noted an appeal on the ground that the damages awarded was grossly inadequate.

Held: That the factors to be taken into account in assessing damages for seduction are—

(*a*) the age of plaintiff;

(*b*) her condition in life;

(*c*) the degree of resistance shown by her;

(*d*) the means employed by respondent to overcome such resistance;

(*e*) whether the seduction took place under a promise of marriage; and

(*f*) whether the plaintiff is pregnant by the defendant.

Held further: That, in the instant case, it is found from the evidence that plaintiff was rather easily seduced, in that the impression one gains from the evidence as a whole, is that the plaintiff was a very willing party from the moment defendant had the opportunity to suggest sexual intercourse.

Held further: That under common law, the damages recovered by the plaintiff is not limited to the amount her father might have been awarded under Native Law and Custom.

Held further: That in the circumstances disclosed in the evidence, the damages awarded cannot be said to be grossly inadequate.

Cases referred to: Ex parte Minister of Native Affairs in re Yako *v.* Beyi, 1948 (1) S.A. 388.

Appeal from the Court of the Native Commissioner, Vryheid.

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

The plaintiff, a minor native girl, sued the defendant, also a minor, both duly assisted by their respective fathers, for £100 damages for seduction.

The Native Commissioner entered judgement in favour of plaintiff for £15 and costs.

The plaintiff has noted an appeal to this Court on the ground that the amount of damages awarded is grossly inadequate.

The Native Commissioner, after dealing with the facts he found proved, states that the amount of damages payable is not limited to the amount recoverable under Native Law but

should bear some relation thereto. He also states that in Natal damages payable in a case brought under Native Law is fixed at one beast in terms of the Natal Native Code.

He came to the conclusion that, taking into account the foregoing, an amount of £15 was sufficient in the circumstances.

McKerron in his Law of Delict page 191 (third edition), mentions that in assessing the damages to be awarded in seduction cases the Court must be guided by all the circumstances of the case. Among the factors to be taken into account are—

(*a*) the age of the plaintiff;

(*b*) her condition in life;

(*c*) the degree of resistance shown by her; and

(*d*) the means employed by the defendant to overcome it.

Maasdorp in his Institutes of South African Law, Vol. IV (5th edition) on page 140 states, *inter alia*, that the Court will also, in assessing damages, take into consideration that the seduction had taken place under a promise of marriage and that the plaintiff is pregnant by the defendant.

In the instant appeal there is no evidence that the defendant had promised marriage but at the time the case was heard, the plaintiff was pregnant.

The plaintiff is a school teacher, aged 20 years, and therefore factors (*a*) and (*b*) are present but when we come to factors (*c*) and (*d*) it is found from the evidence that the plaintiff was rather easily seduced.

Her evidence, after describing how defendant had made love to her, how she had declined being his sweetheart, how he had written to her, how she had replied but did not accept him, but later decided to fall in love with him, is to the effect that she met him at Vryheid the day before she was leaving for her parent's home. She states nothing happened on that Sunday but the following day he came to the place where she was staying with an aunt and accompanied her to the station. He was carrying her suitcase but on the way he suggested they call in at his parent's home. She agreed to this and while there, with no other people in the house, where they sat for a long time, the defendant all of a sudden suggested they should go into one of the rooms and have intercourse. She refused but he begged her, caught hold of her and overpowered her and had intercourse with her. She goes on and states she allowed him to have intercourse with her.

In cross-examination, plaintiff states she had intercourse with defendant only this once and she had no pain with the first connection.

Notwithstanding the evidence of the plaintiff that she was overpowered, we do not think that this evidence can be taken seriously as she admits she allowed the defendant to have intercourse with her. She probably meant by "overpowered" that she was persuaded.

This is not a case in which the man has, over a period, persuaded a girl after much lovemaking to consent to intercourse and the impression one gains from the evidence as a whole, is that the plaintiff was a very willing party from the moment defendant had the opportunity to suggest sexual intercourse.

The degree of resistance shown by her was, therefore, negligible and the means employed by the defendant to seduce her was no more than a suggestion, to which she agreed.

It is true she is a young girl whose father is a teacher and they are, therefore, people of some standing; yet her conduct falls short of the standard one would expect from people of that class when it is considered that she was a willing party from the initial stage to defendant's amorous suggestions.

The amount of damages awarded cannot be said to be grossly inadequate in the circumstances disclosed in the evidence and we do not think this Court is justified in interfering with the award made.

Counsel for appellant has pointed out that the Native Commissioner has misdirected himself where he states in his reasons for judgement that the amount awarded should bear some relation to the amount recoverable under Native Law and has urged that damages should have been awarded without consideration of the amount that might have been awarded if the father had sued under Native Law and Custom.

This Court has considered the decision by the Appellate Division of the Supreme Court in the case of Minister of Native Affairs in *re* Yako *v.* Beyi, 1948 (1) S.A. 388 on page 403 where Schreiner (J.A.) states that the damages awarded to the girl are not necessarily limited in the amount her guardian is entitled to claim under Native Law.

We do not think that the Native Commissioner in his remarks meant to convey that he limited the damages to what a father might have been awarded under Native Law. All he, in fact, states is that in assessing the damages he bore in mind what might have been awarded to the father under Native Law.

Let this be as it may, we, in assessing damages, have approached the matter purely from a common law point of view and, as already indicated, we are of opinion that in the circumstances disclosed an amount of £15 is adequate.

The appeal is consequently dismissed with costs.

Ramsay (Permanent Member): I concur.

King (Member): I concur.

For Appellant: Mr. C. J. Uys of Bestall & Uys.

Respondent in default.

NORTH-EASTERN NATIVE APPEAL COURT.

HLATSHWAYO *v.* **MSIBI.**

N.A.C. Case No. 9/54.

Vryheid: 30th June, 1954. Before Steenkamp, President, Ramsay and King, Members of the Court.

ZULU CUSTOM.

Damages—Alleged custom that man found at night with another's wife, in circumstances where there is no question of adultery, is liable in damages, is contrary to public policy and opposed to natural justice.

Summary: Plaintiff sued defendant in a Chief's Court for damages as defendant was found at night with plaintiff's wife. No allegation was made, nor was it proved, that defendant committed adultery with plaintiff's wife. On appeal to his Court, the Native Commissioner upheld the appeal and altered the Chief's judgment to one of absolution from the instance with costs. Plaintiff thereupon noted an appeal.

Held: That acts of a suspicious nature do not found an action for damages.

Held further: That an alleged Native custom will be sanctioned only if the custom is not opposed to natural justice.

Held further: That the award of damages because a man is found talking to another man's wife at night, when there is no question of adultery having been committed, could lead to abuse.

Held further: That it would be contrary to public policy or natural justice if a man is to be mulcted in damages under those circumstances, and therefore no such custom can possibly receive recognition.

Statutes referred to:

Section 144 (3) of the Natal Code of Native Law, 1932.

Appeal from the Court of Native Commissioner, Utrecht.

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

In the Chief's Court plaintiff was granted judgment for one head of cattle and £7 against the defendant as and for damages plaintiff alleged he suffered in that defendant was found with plaintiff's wife.

There was no allegation of adultery nor has it been proved that defendant committed adultery with plaintiff's wife.

The Chief, in the particulars of defence, states:—

"Defendant admits being with plaintiff's wife and pays the one head of cattle and £7 as prayed."

In his reasons for judgment, the Chief states:—

"As the parties were settling the case between themselves, I gave judgment accordingly, that is £7 and one head of cattle."

The Native Commissioner, on appeal to his Court, upheld the appeal and altered the Chief's judgment to one of absolution from the instance with costs.

Plaintiff (now appellant) has noted an appeal to this Court on the following grounds:—

(1) The plaintiff proved his claim sufficiently on the facts of the case and in any event the Court should have under section 144 of the Code of Natal Native Law, accepted evidence of Native custom adduced there being no evidence to the contrary.

(2) The evidence tendered that defendant admitted his liability to plaintiff and voluntarily paid a beast and £7 to plaintiff, was sufficiently proof that defendant's conduct was actionable, and considered as such under Native Custom by the parties.

(3) In any event, it was not proved that the payment of the beast and £7 was made in error.

(4) The evidence tendered by the defendant tending to show that the evidence of his father was prejudiced or biased against him should not have been accepted or considered by the Court on the ground that such evidence was neither suggested nor put to the defendant's father while giving evidence under oath.

(5) The judgment of Absolution was not competent on the ground that the onus was on the defendant to show that the payment of the beast and £7 was made in error, and was not discharged.

(6) The judgment is generally against the weight of the evidence and the law."

In his evidence, the plaintiff relies for damages on the fact that one evening he found his wife and the defendant talking together. He also called evidence to the effect that according to Native Law and Custom it is a sin for a man to call another man's wife to sit with him in the dark and this calls for damages as well as one beast to cleanse the kraal.

Whatever Native Law might have been at one time concerning a "catch", as mentioned by Seymour in Native Law in South Africa, page 213-214, it must not be overlooked that acts of a suspicious nature do not found an action for damages.

The award of damages because a man is found talking to another man's wife at night, when there is no question of adultery having been committed, could lead to abuse, and the provisions of section 144 (3) of the Code referred to in ground 1 of the Notice of Appeal could only be applicable if the custom is not opposed to natural justice. It would be contrary to public policy or natural justice if a man is to be mulcted in damages because he was seen or found talking to another man's wife and therefore we hold that no such custom can possibly receive recognition and consequently ground 1 of the Notice of Appeal is without substance.

The other grounds of appeal may conveniently be dealt with together as they contain allegations of admissions of liability and payments made.

Arguments in this Court were mainly confined to an alleged agreement by the defendant to pay a beast and several cases were quoted in support thereof, but from the evidence we are satisfied that defendant was not a party to such an agreement which was between the plaintiff and defendant's father especially as defendant has consistently denied that he had committed adultery with plaintiff's wife.

According to the evidence adduced by plaintiff, the defendant agreed to pay an ox and £7 and actually delivered the ox to him and paid over the £7 in cash. Later the defendant and his father came and demanded the return of the ox and the money, which was refused.

Plaintiff thereafter took his complaint to the Chief where he averred that defendant was claiming the return of the ox and the money. The Chief heard the case and gave judgment against the defendant. In the meantime the ox had been taken back by the defendant.

Plaintiff is supported in his evidence by the father of defendant, who gave evidence on behalf of plaintiff. Defendant, however, states that his father paid plaintiff the £7 and the beast and when he taxed his father the reply was that he did not want the case to come before the Chief. He further states his father claimed the repayment of the £7 and the beast and it was then that the plaintiff took the case to the Chief. Defendant also states that he and his father are not on good terms and this is the reason his father gave evidence against him.

Here it is necessary to pause and mention ground (4) of the Notice of Appeal. It is quite true defendant's father was not cross-examined concerning the enmity between himself and his son but the plaintiff would have been justified in calling rebutting evidence if the defendant's evidence was not the truth. He has not done so and therefore we accept that the father was biased against his son.

We do not lose sight of the fact that the present case is against the defendant only and not jointly against him and his father, who is evidently the kraal-head.

Defendant has all along disputed liability and it would appear that his father, to keep the case out of Court, consented to pay a beast and £7 but this does not make the defendant liable as no damages have been proved against him.

The appeal is dismissed with costs.

Ramsay (Permanent Member): I concur.

King (Member): I concur.

For Appellant: Mr. H. L. Myburgh instructed by S. E. Henwood & Co.
& Co.

For Respondent: Mr. C. J. Uys instructed by J. Bisschoff.

NORTH-EASTERN NATIVE APPEAL COURT.

NKOSI *v.* KUMALO.

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

VRYHEID: 30th June, 1954. Before Steenkamp, President, Ramsay and King, Members of the Court.

LAW OF PROCEDURE.

Practice and Procedure—Chief's Civil Courts—Rescission of default judgments—Unreasonable delay in application for rescission raises a presumption that default judgment acquiesced in.

Summary: In a Chief's Court, plaintiff claimed two children from defendant. Default judgment was given against defendant on 30th August, 1952, and the judgment duly registered.

On the 19th January, 1954, the Chief heard and refused an application for the rescission of the default judgment.

Defendant unsuccessfully appealed against this refusal to the Native Commissioner's Court and thereupon noted a further appeal.

Held: That it is clear that the Chief did consider the application for rescission of the default judgment.

Held: That in terms of Rule 2 (3) of the Chiefs' Courts Rules application for rescission should have been made within sixty days after the default judgment had come to the notice of the party against whom it was given.

Held further: That as defendant, who became aware of the default judgment the day after it had been given, had waited nearly sixteen months before taking any steps for the rescission of the default judgment, the Court can arrive at only one conclusion and that is that he acquiesced in the default judgment.

Held further: That it is clear from the record, that the Chief waited a full two weeks instead of 48 hours before he finally gave the default judgment.

Statutes, etc., referred to: Rules 2 (1), 2 (3), 3 (2) and 3 (3) of the Rules for Chiefs' Civil Courts.

Appeal from the Court of the Native Commissioner, Vryheid.

Steenkamp (President): —

In the Chief's Court, the plaintiff claimed from the defendant two children. Default judgment was given on the 30th August, 1952, which judgment was registered at the office of the Native Commissioner on the 10th September, 1952.

On the 19th January, 1954, the Chief heard an application by the defendant for the rescission of the default judgment.

The Chief refused the rescission and the defendant then noted an appeal to the Native Commissioner.

After hearing evidence the Native Commissioner dismissed the appeal with costs and confirmed the Chief's refusal to grant the application for rescission.

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

"1. That the judgment of the learned Native Commissioner is bad in law in that he overlooked the defendant's uncontradicted evidence that the Chief *refused* to give the defendant a hearing on his application for rescission of the default judgment, and by reason thereof the defendant was entitled to relief under Rule 3 (2) and (3) of the Chiefs' Court Rules.

2. In view of the fact that the status of the children was involved, and defendant had no other remedy, the Court should have granted defendant an opportunity to put his case before the Court, in the absence of evidence that he had no defence.

3. In any event defendant's uncontradicted evidence proved that he had a prima facie defence on the merits, and consequently the Court should have approached the matter in the light of Rule 3 (3) (*b*) of the Chiefs' Court Rules.

4. The default judgment granted by the Chief against the defendant was irregular and bad in law, the Chief having failed to observe the provisions of Rule 2 (1) of the Chiefs' Courts Rules before granting the alleged default judgment, and consequently the Court should have dealt with the matter in the light of Rule 3 (3) (*b*) of the Chiefs' Courts Rules.

5. The judgment is against the evidence and bad in law."

Dealing with ground 1 of the Notice of Appeal, it is found that Rules 3 (2) and 3 (3) of the Chiefs' Courts Rules relate to cases where a Chief unreasonably delays or refused to deal with any case or adjudication upon any matter.

The applicant for the rescission of the default judgment was the defendant in the Chief's Court and is now the appellant (hereinafter referred to as the "applicant").

In his evidence before the Native Commissioner, the applicant states that he became aware of the default judgment the day after it had been given by the Chief, i.e. on the 31st August, 1952, but he took no steps until the 27th December, 1953, when he consulted the Native Commissioner's Office at Vryheid. He approached the Chief in January, 1954, and admits this was the first step he took since the judgment came to his notice. Applicant further admits that Mdhuli, the Court interpreter at the Native Commissioner's Office, told him to go back to the Chief and ask him to have the judgment rescinded.

It seems rather strange that although Mdhluli had given this advice to the applicant four days after the judgment had been given by the Chief, he waited such a long period before approaching the Chief to rescind the default judgment.

The Chief gave reasons for judgment and, concerning the application for a rescission, states—

> "I refused to rescind the judgment because when Nkosi (i.e. applicant) was sent for to appear in my Court, he refused to do so."

From these reasons of the Chief it is clear that he did consider the application for a rescission of the default judgment. This is a statement by a Judicial Officer and this Court is not prepared to accept the applicant's evidence that the Chief refused to give him a hearing on his application for rescission.

Rules 3 (2) and 3 (3) are therefore of no application and this ground of appeal and ground 3 are without substance.

Ground 2 of the Notice of Appeal might have been of some force if the applicant had complied with Rule 2 (3) of Chiefs' Courts Rules in which it is stated that application should be made within sixty days after the default judgment has come to the notice of the party against whom it was given.

Applicant waited nearly sixteen months before he took any steps for the rescission of the default judgment and therefore this Court can only form one conclusion and that is that he acquiesced in the default judgment.

It is true that when it comes to the status of children the Court will do everything in its power for an exhaustive investigation to be undertaken, but when an aggrieved party shows such tardiness as is apparent in the instant appeal, then the rights of the successful party must also receive consideration especially as it was found that the plaintiff was the natural father of the children and a customary union between him and the woman had been solemnised.

Ground 4 of the Notice of Appeal is a matter which was never raised in the Court below by the applicant, and if the Chief had not complied with Rule 2 (1) of the Chiefs' Courts Rules, it was incumbent upon applicant to call evidence in this respect. This Court must presume, in the absence of conclusive evidence, that the Chief's Court acted regularly and the maxim *omnia praesumuntur rite esse acta* is applicable.

Counsel for appellant has urged in his argument that from the evidence it would appear that the Chief gave default judgment on the same day he heard the case and if that is the case then non-compliance with Rule 2 (1) of the Chiefs' Courts Rules is fatal and the rescission should have been granted. Rule 2 (1) is to the effect that if a defendant is in default, judgment by default should not be given within 48 hours after the date the parties were called to appear. Counsel has, however, overlooked the fact that there is evidence that when defendant was in default on the first Saturday the case was postponed to the following Saturday when defendant was again in default. The case was again postponed for a week and it was only on the third Saturday that default judgment was granted. The Chief therefore waited a full two weeks instead of 48 hours before he finally gave the default judgment.

Ground 4 of the notice of appeal to which Counsel confined his main argument was badly drawn up and this Court sees no connection between Rule 2 (1) and 3 (3) (*b*).

Applicant's long delay in applying for a rescission of the default judgment granted by the Chief has jeopardised his case and consequently the appeal is dismissed with costs.

Ramsay (Permanent Member): I concur.

King (Member): I concur.

For Appellant: Mr. C. J. Uys instructed by S. E. Henwood & Co.

For Respondent: Mr. G. D. Havemann of G. D. Havemann & Co.

NORTH-EASTERN NATIVE APPEAL COURT.

RADEBE d.a. *v.* BHENGU.

N.A.C. Case No. 17/54.

Pietermaritzburg: 13th July, 1954. Before Steenkamp, President, Slarke and Ramsay, Members of the Court.

ZULU CUSTOM.

Ngqutu *Beast—Claim that cattle attached for husband's death debts are progeny of* ngqutu *beast—Heavy onus of proof thereof.*

Summary: Defendant had, in an action against plaintiff's husband, obtained judgment for four head of cattle, and in pursuance of that judgment four head of cattle were attached at plaintiff's husband's kraal by the Messenger of the Court.

Plaintiff alleges that three of these cattle are her property, being the progeny of a *ngqutu* beast paid to her.

The Native Commissioner gave judgment for plaintiff for two head of cattle and defendant noted an appeal.

Held: That as it is very easy for a woman to state than any cattle attached at her husband's kraal are the progeny of a *ngqutu* beast paid to her, and as the defendant is not in a position to controvert that statement, the evidence adduced on behalf of the plaintiff must be carefully sifted.

Held further: That there is a heavy onus of proof on such a claimant.

Held further: That in the instant case the plaintiff has not proved to the satisfaction of the Court that the cattle in dispute are her property.

Cases referred to:—

Zulu *v.* Mhlongo, 1 N.A.C. (N.E.), 303

Mlaba *v.* Mvelase, 1 N.A.C. (N.E.), 314.

Appeal from the Court of the Native Commissioner, Estcourt.

Steenkamp (President):

The Defendant, (now appellant) obtained a judgment against Bhabeni Bhengu, husband of the present plaintiff (now respondent) and in pursuance of that judgment, four head of cattle in possession of plaintiff's husband were attached by the Messenger of the Native Commissioner's Court.

The plaintiff now sues the defendant for the return to her of three of these cattle or payment of their value, £80. In her particulars of claim she bases the action on the allegation that defendant had been paid the judgment debt for which he had obtained judgment against the plaintiff's husband.

The defendant's plea is to the effect that the judgment debt had not been liquidated and he denies that the said cattle attached are the plaintiff's property.

Only when we look at the evidence is it found that plaintiff bases her claim on the allegation that the three head of cattle attached are the progeny of a beast paid to her by her son-in-law, Bantu Ndhlovu, as an *ngqutu* beast.

The Assistant Native Commissioner gave judgment in favour of plaintiff for two head of cattle and an absolution judgment in respect of the third beast.

Against that judgment an appeal has been noted by defendant, to this Court, on the following grounds:—

"1. The Native Commissioner having correctly found that the cattle were attached in the possession of the judgment debtor, plaintiff's husband, and that the onus lay on her to rebut the presumption of ownership arising from such possession the Native Commissioner should have held on the evidence as a whole that the evidence of plaintiff and her witnesses did not suffice to rebut this presumption; alternatively he should have held that the evidence was such as to leave him in a state of doubt in which case the judgment should have been one of absolution from the instance in respect of the cattle.

2. Plaintiff's claim in respect of all the cattle was based on the same ground, namely, that they were the progeny of her *ngqutu* beast, and the Native Commissioner having found that the evidence raised in his mind a doubt regarding ownership of the red ox (incorrectly referred to in the judgment as a red cow) he should have entertained a similar doubt in regard to all the cattle, and should have granted judgment for the defendant or alternatively absolution from the instance.

3. A substantial proportion of the evidence in the case centered around the ownership of the red ox and the Native Commissioner having granted absolution from the instance in respect of this animal should have awarded costs to defendant or should have apportioned the costs in proportion to the time occupied on the various issues."

Plaintiff called as a witness the Messenger of the Native Commissioner's Court, who executed the writ issued by the *defendant,* and according to his evidence, the plaintiff was present when he attached the cattle and she raised no protest. Her husband was ploughing at the time and the Messenger wanted to attach the cattle that were in yoke but he specially asked that this should not be done and he pointed out other cattle, out of which the Messenger could attach any four. The defendant was present and he confirms the evidence of the Messenger. In fact, the defendant states that it would have been unkind to attach the cattle with which plaintiff's husband was ploughing.

The plaintiff has brought evidence that the three cattle which she claims, are the progeny of a beast paid to her as *ngqutu.*

Plaintiff's son-in-law, Bantu, who paid the *lobolo,* also testifies that he had paid an *ngqutu* beast and that the cattle claimed are the progeny of that beast. The question arises whether that evidence may be accepted as being the truth. The defendant is not in a position to controvert that evidence and therefore the evidence adduced on behalf of the plaintiff must be carefully sifted. It is very easy for a woman to state that any cattle attached at her husband's kraal are the progeny of an *ngqutu* beast paid to her.

There is a heavy onus on such claimant and, as mentioned in the case of Zulu *v.* Mhlongo, 1, N.A.C. (N.E.), 302 at page 303, the capacity of a woman to own property in certain circumstances, is a radical departure from basic Native Law. Any circumstance which has in it the element of such a departure from fundamental principles, must be meticulously canvassed, and the onus of proving it is heavy.

In the later case of Mlaba *v.* Mvelase, 1, N.A.C. (N.E.), 314, it was held that a kraal-head is presumed to own all the cattle in his kraal and that where a woman claims attached property as being the *ngqutu* beast and/or its progeny, such fact must be conclusively proved.

Can it be said that the plaintiff in the instant appeal has conclusively proved that the cattle in question are her property?

She claimed three cattle but the Assistant Native Commissioner held that she had not proved her case in respect of one beast. In other words, he has disbelieved her evidence in respect of one beast and the question arises whether her evidence in respect of the other two head of cattle should not also be viewed with reserve.

The Assistant Native Commissioner, in his reasons for judgment, states that he preferred the evidence of the plaintiff to that of the Messenger of the Court concerning plaintiff's conduct at the time the attachment was made but he has overlooked the fact that the plaintiff called the Messenger as her witness and she must stand or fall by his evidence. She cannot be heard afterwards when she states her own witness was not telling the truth.

As mentioned in the case of Mlaba *v.* Mvelase, *supra,* there is a tendency amongst litigants to get their wives to claim that attached property is the progeny of an *ngqutu* beast. This subterfuge is used extensively and this Court must protect judgment creditors therefrom.

The plaintiff's husband, immediately after the attachment, tendered the amount of the judgment debt and the Assistant Native Commissioner, in his reasons, has quoted this in support of his judgment. It must not, however, be overlooked that, in order to save his cattle, which were worth more than the alternative amount of the judgment debt, the plaintiff's husband caused the £20 to be paid. There would appear to be no link between this payment and the plaintiff's alleged protest against the attachment a day or two before.

The plaintiff has not proved to the satisfaction of this Court that the cattle are her property as alleged and we therefore allow the appeal with costs and alter the judgment of the Acting Assistant Native Commissioner to one of absolution from the instance with costs.

Slarke: I concur.

Ramsay: I concur.

For Appellant: Adv. J. H. Niehaus instructed by Nel & Stevens.

Respondent in default.

NORTH-EASTERN NATIVE APPEAL COURT.

MASUKU *v.* NDABA.

N.A.C. CASE No. 19 OF 1954.

PIETERMARITZBURG: 15th July, 1954. Before Steenkamp, President. Slarke and Ramsay, Members of the Court.

LAW OF CONTRACT.

Contract—Agreement to pay plaintiff's lobolo *when he married, if plaintiff, from an early age, stayed with and performed farm labour and other work for defendant—Enforcement of defendant's obligations.*

Summary: Plaintiff, when 7 or 8 years of age, was placed by his father with defendant. It was agreed that plantiff would stay with and perform farm labour and other work for defendant. Defendant agreed to pay plaintiff's *lobolo* when plaintiff married.

When plaintiff's customary union was celebrated defendant advanced seven head of cattle towards the *lobolo,* but subsequently claimed and received the cattle back. Plaintiff then sued defendant for 11 head of cattle or their value £55. The Native Commissioner gave judgment for eight head of cattle and costs. Defendant noted an appeal against that judgment.

Held: That plaintiff carried out his part of the agreement right up to the time he got married, and as it was then manifest that defendant was not prepared to implement his obligations under the agreement, plaintiff was entitled to terminate his corresponding obligations and seek redress for the services he had rendered.

Held further: That when defendant insisted on the refund of the seven head of cattle, there was then no obligation on plaintiff's part to continue working for defendant, as the latter had, by insisting on a refund of the *lobolo* advanced, broken the agreement.

Held further: That plaintiff was not suing defendant to pay the *lobolo,* which is prohibited by section 91 (2) of the Natal Native Code, but based his action on damages for breach of agreement.

Statutes, etc., referred to: Section 91 (2) of the Natal Native Code, 1932.

Appeal from the Court of the Native Commissioner, Weenen.

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

According to the uncontroverted evidence adduced on behalf of the plaintiff (now respondent) when he was 7 or 8 years of age he stayed with a man by the name of Queenie. He was taken from there by defendant's mother to herd her stock at defendant's kraal for which he was to be paid one goat for each year. He stayed for two years and was paid two goats. His father took him back to Queenie but defendant wanted him to stay and herd his cattle and work on the farm. Plaintiff's father agreed to this and the agreement entered into between defendant and plaintiff's father was that the defendant would pay his *lobolo* of eleven head of cattle when he got married. Plaintiff worked on the farm for a certain Mr. Buys for two six monthly periods. In between the periods he went to Kimberley and gave his wages to the defendant. They moved to another farm where plaintiff also worked for three periods of six months each on behalf of the defendant. In addition to that he ploughed, carried out fencing work and other general work for the defendant.

Eventually plaintiff got married and defendant advanced seven head of cattle towards the *lobolo.* When the customary union was registered, a note was made in the Register, kept at the office of the Native Commissioner, to the effect that the seven head of cattle had to be repaid to Sopoma Masuka, the defendant, who is the uncle of the plaintiff.

Plaintiff's witness, an Induna, under cross-examination, states that he was surprised to hear that the marriage was registered with the proviso that seven head of cattle had to be returned to defendant. Plaintiff states that when the marriage was being registered defendant said that the seven head of cattle had to be repaid, which he did. Under cross-examination he states that at the time the marriage was registered, the Induna, in whose presence the agreement was made between defendant and plaintiff's father, was in gaol, so he had to agree to the provision that the seven head of cattle had to be returned. There was an argument as plaintiff refused to return the seven head of cattle and defendant insisted that they should be returned and he would give the plaintiff the cattle he had promised.

The Induna's evidence is to the effect that both defendant and plaintiff's father came to him to witness their agreement that defendant would pay plaintiff's *lobolo* one day if plaintiff stayed with him and performed farm labour work for him and did everything for him. He also testifies that plaintiff stayed with defendant a long time until he got married.

Plaintiff has now sued the defendant in the Native Commissioner's Court for eleven head of cattle or £55, their value.

The Native Commissioner gave judgment for plaintiff for eight head of cattle and costs and against that judgment an appeal has been noted to this Court on the following grounds:—

" 1. That the Native Commissioner should have found as a fact that the agreement was to continue for the life of the respondent.

2. That the respondent should not have succeeded without tendering performance of his part of the contract namely to live with and work for the appellant for the rest of his life. On the contrary respondent stated that he was no longer prepared to carry out his part of the contract and he indeed ceased to do so some years prior to the action.

3. That the Native Commissioner erred in finding that the respondent was entitled to cancel the contract as at the date of his marriage because—

   (*a*) it was only in April, 1953, some nine (9) years after his marriage, that respondent returned the seven head provided by appellant for his *lobolo*.

   (*b*) Because the seven (7) head were returned volutarily (on the advice of the Clerk in the Native Commissioner's office).

4. That in any event if the respondent was entitled to cancel the contract, his claim should have been confined to damages and no damages were claimed or proved.

5. That the respondent was obliged in terms of the agreement to pay all his earnings to appellant but on his own evidence had acquired 18 head of cattle from these earnings and had used such cattle for *lobolo* purposes. He could not therefore now claim his *lobolo* from appellant.

6. That the respondent was estopped by his action in dishonouring the contract at the time of his first marriage in 1943, from claiming that the appellant should perform his part of the contract some ten (10) years later.

Concerning ground 1 of the notice of appeal, it is true that the evidence adduced on behalf of the plaintiff is to the effect that the agreement was to continue for life but the way we understand the evidence is that it was for the life of the defendant, i.e. appellant, and not for the life of the plaintiff, i.e. respondent.

When defendant failed to implement his part of the agreement, in failing to pay the *lobolo* on behalf of the plaintiff, he broke the agreement and for this breach the plaintiff was entitled to claim damages based on the number of cattle or their monetary equivalent he had to pay as *lobolo*.

It was argued before this Court that the plaintiff was in the position of a son to the defendant and therefore could not sue the latter for the *lobolo* as this is prohibited by section 91 (2) of the Natal Code of Native Law.

We do not interpret plaintiffs action to mean that he is suing the defendant to pay the *lobolo*. What plaintiff in fact bases his action on is for damages for breach of the agreement that defendant would one day pay the *lobolo*.

It is observed that plaintiff, at the time his marriage was registered in the office of the Native Commissioner, protested against the entry that the *lobolo* was a loan from the defendant and had to be refunded but, on advice of the Clerk in the Native Commissioners office, the entry went through and the plaintiff accepted the advice that he could claim from the defendant after he had refunded the seven head of cattle advanced. This was a reasonable attitude on the part of the plaintiff in accepting the advice given in such circumstances.

Ground 5 may be disposed of by stating shortly that, only after defendant had insisted on the seven head of cattle being returned to him, did the plaintiff acquire cattle from his own earnings. There was then no obligation on his part to continue working for the defendant as the latter had, by insisting on a refund of the *lobolo* advanced, broken the agreement.

Plaintiff was in the invidious position that he first had to refund the cattle advanced by the defendant before he could sue for breach of the agreement. It took him a long time to acquire the cattle to make the refund to defendant and this accounts for the delay in bringing an action against the defendant.

Plaintiff carried out his part of the agreement right up to the time he got married and when it was manifest that defendant was not prepared to implement his obligations under the agreement the plaintiff was entitled to terminate his corresponding obligations under the agreement and seek redress for the services he had rendered.

The plaintiff's claim might have been unhappily worded but the meaning is clear enough that he wanted to be recouped for services he had rendered and for which defendant should have paid his *lobolo* in accordance with the agreement and which defendant had not implemented.

In the circumstances the appeal is dismissed with costs.

Slarke (Member): I concur.

Ramsay (Permanent Member): I concur.

For Appellant: Adv. J. H. Niehaus instructed by A. M. Buchan.

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

NORTH-EASTERN NATIVE APPEAL COURT.

MKHASIBE *v.* DHLAMINI d.a.

N.A.C. CASE No. 36 OF 1954.

PIETERMARITZBURG: 15th July, 1954. Before Steenkamp, President, Slarke and Ramsay, Members of the Court.

LAW OF PROCEDURE.

Practice and Procedure—Default judgment—Clerk of Court to refer to Court prayer for appointment of curator ad litem*—Application for rescission of default judgment not to be set down for hearing until costs of default judgment deposited by applicant.*

Summary: A clerk of the Court entered a default judgment in a case where *inter alia* a prayer for the appointment of a *curator ad litem* was made.

On application being made for the rescission of the default judgment, the Clerk of the Court set the application down for hearing although the costs awarded under that default judgment had not been paid into Court. The Native Commissioner dismissed the application with costs.

Held: That as the claim contained, *inter alia,* the appointment of a *curator ad litem,* with which the Clerk of the Court was not competent to deal, he should have referred the application for a default judgment to the Native Commissioner.

Held further: That it is imperative that no application for rescission of a default judgment shall be set down for hearing until the applicant has paid into Court the amount of costs awarded against him under the default judgment.

Held further: That the Native Commissioner had erred in hearing an application which had not been properly set down and which was therefore not before the Court.

Cases referred to:

Modise *v.* Moeketse, 1937, N.A.C. (T. & N.), 38.

M'gamazoel *v.* Sibanyoni, 1938, N.A.C. (T. & N.), 60.

Statutes, etc., referred to:

Rule 36 of the old Rules for Native Commissioners' Courts.

Rules 41 (9), 74 (3) and 74 (4) of the Rules for Native Commissioners' Courts.

Appeal from the Native Commissioner, Estcourt.

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

The application for the condonation of the late noting of the appeal is granted.

On the 25th May, 1953, the Clerk of the Native Commissioner's Court at Estcourt entered a default judgment in favour of plaintiff for a cow and two of its progeny or its value £40 and costs.

The Clerk of the Court should, in view of the nature of the claim, have referred the case to the Native Commissioner in terms of Rule 41 (9) of the Native Commissioners' Courts Rules, particularly as the claim contained, *inter alia,* a prayer for the appointment of a *curator ad litem* with which the Clerk of the Court was not competent to deal. Moreover the claim for four head of cattle stated that the alternative value was £40. Before granting judgment for this amount the Court would ordinarily require to satisfy itself from evidence that the amount was equitable.

Thereafter an application was made by the defendant for the rescission of the default judgment. That application was set down for hearing by the Native Commissioner on the 10th November, 1953.

The Native Commissioner duly considered the application, which was opposed by plaintiff's attorney on the grounds that his costs had not been paid in terms of Rule 74 (3) of the Native Commissioners' Courts Rules and also that defendant had not complied with the rules in that he had not stated the ground of defence in terms of Rule 74 (2). The Native Commissioner thereupon dismissed the application with costs.

Against the Native Commissioner's judgment an appeal has been noted to this Court on the grounds that the judgment is contrary to law and that—

" (1) the applicant's failure to comply with the provisions of Rule 74 (3) of the said Court was not competent reason for the Native Commissioner's decision;

(2) the applicant had stated shortly as required by Rule 74 (2) of the said Court a valid ground of defence to the respondent's claim."

It is first of all necessary to quote Rule 30, Sub-rule 6, of the old Native Commissioners' Courts Rules which have been repealed by Rule 74 (3) of the existing Rules. The old Rule reads: —

> "No application for a rescission of any judgment shall be heard by the Court until the applicant has paid into Court, to abide the directions of the Court, the amount of costs awarded against him in such judgment, and also the sum of £1 as security for the costs of the application."

Under the old Rules it was not necessary specifically to set a case down for hearing and that Rule seems to make it clear that the Court was not permitted to dismiss an application for rescission on the grounds that the wasted costs had not been paid. All that the Rule means is that the Court may refuse to hear the application until the costs have been paid.

There are decided cases under the old Rule and the first one I wish to quote is the case of Modise *v.* Moeketse, 1937, N.A.C. (T. & N.) 38, from which it is manifest that Rule 36 of the old Native Commissioners' Courts Rules, lays it down unequivocably that no application for the rescission of any judgment shall be heard until the costs awarded in the principal action have been paid into Court by the applicant. It was also stated in that case that this, an obligatory and essential preliminary to any application of the kind now being dealt with, had not been complied with.

Notwithstanding the fact that the Rule had not been complied with, the Appeal Court held that the default judgment should have been rescinded as prayed. The Court also ordered that the defendant, that is the applicant in that case, pay into Court, to await directions, the costs awarded to him under the said default judgment before proceeding with his defence.

The question came up again the following year in the case of M'gamazoeel *v.* Sibanyoni, 1938, N.A.C. (T. & N.), 60, where the point was also taken that the costs of the default judgment had not been paid. From the reading of that judgment one also gains the impression that it is not incumbent on the presiding officer to dismiss the application but that he must refuse to hear it until such time as the costs have been paid. So much for the old Rules.

Under the present Rule 74 (3) of the Native Commissioners' Courts Rules it is imperative that no application for a rescission of a judgment shall be set down for hearing until an applicant has paid into Court the amount of costs awarded against him under the default judgment. There is an exception but this is not applicable in the instant appeal.

There is very little difference between the old Rules and the new Rules except this, that under the new Rules provision is made for the setting down of a case. The principles remain the same and we hold the view that until such time as the costs had been paid the case should not have been placed on the roll. The Native Commissioner erred in hearing a case which had not been properly set down and which therefore was not before the Court.

Coming to the second ground of the notice of appeal it is our opinion that this falls away in view of the fact that the Native Commissioner should never have heard the application. In any case, it is our opinion that the applicant, in his supporting affidavit, gave a sufficient indication of the nature of his defence.

The affidavit was certainly drawn up in a confusing manner and legal practitioners will be well advised to pay better attention to clarity when they are briefed by litigants to make applications for rescissions of default judgments.

In the circumstances the appeal is allowed with costs and the Native Commissioner's decision is set aside. This means that the applicant, after he has paid the costs incurred by the plaintiff in obtaining his default judgment, may set the application down for hearing by the Native Commissioner.

We still have to consider the costs of the application heard by the Native Commissioner. As already remarked the Native Commissioner should not have heard the application and therefore we think it is only equitable that there should be no order as to costs in hearing the application for a rescision.

Slarke (Member) and Ramsay (Permanent Member): concurred.

For Appellant: Adv. J. A. Meachin instructed by L. Simon & Co.

Respondent in default.

SOUTHERN NATIVE APPEAL COURT.

NJADU *v.* TOBOTI.

N.A.C. CASE No. 13 OF 1954.

KING WILLIAM'S TOWN, 19th July, 1954. Before Israel, President, Key and Fenix, Members of the Court.

Interpleader action—Evidence—Burden of proof on claimant—Cattle rightly declared executable—Costs—General rule—Improper claim sufficient justification for departing therefrom—Court marks its deprecation of claimant's behaviour by making no order.

Summary: This is an interpleader action in which claimant (Vakele Njadu) claimed nine head of cattle attached under a writ of execution in which one Ntswayimbana is 2nd judgment debtor and his maternal uncle respondent (Nosekeni Toboti) is judgment creditor in the original action. Claimant based his claim on the fact that he had received these cattle as dowry for his sisters; four head in respect of Noralafana and five head for Nontakumba.

Held:

1. Although the attachment was somewhat irregular (effected without the judgment debtor's knowledge or consent and while grazing together with cattle of the claimant), the Native Commissioner was justified in finding that this did not alter the fact that the cattle involved were taken from the common cattle kraal where the judgment debtor kept his stock and that the concatenation of circumstances positively fixed the burden on claimant of proving that he was the owner of the cattle.
2. As claimant originally failed to rebut the irresistable presumptions of ownership which arises from the established facts that judgment debtor is the owner of the kraal in which claimant lives and is, therefore, in control of the cattle of the kraal and that these cattle had quite recently been registered in the name, not of claimant, but of a subordinate inmate of the family, the cattle were rightly declared executable.

3. The general rule is that a claimant in an interpleader action who succeeds in part of his claim, is entitled to his costs, but it would appear that the claim for five head of cattle is an improper one which should never have been made. It is sufficient justification for departing from the general rule and for the Court to mark its deprecation of claimant's behaviour in knowingly claiming cattle not his own by making no order as to costs.

Cases referred to:

Hulumbe *v.* Jussob, 1927, T.P.D., 1008.
Jiyane *v.* Mthemba, 1952 (3), N.A.C., 200.
Lusasa *v.* Maruni, 1946, N.A.C. (C. & O.), 29.
Vabaza *v.* Vabaza, 1947, N.A.C. (C. & O.), 103.
Zwarts *v.* Izaaks, 1910, C.P.D., 295.
De Wet *v.* Brink, 1910, T.P.D., 336.

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

Israel (President):—

The claimant in this interpleader action claimed as his property certain nine head of cattle attached under a writ of execution issued in an action in which one, Ntswayimbane, is a judgment debtor, and based his right of ownership on the fact that he is the dowryholder of his sisters Nontakumba and Noralafana and that the nine head represented dowry-cattle paid for them; four head in respect of Noralafana and five for Nontakumba.

The Acting Assistant Native Commissioner found that five of the cattle in question were, in fact, the property of Ntswayimbana, being, either cattle refunded by claimant to Ntswayimbana in respect of dowry advanced by the latter to the former on the occasion of his marriage, or, cattle acquired by Ntswayimbana in other ways, and declared them executable. The remaining four he declared non-executable and ordered each party to bear his own costs. The matter has now come before this Court as an appeal against two portions of the judgment, namely—

"(*a*) that portion of the judgment declaring certain five head of cattle, to wit, the five head of cattle proved to be the dowry of Nontakumba, executable, on the following grounds, viz.—

(1) that the judgment is against the weight of evidence;

(2) that in the circumstances of the attachment there was a heavy onus on the judgment creditor to establish that the five head of cattle were the property of the judgment debtor, which she failed to do;

(3) that the judgment Creditor failed to establish that there was an agreement between the judgment debtor and the claimant, or his representative, if any, that Nontakumba's dowry should pass to and become the property of the judgment debtor when Nontakumba got married;

and

(*b*) that portion of the judgment ordering each party to pay his or her own costs, on the ground, viz.—

It is respectfully urged that even if the Court was correct in finding for claimant on portion only of his claim (which finding is respectfully disputed), the Court should have awarded costs of the whole action to claimant as there was nothing in the evidence for the claimant to suggest or indicate that the claimant's action had been brought frivolously or recklessly".

As there is no cross-appeal the issue before this Court is narrowed to the ownership of the five head declared executable and to the question of costs.

The particular wording of the second ground of item (*a*) of the notice of appeal would seem to indicate that the claimant, by reason of the circumstances at the time of the attachment, sought to divest himself of the onus, which normally rests on a claimant, to prove, when a claim arises out of an attachment in execution, that the property attached is his. (Hulumbe *v.* Jussob, 1927, T.P.D., 1008), and wished to infer that the cattle when attached were in his possession, in which case the burden of proof would indeed have been shifted. But it is by no means clear from the record that this was the case. Claimant, the maternal nephew of Ntswayimbana, judgment debtor, stated that he had been an inmate of the latter's kraal since infancy and that now, having attained majority, shared a common cattle kraal with Ntswayimbana and other members of Ntswayimbana's family and grazed his cattle with theirs. None was registered in his name in the dipping records and, the cattle in question, in particular, were actually registered in the name of Piyose, a younger brother of Ntswayimbana, to whom they were transferred from Ntswayimbana after the main case had commenced and while it was still in progress. The actual attachment was made while all the cattle of the kraal were grazing together and although this attachment was somewhat irregular in that it was effected without the judgment debtor's knowledge or consent, the Acting Assistant Native Commissioner found that this did not alter the fact that the cattle involved were taken from the kraal where the judgment debtor kept his stock and that there was never any suggestion to the contrary. In the view of this Court, then, the finding, which is justified, and the concatenation of circumstances to which reference has been made, positively fixed the burden of proof where it, *prima facie,* lay, namely on the claimant.

With regard to the ownership of the five head of cattle with which the Court is now concerned, claimant bases his claim to them on the fact that they were cattle paid to him as dowry for his sister, Nonkatumba, or were derived from those cattle by way of increase or exchange. Piyose, the judgment debtor's younger brother, in whose name all the cattle of the kraal were registered for a reason which has not been satisfactorily explained, sought to support the claimant's contention with a wealth of detail, but did not apparently impress the Acting Assistant Native Commissioner. The judgment debtor, Mtswayimbana, who was the only other witness for claimant on this point, could carry the particular matter no further beyond saying that, although communally kraaled and not individually registered, the cattle of the kraal were, nevertheless, individually owned by the respective members of the kraal, including claimant, and that the five head were so held by claimant.

On the other hand, the judgment creditor maintains that the five head of cattle in dispute, whether consisting of or derived from Nontakumba's dowry or not, where in fact the property of the judgment debtor, and that the dowry received by claimant for his sister, Nontakumba, was not retained as claimant contended but was paid over on receipt to the judgment debtor in refund of cattle which he, the latter, advanced to claimant on the occasion of his, claimant's, earlier marriage. The judgment creditor brought the evidence of two witnesses to support her in this allegation and to state that the refund must have been by agreement, because claimant, not being a son of the kraal, would have been given the cattle advanced to him for his marriage as a loan and not as a gift as from father to son. Claimant adduced no evidence to support him in his denial that that was the case and the presiding officer justifiedly came to the conclusion that it was probably the truth.

Had the onus indeed rested on the judgment creditor, as the notice of appeal would have us rule, this finding of fact by the Court *a quo* would have gone far in her favour. But the onus, as I have already intimated, was not on her; it was on the claimant to establish by clear and satisfactory evidence as

was ruled in the case of Jiyane *v.* Mthemba, 1952 (3), N.A.C., 200, that he was the owner of the cattle. To do this, as was the case in Lusasa *v.* Maruni, 1946, N.A.C. (C & O.), 29, he would have to rebut the presumptions which must irresistibly arise from the established facts that judgment debtor is the owner of the kraal in which claimant lives and therefore in control of the cattle of that kraal [Vabaza *v.* Vabaza, 1947, N.A.C. (C. & O.), 103], that the cattle were attached from that kraal and that they had quite recently been registered in judgment debtor's name and were now registered in the name, not of claimant, but of a subordinate inmate of the same kraal. Claimant has, to my mind, signally failed in rebutting these presumptions of judgment debtor's ownership and the cattle were rightly declared to be executable.

To come now to the question of costs, the Court *a quo* pointed out that in ordering each party to pay its own costs it was guided by the fact that claimant was successful only in respect of approximately half the value of his claim (i.e. four head declared non-executable and five executable), and that, in any case, not having been successful in the whole claim, he was not entitled to all the costs. I, however, would have approached the question differently. The Acting Assistant Native Commissioner clearly, and correctly, came to the conclusion that the cattle declared executable were not the property of claimant and in his mind he must have decided also that claimant knew that they were not his property, for, *inter alia,* he voices his suspicions of the motives which actuated their having been finally transferred to the name of Piyose. Now, it is admittedly the general rule that a claimant in an interpleader action succeeding in part of his claim is entitled to his costs (Zwarts *v.* Izaaks, 1910, C.P.D., 295), but for the reason I have mentioned, it would appear that the claim for the five head of cattle is an improper one which should never have been made. This fact, on the analogy of the case of De Wet *v.* Brink, 1910, T.P.D., 336, which is in essence closely similar to the one now before us, is sufficient justification for departing from the general rule confirmed in Zwarts' case (supra) and for the Court to mark its deprecation of claimant's behaviour in knowingly claiming cattle not his own, by making no order as to costs. As the judgment of the Court *a quo* has this effect, it will not be disturbed.

The appeal is dismissed with costs.

Key (Member): I concur.

Fenix (Member): I concur.

For Appellant: Mr. Kelly, Lady Frere.

For Respondent: Mr. Stanford, King William's Town.

NORTH-EASTERN NATIVE APPEAL COURT.

SHEZI *v.* **SHEZI.**

N.A.C. Case No. 20/54.

Eshowe: 20th July, 1954. Before Steenkamp, President, Ramsay and Oftebro, Members of the Court.

ZULU CUSTOM.

Etula *debt creates obligation to refund only a like number of cattle as was advanced and does not entitle claimant house to all the* lobolo *paid for the eldest daughter of the debtor house.*

Lobolo: Number of cattle payable in Natal.

Summary: Plaintiff and defendant are half-brothers, being sons of the same father but from different houses. When their father married plaintiff's mother he used cattle from the house in which defendant is heir to pay for her *lobolo*.

When plaintiff's sister was married, 15 head of cattle were paid as *lobolo* and received by defendant.

Plaintiff sued defendant in the Chief's Court and obtained judgment for 15 head of cattle but on appeal the Native Commissioner altered the judgment to one in favour of plaintiff for 5 head of cattle (or value) and costs. Defendant took the matter on further appeal.

Held: That it is clear that an *etula* debt had been created in favour of the house in which defendant is heir.

Held further: That plaintiff is only entitled to the difference between the *lobolo* defendant received for plaintiff's eldest sister and the amount advanced as *lobolo* for plaintiff's mother.

Held further: That an *etula* debt is settled not by handing over a girl, but only sufficient of the *lobolo* received for her to extinguish the debt.

Held further: That in the instant appeal, as there is a doubt as to the number of cattle advanced as *lobolo* for plaintiff's mother, it should be fixed at ten head of cattle, in terms of the principles of section 87 (2) of the Natal Code of Native Law, 1932.

Case referred to:

Shezi *v.* Shezi 1946, N.A.C. (T. & N.), 33.

Statutes, etc., referred to:

Section 87 (2) of Natal Code of Native Law, 1932.
Section 10 of Natal Code of Native Law, 1878.

Appeal from the Court of the Native Commissioner, Nkandla.

Steenkamp (President):—

Plaintiff sued the defendant (now appellant) in the Chief's Court for return of 15 head of cattle being the *lobolo* of plaintiff's sister and which were unlawfully received by the defendant.

Defendant denied liability but the Chief gave judgment for plaintiff for 15 head of cattle and costs.

Defendant appealed to the Native Commissioner who altered the judgment in favour of plaintiff for five head of cattle or their value £5 each and costs.

Plaintiff and defendant are sons of the late Mzimba, but of different houses.

When Mzimba married plaintiff's mother, Madhlomo, as his third wife, he took cattle from the house in which defendant was heir and paid the *lobolo* for Madhlomo. The third house therefore owed a debt to the house of Magwala, who was defendant's mother. The Native Commissioner found proved that a debt was created but came to the conclusion that only ten head of cattle were paid for Madhlomo and therefore the debt owing was only five head of cattle for which he gave judgment in favour of plaintiff.

An appeal has been noted by the defendant on the following grounds:

" 1. That the said judgment is against the evidence and contrary to law.

2. That in making an award of five head of cattle to the respondent, the learned Native Commissioner erred in Law and in fact.
3. That the learned Native Commissioner should have found that the respondent was not entitled to any cattle over and above the amount tendered by the appellant."

There is no cross-appeal and therefore the plaintiff must be deemed to be satisfied that an *etula* debt had been created in favour of the house in which defendant is heir and that plaintiff is only entitled to the difference between the *lobolo* defendant received for plaintiff's eldest sister, Eslina, viz., 15 head of cattle and the amount advanced as *lobolo* for plaintiff's mother, Madhlomo.

The point to be decided is whether ten head of cattle were advanced or whether fifteen head of cattle, as alleged by the defendant, were taken from the house to which he belonged and to which he is the heir.

The Native Commissioner experienced some difficulty in deciding this issue but after weighing the evidence, which was conflicting and contradictory, he arrived at the figure of ten head of cattle, and if this is the correct number, then he was justified in entering judgment in favour of plaintiff for five head of cattle.

The onus was on the defendant to prove the *etula* debt which was created approximately between 40 and 50 years ago and while it is true that plaintiff delayed many years after his sister, Eslina, got married and after defandant had received her *lobolo* of fifteen head of cattle, before instituting action, it is still a requirement that defendant should satisfy the Court that the number of cattle advanced exceeded the normal number of cattle payable as *lobolo*.

There is no evidence that plaintiff's mother falls within the category of those women whose fathers are entitled to more than ten head of cattle as *lobolo*. This case originates from Zululand and on reference to section 10 of the old Zululand Code (Government Notice No. 194 of 1878) it is found that only certain people of rank are entitled to more than ten head of cattle.

The new Code, promulgated under Proclamation No. 168 of 1932, and which is now also applicable to Zululand, prescribes in section 87 the number of cattle payable but sub-section (2) of that section reads that in the case of doubt, the *lobolo* must not exceed ten head of cattle or their equivalent.

If we apply, in the instant appeal, the principles in the new Code, then we think we are justified in saying that as there is a doubt as to the number of cattle advanced as *lobolo* for plaintiff's mother, we should fix it at ten head of cattle especially as one of the defendant's witnesses eventually admitted that he only saw ten head of cattle being paid as *lobolo*.

It has been specifically laid down in the case of Shezi *v.* Shezi 1946, N.A.C. (T. & N.), 33, that if a debt is due in respect of the mother, then that debt would be settled not by handing over the girl but only sufficient of the *lobolo* received for her to extinguish the debt.

It would seem as if the defendant is under the impression that he is entitled to all the *lobolo* cattle for the eldest girl whose mother's *lobolo* was advanced by his house and, to bolster up his case, he adduces evidence of an unsatisfactory nature in an attempt to prove that actually more than ten head of cattle were advanced by his house.

He has failed in discharging the onus which rested on him and we do not think the delay on plaintiff's part in bringing his action against the defendant is sufficient to outweigh defendant's failure in proving that 15 head of cattle had been advanced.

It is observed that, in this case, as in two other appeals from the same judicial officer heard during this session, the Chief's reasons for judgment do not form part of the record.

The appeal is dismissed with costs.

Ramsay (Permanent Member): I concur.

Oftebro (Member): I concur.

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

Respondent in person.

NORTH-EASTERN NATIVE APPEAL COURT.

XULU *v.* MAGWAZA.

N.A.C. CASE No. 25 OF 1954.

ESHOWE: 20th July, 1954: Before Steenkamp, President, Ramsay and Oftebro, Members of the Court.

ZULU CUSTOM.

Lobolo—*Number of cattle payable is determined by agreement—Nothing to prevent father of girl to agree to accept less cattle then the maximum laid down.*

Summary: Plaintiff obtained judgment against defendant in a Chief's Court for eight head of cattle being balance of *lobolo* owing in respect of plaintiff's sister, who was married to defendant over 20 years ago. Plaintiff alleged that it was agreed that 15 head of cattle would be paid as *lobolo* as his father was related to a Chief. On appeal to the Native Commissioner's Court, the Chief's judgment was altered to one for defendant, whereupon plaintiff appealed.

Held: That it is clear that *lobolo* is determined by agreement and there is nothing in the Code indicating that the father of a girl may not agree to accept cattle less in number than the maximum laid down.

Held further: That it does not follow because the father of a girl is entitled to a higher *lobolo* that his heir may after many years demand from the husband such higher *lobolo,* unless he can prove that the husband had agreed to pay the higher *lobolo.*

Held: That an agreement to pay higher *lobolo* has not been proved, but on the contrary the Court has been satisfied that no such agreement existed.

Statutes, etc. referred to:

Sections 87 (1) and (2) of the Natal Code of Native Law, 1932.

Appeal from the Court of the Native Commissioner, Nkandhla.

Steenkamp (President):—

In the Chief's Court the plaintiff obtained judgment against the defendant for eight head of cattle and costs on a claim for balance of *lobolo* owing in respect of plaintiff's sister, Jini, who is married to defendant.

Before the chief defendant denied liability.

On appeal to his Court the Native Commissioner altered the Chief's judgment to one for defendant with costs.

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

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

2. The Native Commissioner erred in finding that the defendant failed to prove his father's relationship to the late Chief Flatela.

3. The Native Commissioner erred in holding that the probabilities of the case are overwhelmingly in favour of the defendant.

4. The Native Commissioner also erred in finding that the full *lobolo* had been paid; and

5. The Native Commissioner should in all the circumstances have granted absolution from the instance and not judgment for defendant."

The plaintiff's claim, as amplified before the Native Commissioner, reads as follows:—

"1. Plaintiff is the heir in the Ikohlo House of his late father.

2. Plaintiff has a sister, Jini, in the same house.

3. Plaintiff is entitled to the dowry paid or to be paid for his sister Jini.

4. Jini married by Native Custom soon after the death of the late Chief Solomon (1933).

5. As my father, was the brother of Chief Funizwe Xulu's father and as such the dowry for the girl, including *ngqutu,* should be 16 head of cattle.

6. During the time plaintiff's father 6 actual cattle were paid on account of the dowry and also £4 towards the £5 representing a seventh beast thus leaving £1 and 8 cattle still owing.

7. Defendant has paid nothing further in respect of dowry and plaintiff now claims £1 and 8 head of cattle or their value £5 each and costs of suit.

8. Defendant is the man who married Jini."

Defendant's reply before the Native Commissioner is to the effect that the total *lobolo* payable by him was 11 head of cattle including the *ngqutu* beast and that this *lobolo* debt was fully liquidated.

It is observed that the Native Commissioner tried the appeal without first having obtained the Chief's reasons. In this connection attention is invited to the remarks by this Court in N.A.C. 28/54 heard during this session.

From the record it appears that defendant, who is a Native constable, married Jini, plaintiff's sister, during the lifetime of her father. She was the Indhlukulu wife and since then he has married 5 more wives.

Plaintiff in his evidence states:—

"Apart from the *ngqutu* beast the agreed dowry was 15 head of cattle . . .

"I am entitled to 15 head of cattle as dowry because my father was related to the late Chief Flatela. I cannot say how he was related . . .

"I know what amount for dowry was mentioned when defendant and my father first discussed the matter."

This is the only evidence adduced on behalf of the plaintiff that defendant had agreed with his late father to pay 15 head of cattle but plaintiff does not base his action on an agreement but on the fact that his late father was the brother of a chief.

Section 87 (1) of the present Code makes it clear that *lobolo* is determined by agreemeent and there is nothing in the Code indicating that the father of a girl may not agree to accept cattle less in number than the maximum laid down. Section 87 (2) reads that in case of doubt the *lobolo* must not exceed 10 head of cattle. This sub-section may be of application in cases where there is a doubt whether the father of a girl falls within the ambit of paragraph (*a*), (*b*) or (*c*) of sub-section 1 of section 87 and/or if he does fall within that category, there is a doubt as to what the agreement was.

It does not follow because the father of a girl is entitled to a higher *lobolo* that his heir may after a period of over twenty years demand from the husband such higher *lobolo*. He must be able to prove that the husband had agreed to pay the higher *lobolo*.

Plaintiff has not been able to prove the agreement. On the contrary the defendant has satisfied the Court *a quo* that no such agreement existed and this is amply borne out by the evidence and the probabilities and therefore the appeal fails with costs.

Ramsay (Permanent Member): I concur.

Oftebro (Member): I concur.

For Appellant: Mr. W. E. White.

Respondent in person.

NORTH-EASTERN NATIVE APPEAL COURT.

GAZU *v.* **NDAWONDE.**

N.A.C. CASE No. 29 OF 1954.

ESHOWE: 21st July, 1954. Before Steenkamp, President, Ramsay and Oftebro, Members of the Court.

LAW OF PROCEDURE.

Practice and Procedure—Appeal from Chiefs' Courts—System of Law to be applied at hearing of appeal—Chief's reasons to be furnished except only where such reasons are unobtainable—Exception provided in Rule 11 (3) *is a judicial one and if the Chief's reasons are unobtainable a note should appear on the record giving the Native Commissioner's grounds for dispensing therewith.*

Delicts: Tort feasor personally liable for any unlawful act committed by him.

Summary: Plaintiff obtained judgment in a Chief's Court for two head of cattle taken away by defendant from plaintiff's possession while the cattle were under attachment, and costs. The Native Commissioner dismissed the appeal to his court. He added a note that he decided the case under Common Law.

The Native Commissioner heard the case as an appeal from the Chief's Court yet the Chief's reasons for judgment had not been furnished.

Defendant sought to shield behind the fact that he was instructed by a woman to remove the cattle from plaintiff's possession.

Held: That as a Chief's jurisdiction is limited to cases arising out of Native Law and Custom an appeal from a Chief's Court may only be heard under that system of law, and if a Native Commissioner is of opinion that the action may not be found under Native Law then the obvious procedure is to set aside the proceedings in the Chief's Court.

Held further: That the action as formulated in the Chief's Court is one which may be tried under Native Law and Custom.

Held further: That the exception referred to in Rule 11 (3) of the Rules for Chiefs' Court may only be considered if the reasons are unobtainable.

Held further: That only after steps under Rule 11 (2) had been taken should a Native Commissioner use his discretion, which is judicial and not arbitrary, in dispensing with the Chief's reasons for judgment and he must note on the record his reasons for such dispensation.

Held further: That defendant could not shield behind the allegation that he was instructed by a woman to remove the cattle from plaintiff's possession and hand them over to her as a tort feasor is personally liable for any unlawful act committed by him, even if he thinks that the person who instructed him to do so, had a right thereto.

Cases referred to:

Dhlongolo *v.* Dhlongolo, 1952, N.A.C. 226, N.E.

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

Statutes, etc., referred to: Rule 11 of the Rules for Native Chiefs' Civil Courts.

Appeal from the Court of the Native Commissioner, Nkandhla.

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

This case originated in the Chief's Court where judgment was granted in favour of plaintiff for two head of cattle taken away by the defendant from plaintiff's possession while the cattle were under attachment. Costs were granted to plaintiff.

On appeal to the Native Commissioner the appeal was dismissed with costs but the Chief's judgment was altered by the placing of an alternative value of £10 on each beast and costs in the Chief's Court being limited to £2.

When the trial of the appeal in the Native Commissioner's Court was concluded the Native Commissioner added a note that he decided the case under Common Law.

An appeal from a Chief's Court may only be heard under Native Law and Custom as the Chief's jurisdiction is limited to that system of law, and if a Native Commissioner is of opinion that the action may not be found under Native Law then the obvious procedure is to set aside the proceedings in the Chief's Court.

We are, however, of opinion that the action as formulated in the Chief's Court is one which may be tried under Native Law and Custom and therefore this Court will amend the endorsement by substituting the words, " Decided under Native Law and Custom " instead of the words " Decided on Common Law ".

There is another aspect which calls for comment. The Native Commissioner heard the case as an appeal from the Chief's Court, yet the Chief's reasons for judgment as provided for in Rule 11 (1) of the Chiefs' Court Rules have not been furnished. The exception referred to in Sub-rule (3) may only be considered if the reasons are obtainable.

The discretion provided for there-in is a judicial one and if the reasons are not obtainable a note should appear on the record giving the Native Commissioner's grounds for dispensing with the Chief's reasons (see case Dhlongolo *v.* Dhlongolo, 1952, N.A.C. 226, N.E.).

In a later case Gumede *v.* Nxumalo, 1953, N.A.C. 191 (N.E.), this Court laid it down that only after steps under Rule 11 (2) had been taken should a Native Commissioner use his discretion, which is judicial and not arbitrary, in dispensing with the reasons and he must note on the record his reasons for such dispensation.

Defendant has now noted an appeal to this Court on the following grounds:—

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

2. That the learned Native Commissioner erred in treating the action as an application for a Mandament van Spolie by reason of the nature of the claim as made in the Chief's Court, by reason of the fact that in the Statement of Claim the plaintiff claimed in the alternative for the value of the cattle and by reason of the fact that the evidence discloses that at the time of demand and ever since the cattle were not in the possession of the defendant or under his control, having been sold to innocent third parties.

3. That even if the action be treated as a Vindicatory Action the plaintiff was not entitled to succeed in view of the absence of any proof that he is the owner of the cattle or in any event in view of the insufficiency of such proof the onus whereof was on the plaintiff.

4. That the learned Native Commissioner erred in taking cognizance of the case alleged to have been tried by Chief Bhekeyake Kanyile in the absence of proof of due registration thereof and in view of the absence of proof of the nature of the claim in that alleged case and in view of the absence of proof that Butekile and/or the defendant were parties thereto or were even aware thereof."

Counsel for Appellant has advanced the argument that this is a vindicatory action and as appellant deprived respondent of the possession of the cattle on instructions from a woman, Butekile, he cannot be personally held liable for their value. The record discloses that plaintiff had a case before the Chief in which he sued Mlandeni, the guardian of Butekile. The Chief gave evidence before the Native Commissioner and he testifies that he tried such a case and gave judgment in favour of plaintiff. It has been argued that this is not the best evidence and the record of the Chief should have been handed in to prove that he had tried the case.

The Chief's evidence in this respect has not been challenged and in the absence of any dispute concerning the question of a trial before him, we hold that sufficient evidence had been led. This disposes of ground 4 of the appeal.

Defendant is shielding behind the allegation, even if it is true, that he was instructed by a woman, Butekile, to take the cattle from plaintiff's possession and hand them over to her.

He had no right to do this and a tort feasor is personally liable for any unlawful act committed by him even if he thinks that the person who instructed him to do so, had a right to the cattle.

In this case appellant personally deprived respondent of the rights to the cattle he had obtained in a competent Court of Law and therefore is liable to return them to respondent or pay their value.

In the circumstances the appeal is dismissed with costs.

Ramsay (Permanent Member) and Oftebro (Member) concurred.

For Appellant: Mr. W. E. White.

Respondent in default.

NORTH-EASTERN NATIVE APPEAL COURT.

MHLONGO *v.* MHLONGO.

N.A.C. CASE No. 37/54.

ESHOWE: 21st July, 1954. Before Steenkamp, President, Ramsay and Oftebro, Members of the Court.

ZULU CUSTOM.

Customary Union—Re-marriage of widow—Union contracted prior to coming into operation of 1932 *Natal Code of Native Law.*

Summary: Plaintiff sued defendant for the balance of assets in the estate of the late Nkandhla. Plaintiff is the natural son of the late Nkandhla by a widow, Nomfula. Defendant is the nephew of the late Nkandhla. The question in issue is whether or not a customary union was contracted between Nkandhla and Nomfula.

Held: That it is a well established rule that in Zululand (prior to the coming into operation of the 1932 Natal Code of Native Law) far less formality was attached to the marriage of widows and divorced women than was the case with women marrying for the first time.

Held further: That the omission to pay *lobolo* (in the case of widows re-marrying) has no important significance as long as the right to claim it exists and is not disputed.

Held further: That in all the circumstances of this case the Court could come to no other conclusion than that there was a customary union between Nkandhla and Nomfula.

Cases referred to:

Zulu *v.* Mkanyana, 1936, N.A.C. (T. & N.), 1.

Appeal from the Court of the Native Commissioner, Eshowe.

Oftebro (Member), delivering the judgment of the Court:—

This is an appeal against the decision of the Native Commissioner, Eshowe, who dismissed plaintiff's claim with costs.

The plaintiff originally sued defendant in the Native Chief's Court for 43 head of cattle being assets in the estate of one Nkandhla Mhlongo. The Chief awarded plaintiff a judgment for that number of cattle and defendant appealed successfully to the Court of the Native Commissioner, Eshowe, and the Chief's judgment was altered to one of absolution from the instance with costs. At some stage after this judgment but before summons in the present action, plaintiff obtained or secured payment of 17 head of cattle, and then issued summons for the balance of 26 head of cattle which is the subject matter of the present case. As stated earlier the summons was dismissed with costs. It is difficult to reconcile this order with the Native Commissioner's reason for judgment No. 6 on page 19 of the record for there the Native Commissioner states that he found that defendant was the heir to the late Nkandhla Mhlongo and one would then have expected him to give judgment for the defendant. Be that as it may, the plaintiff has now appealed against the judgment on the following grounds:—

"1. That the learned Native Commissioner erred in holding that the plaintiff had failed to prove that a customary union or *de facto* union had been entered into between Nkandhla Mhlongo and the plaintiff's mother and that the plaintiff was accordingly heir to the said late Nkandhla Mhlongo.

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

The evidence discloses that plaintiff is the natural son of one Nkandhla Mhlongo, by a widow named Nomfula, whilst defendant is a nephew of the said Nkandhla.

It appears that Nomfula was originally a girl from the Biyela clan and she married one Mcijelwa Mtetwa. By this Mtetwa she had 3 sons and 2 daughters. Mcijelwa then died and she became widowed. She then appears to have met the late Nkandhla Mhlongo and eventually the present plaintiff was born. Nkandhla himself had two other wives who bore him only daughters, seven in all. Plaintiff alleges that Nkandhla married Nomfula and paid two head of cattle as *lobolo* and that therefore he is the legitimate son of Nkandhla whereas defendant states there was never any customary or *de facto* union and that plaintiff is illegitimate and cannot, therefore, succeed.

The point at issue is, therefore, whether there was a union between Nkandhla and Nomfula or not. Plaintiff is supported by Mbekumnewabo Mtetwa, a son of the late Nomfula by Mcijelwa, and Kumalo Magwaza, a disinterested party; and from their evidence it is clear that the question of *lobolo* was discussed by the Mtetwa's and Nkandhla, that two head of cattle were agreed upon and that two head, a white heifer and a red Nkone heifer were actually pointed out, though not removed. Whilst it is true that there are certain discrepancies in their evidence it seems clear that the defendant's witnesses Selinah and Vuthiwe eventually, under cross-examination, had to admit that there had been *lobolo* discussions and that Nkandhla and Nomfula had lived or cohabited together. They contend, however, that plaintiff only stayed in Nkandhla's kraal for the purpose of herding cattle and not for any other reason.

Counsel for defendant admitted in argument that there was no doubt that negotiations had taken place and that it was Nkandhla's desire to marry Nomfula, but argued that the union was never contracted, and that Qiyana, father of the defendant, has had all the *lobolo* for Nkandhla's daughters but that he gave the *lobolo* of one to plaintiff merely as a gratuitous gift. Plaintiff of course contends that he has had the *lobolo* of these girls and it is significant that his present claim is only for kraal property.

All these transactions took place in the early 1920's and before the present Code came into operation and in Zululand, in those days, there was little, if any ceremony attaching to the union of a widow. In Zulu *v.* Mkwanyana, 1936, N.A.C. (T. & N.), 1, the then President stated as follows:—

> "It is a well established rule that in Zululand far less formality attaches to the marriage of widows and divorced women than is the case with women marrying for the first time, especially in respect of the essentials of a valid marriage as defined by the Code. The omission to pay *lobolo* has no important significance as long as the right to claim it exists and is not disputed. Whether or not *lobolo* is to be paid largely depends on the child bearing capacity of the woman concerned and there is nothing to prevent the postponement of the payment of such *lobolo* until some future time. The circumstances in this case indicate, notwithstanding the denials of Notugela, who is obviously now anxious to benefit her own son, the respondent, that a *de facto* marriage between her and Silevu was intended and consummated. There is a strong presumption which has not been rebutted, that the union was sanctioned by the responsible members of the family of the late Mndeni who appear to have contented themselves with holding over their claim for *lobolo* until such time as the respondent, who was then a child, could himself receive it."

It is clear from the evidence before us that Nomfula did live at Nkandhla's kraal for some time and that she only went to her own people when she became ill. She died in the Biyela kraal but was nevertheless buried by the Mhlongo's, and in all the circumstances, and applying the principles laid down in the case quoted, we can come to no other conclusion than that there was a customary union between Nkandhla and Nomfula, thereby legitimising plaintiff and that therefore, he must be regarded as Nkandhla's heir.

The appeal is therefore allowed with costs and the judgment of the Court *a quo* is altered to read:—

"For plaintiff as prayed, with costs."

Steenkamp (President) and Ramsay (Permanent Member), concurred.

For Appellant: Mr. W. E. White.

For Respondent: Mr. S. H. Brien of Wynne & Wynne.

NORTH-EASTERN NATIVE APPEAL COURT.

GUMEDE *v.* MADHLALA d.a.

N.A.C. CASE No. 24 OF 1954.

DURBAN: 26th July, 1954. Before Steenkamp, President, Ramsay and de Souza, Members of the Court.

LAW OF PROCEDURE.

Practice and Procedure—Judgment of Chief's Court—Native Commissioner justified in accepting evidence as to what claim in Chief's Court was.

Summary: Plaintiff sued defendant and two tribal constables for the return of a beast attached by the two tribal constables and which they handed over to the defendant. Defendant had sued plaintiff in a Chief's Court and, according to her evidence, obtained judgment for a beast, and as a result of that judgment the beast in question was attached.

The Register of Chiefs' Judgments reflects that the claim before the Chief was one for £2. 10s. and that the Chief's judgment was for plaintiff as prayed with costs. The Native Commissioner accepted defendant's evidence and concluded that the claim before the Chief was for a beast and not for £2. 10s.

Held: That the Native Commissioner was justified in accepting evidence as to what the claim in the Chief's Court was.

Held further: That the Native Commissioner was correct in arriving at the conclusion that the claim was for a beast and not for £2. 10s.

Cases referred to:

Komo *v.* Dhlomo, 1940, N.A.C. (T. & N.), 140.

Nqoko *v.* Nqoko, 1942, N.A.C. (T & N.), 86.

Appeal from the Court of the Native Commissioner, Mapumulo.

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

In the Native Commissioner's Court the plaintiff sued three defendants for the return of a beast or its value, £15, and damages in the sum of £5, and in his particulars of claim he alleges that 1st and 2nd defendants, who are tribal constables, attached a beast and handed it over to defendant No. 3.

The plea is to the effect that the beast was lawfully attached in execution of a valid judgment.

The Native Commissioner gave judgment for defendants with costs.

An appeal has been noted against that portion of the judgment which was given in favour of third defendant with costs. In the Notice of Appeal it is specifically mentioned that no appeal is lodged against the judgments given in favour of 1st and 2nd defendants.

The grounds of appeal are lengthy and it is not necessary to set them out *in toto*.

From the record it appears that about 20 years ago, the respondent, who was defendant No. 3 in the Court below, purchased from the appellant (plaintiff in the Court below), a certain beast for £2. 10. There is a dispute as to whether it was a bull calf or a heifer calf, but the fact remains that it was a young beast. The price was paid but, on account of cattle movement restrictions, the calf remained with the seller, i.e. the appellant. According to respondent, this beast, when grown up, was attached for appellant's debts. She approached him and he promised he would replace the beast by another which he was expecting as *lobolo* from a certain kraal. He received the *lobolo* but did not pay her and her guardian then sued him in the Chief's Court for a beast. According to respondent's evidence, her guardian obtained judgment for a beast and costs and it was as a result of this judgment that a beast was attached by the tribal constables and handed over to her.

According to the Register of Judgments by Chiefs maintained at the office of the Native Commissioner, the judgment was registered as being in respect of a claim for £2. 10s. The Chief's judgment reads: "For Plaintiff as prayed with costs".

Respondent adduced evidence that her guardian's claim before the Chief was for a beast. She is corroborated by her guardian, who was the plaintiff in the Chief's Court. The tribal policeman states he was not present in Court when judgment was given but the Deputy-Chief told him to go to the appellant and remind him that he had to pay a beast to respondent and costs, and to make an attachment if necessary and this is what he did.

Appellant's evidence is that there is no truth in the allegation that the Chief gave judgment in favour of respondent for a beast. He further states that he has never been approachd with the object of altering or correcting the Chief's judgment as recorded in the Register and he declines to consent to such an alteration now.

The Assistant Native Commissioner has, however, found that the judgment of the Chief was for one beast and that it was erroneously recorded in the Register of Chiefs' Judgments and that therefore respondent's possession of the beast was not unlawful.

The question arises as to whether the Assistant Native Commissioner was correct in arriving at this decision. He quotes as authority the following cases:—

1. Komo *v.* Dhlomo, 1940, N.A.C. (T. & N.), 140.
2. Nqoko *v.* Nqoko, 1942, N.A.C. (T. & N.), 86.

In each of these cases an appeal was heard from the judgment of a Chief and it was, on appeal, held by this Court, that the Native Commissioner, in hearing the appeal, is not confined to the claim as registered by the Clerk of the Court. In other words, the Native Commissioner may, on the evidence, decide that the claim is not as recorded in the Register of Chiefs' Judgments but as is manifest from the evidence. Those decisions were based on a reading of the old Rule 9 of Chiefs' Courts Rules.

Counsel for appellant has argued that if it is desired to alter a Chief's recorded judgment, application may not be made under the Old Rules but that the new Rules should be referred to with a view to ascertaining whether the application for the alteration may be entertained. He argued further that as no such Rule now exists, the Chief's recorded judgment must be accepted as correct and no evidence to the contrary may be accepted.

In the instant case it is not so much a question as to whether the actual judgment of the Chief was correctly recorded but rather as to whether the nature of the claim in the Chief's Court was correctly recorded.

We hold that the Assistant Native Commissioner was justified in accepting evidence as to what the claim in the Chief's Court was and that he was correct in arriving at the conclusion that the claim was for a beast and not for £2. 10s., being the price respondent had paid for a beast.

The evidence and probabilities favour the respondent, especially if it is taken into consideration that a calf, purchased for £2. 10s. must have been worth much more when it became a grown up beast and it would have been rather absurd for the respondent to have claimed only the refund of the money she paid for a beast when she was entitled to a grown up beast, worth much more.

In the circumstances the appeal is dismissed with costs.

Ramsay (Permanent Member) and de Souza (Member), concurred.

For Appellant: Mr. C. J. Robbins, instructed by A. C. Bestall & Uys.

Respondent in person, duly assisted.

CENTRAL NATIVE APPEAL COURT.

NKOSI *v.* MOSHOEN.

N.A.C. CASE No. 17 OF 1954.

JOHANNESBURG: 24th August, 1954. Before Marsberg, President, Menge and O'Driscoll, Members of the Court.

Curator ad litem—Illegitimate status in Common and Native Law—Onus of proof—Confession and avoidance—Sufficiency of proof of customary union.

Summary: Plaintiff claimed from defendant the custody of her illegitimate child. Defendant resisted the claim on the ground that the child was his by virtue of a customary union between plaintiff and himself. Judgment with costs was granted for plaintiff.

On appeal:—

Held: The child's interests do not require the appointment of a curator ad litem, even if the judgment can be said to have the effect of bastardising it.

Held further: There is, however, no such thing as illegitimate status (as commonly understood) in Native Law where a female child is concerned.

Held further: The onus of proving that a customary union existed was rightly cast on the defendant.

Held further: On the evidence that onus had not been discharged.

Held further: That the defendant's counterclaim should have been disposed of.

Cases referred to: Stigling *v.* Melck, 1935, C.P.D., 228.

Appeal from the Court of the Native Commissioner, Johannesburg.

O'Driscoll, Member, delivering judgment of the Court:—

In the Native Commissioner's Court, Johannesburg, plaintiff Rebecca Moshoen claimed from the defendant, Aaron Nkosi, the return of a minor child of which they were the parents; but which Rebecca described as illegitimate. To this claim defendant pleaded that Rebecca has no *locus standi* by reason of the fact that she was married to him by Native Custom.

To this was later added a counterclaim by defendant demanding the return to him of his wife (the plaintiff), failing which, an order for the dissolution of the customary union, refund of the bogadi and an order for the custody of the minor child. The Native Commissioner in giving judgment has not referred to the counterclaim, which he presumably regarded as having fallen away as a natural consequence of his judgment on the main claim. (During the course of the hearing the plaintiff Rebecca's father, David Moshoen, was by common consent substituted as plaintiff.)

At the conclusion of the proceedings in which each party was given every opportunity of presenting his case, the Native Commissioner gave judgment for the plaintiff for the return of the minor child.

This judgment has been appealed against on the grounds that the Native Commissioner had erred—

(*a*) in granting an order that had the effect of bastardising the child, Sarah, without appointing or hearing a curator *ad litem* on behalf of the child;

(*b*) in ruling that the onus rested on appellant to prove that the parties had been married by bogadi Native customary union;

(*c*) in ruling that appellant had failed to prove that the parties had been married according to Native Custom;

(*d*) in rejecting the evidence of appellant and his witnesses and in accepting the evidence of respondent's witnesses;

(*e*) in finding that respondent was a proper person to have custody of the child and was entitled to her custody, and that the judgment was against the weight of evidence.

Now, dealing with these grounds of appeal seriatim, it is clear that there is no foundation for the first, in that the status of the child is not in issue, she is not a party to the action (see Stigling *v.* Melck, 1935, C.P.D., 228), and for the reason that illegitimate status (as commonly understood) does not exist in Native Law, where the child falls under the guardianship either of its natural father (if it is the progeny of a customary union) or of its maternal grandfather (if its mother was not married to its father in a customary union).

No application was at any time made for the appointment of a curator ad litem and the child's interests were sufficiently safeguarded by the presence of its father and by the value of the evidence which he was in a position to adduce on its behalf.

Regarding the second ground of appeal, the Court is of the opinion that the onus of proof of the customary union was correctly placed by the Native Commissioner on the defendant who averred the existence of such union.

Scoble (second edition, page 66) says—"The Court is also guided by a second rule of Roman Law, i.e. that the issue is upon the party who states the affirmative and not upon him who avers a negative. The principle has been adopted in practice, not because it is impossible to prove a negative, but because the negative does not admit of the direct and simple proof of which the affirmative is capable. This rule means that the issue must be proved by him who asserts the affirmative in substance and not merely in form".

The defendant's assertion that a customary union existed between himself and the plaintiff's daughter (Rebecca) being the axis on which the issue of the proceedings (i.e. the question of the custody of the child) turned, he was rightly called upon to substantiate his statement by opening the evidence. As Beck points out in his "Theory and Principles of Pleading in Civil Actions" the effect of such a defence or plea is to shift the onus of proof on the defendant of all collateral matter so introduced.

Coming to the third ground of appeal, it may be said at once that an analysis of the evidence establishes beyond reasonable doubt that the defendant has failed to produce adequate or convincing proof of a customary union having been arranged or of any of its prerequisites having been observed in regard to his association with Rebecca.

For six years after its birth, the child Sarah remained at Thabanchu with is maternal grandfather, David Moshoen, to whom it had been taken in 1947. Yet defendant declares that bogadi was discussed, agreed upon and paid in December, 1950, at Thabanchu. Notwithstanding that, the child was permitted to remain with Rebecca's father until 1953.

Defendant's uncle, Abram Magagula, states that he ascertained from the plaintiff, David, in Johannesburg during 1947 the amount of bogadi required and he fixed it then at £40.

The fact that, as stated by defendant, one of Rebecca's brothers came to Johannesburg in September, 1953, to take the child back to Thabanchu indicates that even at that late stage the plaintiff, David, did not regard her as the progeny of a valid customary union between his daughter and defendant.

It is significant too that if, so defendant alleges, such a union did subsist between them, he did not, as one might expect, bring Rebecca's desertion of him to the notice of her father or even request her return. There is also the discrepancy in the evidence of defendant and of his uncle, Abram, as to the denomination of the notes paid over as bogadi, the former declaring that they were one pound and the latter that they were all five pound notes. Where it is alleged that bogadi is paid in cash (which is in itself a departure from normal Native custom), there should be no confusion or uncertainty as to the details as evidence of such payments must of necessity be more precise than would be the case where the formalities are ratified (as they should be) by the transfer of cattle. The evidence of Mr. Coetzee does not asist defendant's case materially and there are other weaknesses in the evidence adduced on behalf of the defendant which need not be detailed here but all of which in the aggregate dispose of this ground (*c*) of appeal as also of the following, i.e. (*d*) mentioned above, this being of similar substance.

It is obvious that the point raised in paragraph (*e*) above of the grounds of appeal does not arise for the Native Commissioner having decided that no customary union existed, the suitability or otherwise of the plaintiff (i.e. the child's maternal grandfather) as its custodian was immaterial and could not affect the position. He became entitled to its custody as a natural consequence under Native Law of the decision by the Native Commissioner.

A general analysis of the evidence given in these proceedings does not indicate that the ordinary prerequisites of a customary union were observed or fulfilled. There is no clear evidence of negotiation between the parties at Thabanchu (the home of Rebecca's father) or of the payment of bogadi or of the formal handing over of Rebecca to the defendant by her father.

True she lived with defendant for a number of years, but it has not been established that she did so with the approval of her father or as a natural consequence of the payment of bogadi.

Judgment in these proceedings must of necessity, owing to the conflicting evidence, be based on the credibility and probability of the evidence adduced by or on behalf of the respective parties; and in this respect and for the reasons given above, the Court is satisfied that no adequate grounds exist for reversing the judgment of the Native Commissioner.

The appeal is therefore dismissed with costs, but the Native Commissioner's judgment is amplified by the addition of the words "The counterclaim is dismissed with costs".

Marsberg (President) and Menge (Permanent Member), concurred.

For Appellant: Adv. D. Spitz, instructed by Messrs Helman & Michel.

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

CENTRAL NATIVE APPEAL COURT.

KUMALO *v.* MOGOTSI.

N.A.C. Case No. 14 of 1954.

Johannesburg: 24th August, 1954. Before Marsberg, President, Menge and O'Driscoll, Members of the Court.

Review proceedings—Matters settled by parties in Court below.

Summary: Plaintiff sued defendant in the Court below for ejectment. During the trial the plaintiff's attorney took offence at a remark from the bench and withdrew. Plaintiff thereafter asked the Native Commissioner to recuse himself, but this was refused. The parties thereupon decided to settle the action and the Native Commissioner recorded the settlement. The plaintiff subsequently brought the matter in review alleging that the proceedings were irregular; that the Native Commissioner should have recused himself and that the Native Commissioner should have added a certain clause, favourable to plaintiff, to the conditions of settlement even though the latter did not ask for this.

Held: That the circumstances disclosed no irregularity.

Held further: That any prejudice which might have been caused by the refusal of the Native Commissioner to recuse himself had been cured by plaintiff's settlement of the action.

Held further: That the Native Commissioner had no duty to formulate conditions which the parties themselves had not mooted.

Application for review of proceedings of the Court of the Native Commissioner, Johannesburg, dismissed.

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

This is an application for review of the proceedings of the Native Commissioner's Court, Johannesburg, in a case in which the applicant, George Kumalo, sued one Thomas Mogotsi for ejectment from certain premises.

It appears this case came to trial on the 3rd May, 1954. The defendant, who appeared in person, had accepted the onus to begin; and in the course of his evidence a remark was made by the Native Commissioner to which plaintiff's attorney took exception. The attorney therefore asked for leave to withdraw from the case and withdrew. The matter was then postponed by consent to the 8th May, 1954. At the resumed hearing plaintiff asked the Native Commissioner to recue himself. This the Native Commissioner refused to do. After a short adjournment granted to enable plaintiff to consider his next step, the latter decided that the matter be proceeded with. This was not done, however. Instead there was a discussion between the parties as a result of which a settlement was arrived at. This was recorded and made an order of court.

That, briefly, is the background to the present proceedings. The grounds of review are as follows:—

(*a*) The proceedings held on the 8th May, 1954, were irregular;

(*b*) the Presiding Officer should have recused himself;

(*c*) the Order of Court was prejudicial to the plaintiff in that it should have included a proviso to the effect that if the defendant did not pay his rental on due date, a Warrant of Ejectment could be issued.

The application for review is supported by affidavits from plaintiff and from the attorney who withdrew from the case. Replying affidavits were filed by the Native Commissioner, the defendant, the Court interpreter, Manana, and a temporary official of the Native Commissioner's office.

In this form the matter came before this Court at the last session. Mr. Helman appeared for the applicant (i.e. plaintiff in the Court below) and asked for a postponement to enable him to file affidavits in rejoinder. The matter was consequently postponed to this session. Meanwhile there have been filed further affidavits from the plaintiff and the attorney.

It is a feature common to all these affidavits and counter-affidavits that they go far beyond what is relevant to the present review proceedings; and it is not easy to sift out the relevant portions.

The first ground of appeal appears to rest on two incidents: Firstly, that the resumed hearing on the 8th May, 1954, took place in the Native Commissioner's office and not in open Court, and secondly, that the Native Commissioner by duress influenced the plaintiff to agree to a settlement.

In his replying affidavits the Native Commissioner states, as to the first allegation, that the proceedings took place in open Court, where he took his seat, not on the bench, but at a table in front of the bench for the convenience of the parties who were no longer represented. In his further affidavit the plaintiff admits this but explains that "the office referred to by me and the Court are in the same room". We regard this explanation as a clumsy attempt to cover up plaintiff's deliberate intention to mislead this Court. It seems also that Rule 47 of the Native Commissioner's Court rules has been overlooked.

As regards the second allegation the Native Commissioner states that he did no more than to suggest that the parties come to a settlement in as much as it appeared to him that the non-payment or receipt of certain rent was the only matter in dispute between them. He assisted the parties in the discussion on the settlement and then recorded the terms thereof. The affidavit of the Court interpreter is to the same effect. The plaintiff does not deny that he agreed to the settlement or the terms thereof; but states that he did so under duress. That is very difficult to believe. The record certainly does not disclose any irregularity. Plaintiff is apparently no stranger to court procedure. He states in his further affidavit: "this is not the first ejectment matter in which I have appeared as plaintiff before Mr. Potgieter, where both he and Manana functioned as officers of the Court". Would such a man allow himself to be persuaded to agree to a settlement against his will when he had the choice of a number of alternative courses before him? He consulted his former attorney on the day before. He could have asked for an adjournment and consulted him again on the proposed settlement. He was quite aware of these facilities because he had already asked for and obtained an adjournment when he wished to consider his position after the refusal of the Native Commissioner to recuse himself.

We find, therefore, that the proceedings on the 8th May were not irregular.

As to the second ground of appeal it appears that the request for recusal took the form of an unsigned document prepared for plaintiff by his former attorney although the latter had already withdrawn from the case. One gathers that this request is also based on two incidents. The first is that after the adjournment on the 3rd May, 1954, there was a discussion between the Native Commissioner and the defendant in the former's office. It is not alleged what the discussion was about. The Native Commissioner's replying affidavit omits to deal with this incident. The second is the incident which took place when plaintiff's attorney withdrew from the case. There is a dispute as to the actual words used by the Native Commissioner at which the plaintiff's attorney took offence. Whatever version is correct we feel that the remark was unfortunate and should not have been made. In justice to the Native Commissioner we must nevertheless record that he immediately gave the attorney an explanation which was in the nature of an apology and certainly took the edge off the offending remark. This matter of recusal was the only point of appeal argued before us by counsel for applicant. However we do not consider that we are called upon to decide whether or not the Native Commissioner should have recused himself, since the possible effect and consequences of such refusal were entirely eliminated by the voluntary act of the plaintiff in agreeing to a settlement of the case. In other words, the plaintiff himself cured the defect of which he complains.

The third ground for review is the least convincing. Why the Native Commissioner should have added conditions to the terms of settlement which the parties themselves had not formulated is not understood; but to hold that his failure to do so constitutes a grave irregularity or illegality is surely absurd.

The application for review is dismissed with costs.

Marsberg (President) and O'Driscoll (Member) concurred.

For Applicant: Adv. D. Spitz, instructed by Messrs Helman and Michel.

Respondent in person.

CENTRAL NATIVE APPEAL COURT.

HLAKOTSA *v.* LENGENE.

N.A.C. CASE No. 4(*a*) OF 1954.

JOHANNESBURG: 27th August, 1954. Before Marsberg, President, Menge and O'Driscoll, Members of the Court.

Spoliation—Restoration of possession terminated in consequence of a wrong judgment—Effect of judgment given in absence of parties.

Summary: Appellant, in a prior action, had sued respondent for ejectment from certain business premises and obtained judgment. By means of legal process she had also ousted him from the premises and goods. These proceedings were subsequently set aside on appeal. Respondent thereafter obtained a rule *nisi,* which was confirmed, ordering the appellant to restore to him possession of the premises and goods. The appellant appealed against this order.

Held: (Menge, Permanent Member, dissenting) that, whether or not there has been spoliation, from the moment the Native Commissioner's judgment was set aside on appeal the appellant could enjoy no greater rights than she had when she first issued summons, and that she must consequently restore possession to the repondent.

Cases referred to:

Gwavu versus Makunga, 1906, E.D.C. 99.
Van Malsen versus Alderson and Flitton, 1931, T.P.D. 38.
Blismas versus Dardagan, 1951 (1), S.A. 145.
Maisel versus Camberleigh Court (Pty.), Ltd., 1953 (4), S.A. 371.
Jasmat versus Another versus Bhana, 1951 (2), S.A. 496.
Nino Bonino versus De Lange, 1906, T.S. 120.
Sillo versus Naude, 1929, A.D. 21.
Makhubedu and Another versus Ebrahim, 1947 (3), S.A. 155.

Appeal from the Court of the Native Commissioner, Johannesburg, dismissed.

Marsberg (President):—

On the 7th April, 1954, this Court delivered judgment on appeal in a case from the Native Commissioner's Court at Johannesburg in which *Stella Hlakotsa* was the plaintiff and *Peter Lengene,* the defendant. The relationship between the parties was recorded by this Court as follows:—

"Plaintiff (Stella Hlakotsa) carried on business as a general dealer at Stand No. 3675, Orlando, until 1st April, 1951, from which date defendant (Peter Lengene) commenced trading on the stand. This was in terms of an agreement entered into between the plaintiff and defendant on 30th April, 1951. According to this agreement the parties concluded a partnership which was to last for five years . . . Defendant was to be solely in control."

Some difficulties arose later and plaintiff purported to cancel the agreement on 19th February, 1953. On 25th April, 1953, plaintiff applied for an interdict restraining defendant from entering the premises, carrying on business or removing the assets pending action to be brought. A rule *nisi* was granted on 28th April, 1953. On 20th May, 1953, the Native Commissioner made this order:—

"Interim interdict to remain in force pending hearing of final judgment in case but execution in terms thereof to be stayed until Court grants final judgment."

In the meantime summons had been issued and the trial proceeded. Defendant, it appears had continued to trade in spite of the interdict. Whereupon plaintiff obtained a further order authorizing the Messenger of the Court to take the assets into his custody. He did so on the 25th July, 1953, although the order was not confirmed until 7th August, 1953. Defendant was, thereafter, effectively restrained from carrying on the business and was ejected from the premises.

On 18th November, 1953, judgment was given in favour of plaintiff ejecting defendant from the premises. This Court of Appeal on 7th April, 1954, set aside this judgment of the Native Commissioner and entered judgment of "Absolution from the Instance with costs". The foregoing is a synopsis of the relevant portions of the Native Appeal Court judgment.

As plaintiff apparently failed to restore the stock-in-trade and reinstate defendant in occupation of the business premises defendant applied on the 1st June, 1954, to the Native Commissioner for an Order:—

"That the Messenger of the Court be authorized to attach the premises situate at Stand No. 3675, Orlando East, Johannesburg, together with the stock previously placed by him in the possession of the Respondent (Stella Hlakotsa) and to place the Applicant (Peter Lengene) in repossession thereof."

Defendant's application alleges as follows (*inter alia*):—

3. The applicant and respondent entered into an agreement of partnership and lease in respect of a general dealer's business carried on at Stand No. 3675, Orlando East, Johannesburg, in terms of which agreement the business of the partnership was accordingly carried on under the supervision, managership and control of the applicant.
4. On or about 25th April, 1953, the respondent instituted action against the applicant for cancellation of the said agreement and dejectment of the applicant from the premises.
5. As a result of the said action, the applicant was dispossessed of his stock-in-trade and of the premises in which the business was being conducted by him as aforesaid.
6. The applicant appealed against the decision aforesaid, which appeal was upheld and the Court's decision was altered to one of Absolution from the Instance and the agreement of partnership and lease is consequently still of force and effect.
7. The applicant, as he was consequently entitled to do by virtue of the aforegoing, requested the respondent to return to him the stock which was taken from him and the occupation of the premises from which he was ejected and which in terms of the judgment of the Court (now reversed) was placed in the possession of the respondent.
8. The respondent has wrongfully and unlawfully refused and still refuses to place the applicant in possession of the said stock and premises.

In answer to these allegations respondent (Stella Hlakotsa) by affidavit said:—

3. That the alleged agreement of partnership was cancelled by me during February, 1953.
4. That I instituted action against the applicant for ejectment and the respondent brought a counterclaim against me and which counterclaim is *lis pendens*.

5. The allegations in paragraph 5 are incorrect. The applicant was not dispossessed of the stock-in-trade as the result of the judgment of the summons brought by me in the said action. He has absented himself from the premises since about July, 1953. The stock-in-trade was attached by the Messenger of the Court in virtue of Interdict proceedings (affidavit by Messenger attached hereto). On the date of the attachment, the Messenger asked me to afford him storage accommodation for the goods attached by him. The said goods have at all times been at the sole risk and disposal of the Messenger who has been notified by me that the said stock should be removed from my possession and control, during February, 1954. The said Messenger has failed to remove the said assets from me but in my presence and hearing at Stand No. 3675, Orlando, he notified the applicant on or about 7th April, 1954, that the goods have been released from attachment and are at his, applicant's, disposal. Applicant refused to take the said goods.
6. The judgment of the Central Native Appeal Court, Johannesburg, was delivered on 7th April, 1954. The said judgment did not adjudicate upon the counterclaim and in terms of which the validity of the said lease is still *lis pendens*.
7. I deny that the said goods have been placed in my possession and repeat the allegations of paragraph 5.
8. Applicant should receive the goods from the Messenger of the Court, who has duly tendered it to him. I refuse to allow the applicant possession and occupation of the premises, and state that the applicant may institute an action against me if so desired. I have not spoliated the application in his posession and I submit that the applicant has not set out details of any alleged spoliation.

In passing it may be stated that the Native Appeal Court in its judgment of 7th April, 1954, indicated that plaintiff could not cancel the partnership agreement on her own (*vide* paragraph 3 *supra*); and that the counterclaim had been abandoned by defendant (*vide* paragraphs 4 and 6 *supra*).

On this application the Native Commissioner ordered "that the Interim Interdict granted on the 9th June, 1954, is hereby made final with costs", the effect of which was to restore defendant to possession of the premises and stock-in-trade.

Plaintiff has appealed against this judgment.

Viewed against the background of this case outlined in the judgment of the Native Appeal Court of the 7th April, 1954, there can be no ambiguity as to the present issue and the following simple facts emerge, viz.—

1. From April, 1951, to 28th April, 1953, defendant, Peter Lengene, was trading as a general dealer on premises No. 3675, Orlando. He was in sole control and occupation of the premises.
2. By interim interdict at the instance of plaintiff on 28th April, 1953, he was restrained from entering the premises, carrying on the business or removing the assets.
3. Judgment for his ejectment was given on 18th November, 1953.
4. On 7th April, 1954, this judgment was set aside by the Native Appeal Court.
5. Defendant has since demanded of plaintiff to be reinstated.
6. Plaintiff refuses to reinstate defendant.

As a Native Commissioner's Court has full jurisdiction in all civil causes and matters between Native and Native it was competent for the Court to receive and adjudicate upon the application.

Argument has been directed to this Court that where someone obtains possession of something in the course of legal proceedings or through the action of the Messenger of the Court such obtaining is not unlawful and that to refuse to restore possession after loss of the legal protection does not constitute spoliation. In the case of Gwavu *v.* Makunga (1906, E.D.C. 99), where a stallion was alleged to have strayed to another's kraal where the owner of the kraal kept it and refused to give it up on demand, it was held that the horse remained in his possession through an act of his own and he was responsible for the control which he exercised over it. Having regard to the facts of that case " and to the fact that it is now found in Makunga's possession, who refuses to give it up, we think that the stallion should be given up to Gwavu who has been dispossessed of the stallion ". Incidentally, there was a dispute in two Court proceedings relating to this stallion. The Court ordered return of the stallion. In the case of Jasmot and Another *v.* Bhana [1951 (2) S.A. Law Reports 496], the Court, where a default judgment had been rescinded, ruled: " that judgment is a nullity and respondent can clearly derive no advantage therefrom nor can petitioners labour under any disadvantage as a result of that judgment ". Again, " As that judgment admittedly has been set aside the Respondent cannot now claim to have any greater rights than he had when he filed his summons in his action in that Court." " The judgment which has been set aside is a nullity and anything obtained by him under it must be restored to the applicants ". Jasmot's case was one in which applicant applicd to be restored to possesion. In van Malsen *v.* Alderson and Flitton (1931, T.P.D. 38), Greenberg, J., quoting from Nino Bonino *v.* de Lange (1906, T.S. 120), states " It is a fundamental principle that no man is allowed to take the law into his own hands; no one is permitted to dispossess another forcibly or wrongfully and against his consent of the possession of property, whether moveable or immovable. It he does so the Court will summarily restore the *status quo ante*, and will do that as a preliminary to any inquiry or investigation into the merits of the dispute ", and the learned judge then goes on to say " that spoliation need not necessarily consist of an act of violence, that illicit deprivation of the right of another is sufficient ". Referring to Gwavu's case the learned Judge remarks: " It was admitted that there the respondent had taken possession of the stallion which he knew the applicant claimed as his property and about which there had been considerable litigation, and I think that clearly was an illicit deprivation by the Respondent of the titled property of another ".

Whatever may have been the protection afforded the plaintiff during the course of the original proccedings before the Native Commissioner it is clear that from the moment the Native Appeal Court set aside the judgment plaintiff could no longer enjoy any greater rights than she had when she issued summons, and conversely, defendant should not labour under any disadvantage. Demand for reinstatement has been made and refused by plaintiff. Following the reasoning in Gwavu's case and the line taken by the judges in Jasmot's case there can be no doubt but that plaintiff must restorc possession to defendant.

The Native Commissioner in his reasons for judgment states:—

> " Now when the Native Appeal Court altered the judgment of the Native Commissioner to one of 'Absolution from the instance', the applicant was entitled to the benefits of such altered judgment; and as the manager of the partnership entitled to be reinstatcd in his former position."

Both parties refer to possible prejudice arising from some interest which the Municipality of Johannesburg may have in their affairs. I do not consider that this is a complication with which this Court need concern itself at this stage.

As, in my opinion, the defendant has applied for relief to which he is entitled, the Native Commissioner has correctly ordered restoration.

The appeal should be dismissed with costs.

O'Driscoll, I.P. (Member):—

This is an appeal by Stella Hlakotsa against a judgment on the 16th June, 1954, by the Native Commissioner, Johannesburg, making final an interim interdict granted by him on the 9th June, 1954, whereby the Messenger of Court was empowered to attach the premises situated at Stand No. 3675, Orlando East, Johannesburg, together with the stock previously placed by him in the possession of the respondent and to place the applicant in repossession thereof.

The grounds of the appeal are briefly that the judgment is against the evidence and is bad in law in that the Native Commissioner erred in granting the application whereas the latter contained no allegation showing that respondent had the consent of the Johannesburg Municipality to occupy the premises and respondent's counterclaim showed that he had no right to the premises and further that the application contains no allegations showing that respondent had a clear right to the property, that he had been wrongfully dispossessed thereof or that he was in possession thereof and that the Native Commissioner erred in finding that respondent and not the partnership was entitled to occupation and that on the original judgment being set aside, the *status quo ante* automatically followed and that spoliation proceedings were the correct proceedings to apply to the application.

Now, to deal with the last point first, it is clear that this is not a case of spoliation in that the essentials to an application for a spoliatory order are not present, the Messenger of Court having attached the goods on Stand No. 3675 and ejected the respondent, Lengene, therefrom on a writ issued from the Court of the Native Commissioner.

The Native Commissioner has mentioned this aspect in his Reasons for Judgment.

This disposes of the last of the grounds of appeal.

In regard to the restoration of the *status quo ante* following on the reversal of the Native Commissioner's judgment by the Native Appeal Court, there appears to be some difference of opinion.

In the first place, it is not understood how, if an appeal against the Native Commissioner's judgment of the 18th November, 1953, had been noted, the writ for the ejectment of the respondent, Lengene, came to be issued. In Levin *v.* Felt and Tweeds, Ltd. [S.A.L.R., 1951 (1) at page 217] acting Judge van Winsen says: "The Common Law is clear that a notice of appeal, save in certain exceptional cases, automatically suspends the execution of the judgment appealed against.".

In Reid *v.* Godart and Another, 1938, A.D., 511, De Villiers, J.A., says: "Now, by Roman Dutch law, the execution of all judgments is suspended upon the noting of an appeal; that is to say, the judgment cannot be carried out and no effect can be given thereto, whether the judgment be one for money or for any other thing or for any form of relief granted by the Court appealed from.

The foundation of the Common Law rule as to the suspension of a judgment on the noting of an appeal is to prevent irreparable damage being done to the intending appellant, whether such damage be done by a levy under a writ or by the execution of the judgment in any other manner appropriate to the nature of the judgment appealed from.".

It appears, therefore, that the writ ejecting the respondent should not have been issued and that he was wrongfully, even if not illicitly, ejected.

The affidavits of the parties to these proceedings show that they entered into an agreement of partnership and lease in respect of a general dealer's business carried on at Stand No. 3675, Orlando East, which agreement was cancelled by Stella Hlakotsa, the applicant in these proceedings.

In Blismas v. Dardagan [S.A.L.R. 1951 (1), page 145], Justice Beadle, states "if the contract was one of partnership . . . so long as the partnership is in existence, the respondent has a perfect right to occupy the premises and run the business, since in the case of partnership one partner cannot against the wish of the other by unilateral action terminate the agreement and dispossess the other partner. The correct course to be adopted by the partner who wishes to terminate the business is for him to apply to the Court for an order dissolving the partnership".

This was apparently not done and the partnership, in so far as these parties are concerned, cannot be regarded as properly, that is, judicially dissolved. The respondent is, therefore, by virtue of and for the purposes of the partnership, entitled to be on the premises mentioned above. The future attitude of the Johannesburg Municipality in regard to the parties or the partnership is not relevant and in my opinion does not affect their rights and relationship to each other as partners or the outcome of these proceedings in which the Municipality is not represented or participating. As the Native Commissioner rightly points out, the attitude of the Municipality in regard to the respondent, Lengene's, right to occupation of the premises is not before the Court.

Regarding the restoration of the *status quo* the views of Van Winsen, A.J., and Watermeyer, A.J., in Maisel *v.* Camberleigh Court (Pty.), Ltd. [S.A.L.R. 1953 (4), page 371], which were summarised as follows, are instructive:—"Where a tenant has been ejected by reason of a judgment which has subsequently been set aside as a nullity, he is entitled to be put back into possession and the *status quo ante* restored, even if he was a statutory tenant, for a tenant is entitled to remain in occupation of the premises until evicted by proper process of law and in such a case, he has not been so evicted".

In Jasmot and Another *v.* Bhana [S.A.L.R., 1951 (2), page 496], which was applied in the above case, Neser, J., in the course of his judgment said:—

> "A default judgment was granted in favour of respondent against second petitioner and as a result of a writ of execution issued to enforce such judgment, respondent obtained possession of the premises. That judgment has been rescinded . . . That judgment is a nullity and respondent can clearly derive no advantage therefrom nor can petitioners labour under any disadvantage as a result of that judgment.
>
> In my opinion petitioners are entitled to claim that any benefit or disadvantage respondent has derived from the judgment or any disadvantage caused thereby to themselves should be set aside and that the *status quo* prior to the judgment be restored. There is no question of spoliation."

Lucas, J., in the same case (at pages 500, 501) said "Whichever is the true position, applicants were by virtue of their lease in possession when the Messenger executed the judgment of the Magistrate's Court. As that judgment admittedly has been set aside, the respondent cannot now claim to have any greater rights than he had when he filed his summons in his action in that Court. However strong may be his rights in that action, he cannot enforce them except by getting a judgment in his favour on them. The judgment which has been set aside is a nullity and anything obtained by him under it must be restored to the applicants".

The points of view expressed by the learned judges in these cases appear to be particularly applicable to the case now under consideration by this Court. The respondent in these proceedings is a tenant of the stand mentioned by virtue of his position as manager and partner in a business on that stand with the applicant in whose name the stand is registered.

The judgment given by the Native Commissioner's Court in favour of appellant (Hlakotse) in these proceedings, for the ejectment of respondent clearly became a nullity on its being set aside by the Native Appeal Court. The Respondent (Lengene) was in consequence entitled to claim to be reinstated and that the *status quo* be restored. This, by reason of the ejectment, involves his restoration to the occupancy of Stand 3675, Orlando East, Johannesburg, in his capacity mentioned, i.e. as manager of and partner in the business being conducted on that stand.

It does not appear to me essential that before he can claim the restoration of the *status quo,* the respondent should be obliged to establish by way of action his right to be in occupation of those premises. Why should he be put to the inconvenience and expense of proving his right to be reinstated in the position from which he had been removed by the premature issue of a writ based on a judgment, the execution of which was suspended by the lodging of an appeal and which was subsequently set aside as the result of such appeal.

Of what value or advantage would be the lodging of the appeal if it were necessary for the outcome to be tested or implemented further by the successful litigant by means of an action in the lower Court.

Apart from other considerations it seems to me that natural justice demands that the party dispossessed in such circumstances should be assisted in obtaining reposession without further action on his part beyond formal application to the Court for such reinstatement.

It is clear that the appellant is not entitled to enjoy or retain any benefit or advantage which she did not possess prior to the institution of the proceedings that led to the order of ejectment and that on the basis of the decisions quoted the *status quo* must *ante omnia* be restored, irrespective of the merits of the position or of any future possible action that may be initiated by either the appellant or respondent or by any third party.

The appeal should be dismissed and the judgment of the Native Commissioner confirmed with costs against appellant.

(Signed) I. P. O'Driscoll, Member.

Menge, Permanent Member (dissentiente):—

This is an appeal against a final order made by the Native Commissioner, Johannesburg, on the 16th June, 1954, after a rule *nisi* had been issued by him on an application for the recovery of possession of certain trading premises and goods.

The proceedings developed out of a case between the parties which this Court heard on appeal in April, 1954. In that case the present appellant, a Native woman, sued the respondent for ejectment from premises occupied by him as her partner in terms of a partnership agreement. She had also obtained an interdict *pendente lite* against the respondent restraining him from entering and trading on the premises; and, under an extension of this interdict, the Messenger of the Court had also attached the stock-in-trade and placed it in appellant's charge pending the final decision of the case. The trial Court gave judgment in favour of appellant. The respondent had filed a counterclaim in that action in which he challenged the validity of the partnership agreement. This counterclaim was not proceeded with and was in fact withdrawn when the matter came before this Court on appeal. On the 7th April, 1954, the Native Commissioner's judgment was altered to one of absolution from the instance.

Thereupon the respondent filed with the Native Commissioner an application for an order authorising the Messenger of the Court to place the respondent again in possession of the shop and stock-in-trade. This was granted in the form of a rule *nisi*. On the return day the 16th June, 1954, argument was heard and thereupon the order was made final.

The burden of the application was that, pursuant to the reversal by this Court, of the Native Commissioner's judgment, the respondent requested the appellant to return to him the stock-in-trade and to restore to him occupation of the premises and goods and that the appellant refuses to comply. Spoilation is not expressly alleged but apparently implied.

The appellant at all events does not allege that he has a real right, a *jus in rem* to the premises and goods. He merely relies on having been in undisturbed possession under an existing partnership agreement and he claims that this possession must be restored to him because it was terminated in consequence of a wrong judgment.

There are replying affidavits, but having regard to the nature of these proceedings, these are only relevant in so far as they deny spoliation. The appellant now appeals against the order granted by the Native Commissioner on the 16th June, 1954.

Counsel who appeared before us for the appellant relied mainly on two grounds of appeal. He submitted that as the respondent had not shown that he had any clear right, he had only a possessory interdict, the *mandament van spolie,* to rely on; but that the essentials for such an interdict were not shown to exist. Secondly he contended that whereas the appellant had a lawful right to the premises the respondent had none by reason of the fact that he did not have the Municipality's approval to occupy the premises. This second submission does not appear to me to be relevant.

Mr. Gordon who appeared for the respondent argued that the latter had rights under an existing partnership agreement which this Court had accepted as valid. This Court's judgment, however, established no rights for the respondent at all. It merely decided that the appellant had not succeeded in her attempt to eject him. In any case, having regard to the procedure which the respondent has adopted, the nature of his *jus in personam* or whether he has any at all, is, as I stated before, irrelevant. Mr. Gordon also stated that although all the essentials of spoliation were present, he was not relying on spoliation, as this presented what he described as certain difficulties but which he did not explain. He relied simply on the fact that the *status quo* had to be restored, but cited no authority for this proposition.

For the purposes of this judgment I will assume in respondent's favour that the appellant has no rights to the premises and goods whatsoever.

Now, it seems to me that a person who has been dispossessed of property has only three courses open to him, depending on the facts:—

(1) If he is the owner of the property or the holder in any form of a *jus in rem* to it, he can apply summarily to be reinstated merely on the basis that he has such right and that the other party has not. [See for instance Jasmat and Another versus Bhana, 1951 (2), S.A. 496.]

(2) If he cannot show that he has a *jus in rem,* but merely a *jus in personam* he can sue in the ordinary way on contract and claim specific performance or damages. His prior possession would have nothing to do with his cause of action.

(3) Whether or not he has real or other rights, or none at all, he can always claim summary re-instatement even against a person with very solid rights if he can prove spoliation.

I know of no other possessory remedy that can be invoked. If there is one then Wille's "Principles of South African Law" (to name only one well-known modern text book) has omitted to mention it. I cannot even think of any circumstances which would justify the rule that "*Actor*" *ante omnia restituendus est.*

Now, the respondent has not shown that he is the holder of a *jus in rem.* Consequently the first course was not open to him. He could clearly have adopted the second course; but he has not done so. No doubt he had a very good reason. As counsel has pointed out, in his previous counterclaim respondent admitted that the partnership agreement on which he now relies, is illegal. The abandonment of that claim did not, of course, affect the admission. It would have to be shown that this was made in error or due to fraud. This is possibly one of the difficulties that Mr. Gordon had in mind. I merely mention it to indicate a possible reason why the respondent did not proceed by ordinary action; the admission has no bearing whatsoever on the present matter.

The only question which remains then is whether the respondent has proved spoliation. True, Mr. Gordon said he did not rely on spoliation; but he nevertheless submitted that all the essentials of spoliation were present. I think, therefore, that we are justified in assuming in respondent's favour that he does rely on spoliation as to at least part of his case; and so we must examine the matter further on that basis.

The vital requisite for amandament van spolie is that the dispossession should have an element of lawlessness, for instance where the dispossession is carried out by force (see Grotius: Introduction to Roman-Dutch Law, 2.3.3.) or without legal process (see v.d. Linden/Morice, Ch. XIII, 2b); or, in the words of Innes, C.J., in Nino Bonino *v.* De Lange, 1906, T.S., 120: where the dispossessor takes the law into his own hands. Now it is clear that the appellant resorted to no form of self-help whatsoever (Sillo *v.* Naude, 1929, A.D. 21). She instituted an action in a competent Court and the Messenger effected the dispossession under lawful authority. The fact that the judgment was subsequently set aside does not make the dispossession lawless or void of authority. Nor does the appellant's present refusal to let respondent occupy the premises constitute spoliation. The reversal of the Native Commissioner's judgment by this Court does not directly or indirectly require her to do anything to re-admit the respondent to the premises. Her attitude is entirely passive. There is no suggestion of self-help. In Van Malsen *v.* Alderson and Flitton and Others, 1931, T.P.D., 38, Greenberg, J., (as he then was) stated that he was "not prepared to assent to the proposition that where one is in possession of an article lawfully, one's refusal to return that article when one's right to retain it expires, would amount to a spoliation.".

If this is a case of spoliation then it must follow that the case of Makhubedu and Another *v.* Ebrahim, 1947 (3), S.A., 155, quoted by counsel, where the circumstances of the dispossession are precisely the same, must have been wrongly decided.

Clearly, therefore, there has been no spoliation. The Native Commissioner realised this too. He gives no reason or authority for granting the order but merely poses the question: "If the defendant could not, after being successful in the Appeal Court and after he had been refused entry by the plaintiff come to Court for assistance, what then must he do to protect the interests of himself and that of the partnership".

It is clear there is no authority in law for the course which the Native Commissioner adopted. Neither the rule *nisi* nor the confirmation should have been granted. The appeal must be allowed with costs and the Native Commissioner's order set aside.

However, as I see it, no judgment has been given in this matter which will have any force and effect. This judgment was not given in the presence of either of the parties; nor were they given an opportunity to be present. It is a judgment delivered in chambers, as it were, and as such not a valid judgment at all.

For Appellant: Adv. D. Spitz, instructed by Messrs. Helman & Michel.

For Respondent: Mr. D. I. Gordon.

NORTH-EASTERN NATIVE APPEAL COURT.

SEKGABI *v.* **MAHLANGU.**

N.A.C. Case No. 40 of 1954.

Pretoria: 9th September, 1954. Before Ashton, Acting President, Bowen and Coertze, Members of the Court.

LAW OF PERSONS.

Maintenance—Transvaal Ordinance No. 44 *of* 1903—*Essentials to be proved before order made.*

Summary: Appellant appeared before a Native Commissioner on the complaint of the respondent that he had unlawfully deserted his two children under fifteen years of age and left them without means of support. The Native Commissioner made an order under Transvaal Ordinance No. 44 of 1903 against appellant for the maintenance of the children.

Held: That before an order is made in terms of the Ordinance the following requirements must be satisfied:—

1. The child for whom maintenance is claimed is under fifteen years of age.
2. The child for whom maintenance is claimed is the child of the father who is summoned.
3. The child for whom maintenance is claimed has been left by the father without adequate means of support.
4. The father of the child can afford to maintain it.

Held further: That the evidence without doubt adequately fulfilled the requirements numbered 1, 2 and 4.

Held further: That as the evidence did not fully meet the requirement of proving that the children were left by the father without adequate means of support, the Native Commissioner had no right to grant the order he did.

Cases referred to: Rex *v.* Rantsoane, 1953 (3) S.A., 286.

Statutes, etc., referred to: Section *three* of Ordinance No. 44 of 1903 (Transvaal).

Appeal from the Court of the Native Commissioner, Pretoria.

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

Application is made for an extension of time within which to appeal against an order made by the Acting Assistant Native Commissioner, Pretoria, against applicant to pay £2 a month maintenance for the two children of Norah Mahlangu on the 20th November, 1953. The application is dated the 15th June, 1954—a considerable time after the last day for noting an appeal.

The reasons given for the failure to note the appeal timeously, are:—

"(*a*) That no proper investigation was made at the enquiry held on the 20th November, 1953.

(*b*) That I was not legally represented.

(*c*) That I was unaware of my rights and the rights of the Complainant in the matter.

(*d*) That at the time I had no funds to engage an attorney."

None of these reasons can be accepted as good and sufficient for the non-noting of the appeal within the time allowed and if consideration of the application ended there refusal of the application would be the inevitable result. But there has to be taken into account the question whether the applicant might have a reasonable prospect of succeeding in his appeal if he were allowed to prosecute it.

It becomes necessary therefore to review the proceedings in the Native Commissioner's Court and I feel that the applicant may be prejudiced if his appeal is not allowed to be heard. The application is accordingly granted.

The appellant was summoned to appear in the Native Commissioner's Court on the complaint of the respondent that he had unlawfully deserted his two children under fifteen years of age and left them without means of support. Appellant was called upon to show cause why he should not support these two children and was warned that an order to do so might be made against him in terms of section *three* of Transvaal Ordinance No. 44 of 1903.

An enquiry was held by the Acting Assistant Native Commissioner at which the mother of the children gave evidence followed by appellant himself and he made the order against which this appeal is lodged on the following grounds:—

"1. That the said order is illegal.

2. That no proper investigation and/or enquiry was made.

3. That the Guardian of the respondent was not present at the said enquiry.

4. That the matter was not investigated under Native Law and Custom.

5. That there was no legal ground upon which an order for maintenance could be made.

6. That the question of previous children born to the respondent and/or her prior seduction were not considered.

7. That the order is bad in law."

It has been laid down that before an order may be made in terms of the Ordinance the following requirements must be satisfied [see Rex *v.* Rantsoane, 1952 (3) S.A. at page 286 *et seq*]:—

1. The child for whom maintenance is claimed is under fifteen years of age.

2. The child for whom maintenance is claimed is the child of the father who is summoned.

3. The child for whom maintenance is claimed has been left by the father without adequate means of support.
4. The father of the child can afford to maintain it.

The evidence at the enquiry without doubt adequately fulfilled the requirements numbered 1, 2 and 4 but that numbered 3 needs more careful examination.

The evidence of the mother in this respects is that the father supported the elder child until he was fifteen months old, he was born in 1947—and that he had not supported the second child at all. She added that she had received nothing at all from the father after he ceased to support the elder child. She also pointed out that children's clothes were dear and that the elder child had to go to school and that she needed £5 a month to maintain them. Nowhere is any mention made that the children, despite the father's defection, are without adequate means of support.

Appellant's evidence did not do anything to help to show that the children were not adequately supported though he said nothing to refute that they were inadequately supported.

The question of his liaiblity whether at Common Law or Native Law does not come into the picture in proceedings under the Ordinance once it has been established that the person summoned is the father of the child. It is possible therefore to eliminate the grounds of appeal numbered 1, 2, 3, 4 and 6.

The remaining grounds of appeal numbered 5 and 7 seem to mean the same thing. One of the requirements precedent to the making of an order, namely that the children were left by the father without adequate means of support, was not fully met and the Acting Assistant Native Commissioner had no right to grant the order he did. The appeal must therefore succeed.

It is ordered that the appeal be and it is hereby allowed and the order of the Acting Assistant Native Commissioner is set aside. This does not mean that the father may not be brought again before a Native Commissioner to show cause why an order should not be made against him in terms of the Ordinance but the Native Commissioner will, in his enquiry, hear evidence and decide on the point whether the children are not adequately supported as well as decide whether the other three requirements mentioned above have been fulfilled.

Bowen and Coertze (Members) concurred.

For Appellant: Adv. T. H. van Reenen, instructed by Nel and Nel.

For Respondent: Mr. M. Bennett of Aubrey Molin, Matterson Bennett and Co.

INDEX OF LITIGANTS: 1954 (3).

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