VERSLAE

VAN DIE

NATURELLE-APPÈLHOWE

1956 (3)

REPORTS

OF THE

NATIVE APPEAL COURTS

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NORTH-EASTERN NATIVE APPEAL COURT.

CILIZA *v.* CILIZA.

N.A.C. CASE No. 44 OF 1956.

PIETERMARITZBURG: 19th July, 1956. Before Steenkamp, President. Ashton and Durr, Members of the Court.

NATIVE LAW AND CUSTOM.

Zulu custom—Essentials to establish existence of a valid custom Section No. 144 *of the Natal Code of Native Law—Heirship:* ukuzalela *customs.*

Summary: A man having become impotent and having only female offspring married a young bride and at the wedding ceremony announced that defendant, his brother's son who would in the absence of male issue become his heir, would beget a son from her on his behalf. Thereafter as a result of this arrangement plaintiff, a son, was born. The impotent man having died, defendant as guardian of plaintiff collected the *lobolo* of certain girls on plaintiff's behalf and when called up to account for them did not do so satisfactorily.

Plaintiff then sued him in a Chief's Court for the *lobolo* cattle and was awarded a full judgment. Defendant, however, appealed to the Court of the Native Commissioner where he unsuccessfully challenged plaintiff's position as heir. Defendant now appeals to this Court on the grounds that the custom relied on by plaintiff was not authoritatively proved and in any case it was repugnant to the principles of public policy and natural justice.

Held: (1) To establish a valid custom it is necessary to show that—

(i) the custom is certain and definite in its incidence;
(ii) the custom is reasonable;
(iii) the evidence is conclusive;
(iv) the custom is in accordance with natural justice and public policy.

Held: (2) That the custom referred to is only another method of attaining the object of the *ukuzalela* customs and there can be no doubt that such a custom has been followed by the Zulu people.

Held: (3) That the custom was proved and that it was not contrary to public policy or natural justice.

Appeal from the Court of the Native Commissioner, Ixopo.

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

Plaintiff claimed in a Chief's Court "thirty head of cattle, pigs and fowls due to plaintiff by defendant to value £150"; defendant's reply to the claim is recorded "Admits liability and states debts for plaintiff's sister were paid"; judgment was entered for plaintiff for "thirty head of cattle, three pigs and fowls with costs £1. 15s.".

The Chief's reasons for judgment are worthy of record in full:—

"1. The plaintiff, Mnikiniki Ciliza, claims the head of cattle that were paid to Nodwengu Ciliza, the defendant, as *lobolo* for the plaintiff's three (3) sisters.

2. The defendant states that he received the *lobolo* in respect of the said three (3) girls and that he paid the marriage expenses with the *lobolo*.

3. Defendant states further that with the *lobolo* of one of the girls he liquidated the debts of the plaintiff's home because he (defendant) was at the time acting for the plaintiff the latter being young.

4. I have found against the defendant because the latter first expelled the mother of the plaintiff only to receive the *lobolo* for the plaintiff's sisters thereafter. This *lobolo* the defendant did not hand over to the plaintiff as he ought to have done since the former was only acting for the latter."

It would seem then that he took the view that defendant accepted plaintiff as the heir in the estate in question (Mcophela Ciliza) and that defendant admitted receiving the *lobolo* of plaintiff's three sisters on his behalf and that defendant did not hand over those cattle to plaintiff. It would appear that the Chief based the first two views on the pleadings and was correct and that he based the third view on the evidence before him. It would be reasonable, too, to expect that when defendant appealed as he did against the Chief's judgment he was appealing aginst the decision based on the evidence and not those decisions based on the admission he made before the Chief.

But when the appeal came before the Native Commissioner and the claim fell to be heard *de novo* the defendant's attorney completely changed the defendant's plea by simply pleading that " plaintiff is not the son of the late Mcophela and is therefore not his heir ", and that the defendant being the nearest surviving male relative of the late Mcophela was Mcophela's heir.

Any doubt there might be about the plea having been wrongly recorded in the Chief's Court was removed when the Chief gave evidence " When I asked Nodwengu (defendant) what Nikiniki (plaintiff) was, Nodwengu said that he had the property on his (Nikiniki's) behalf. Nodwengu said he had the property on plaintiff's behalf because plaintiff was heir ".

This complete *volte-face* apparently passed unnoticed in the Native Commssioner's Court where the main issue was fought on the question whether plaintiff was the heir to Mcophela Ciliza and it is necessary here to give the history of plaintiff's birth. It should be stated at the outset that defendant is the son of Mcophela's brother and had there been no male surviving issue of Mcophela, defendant would have been his heir, Mcophela having died some years ago.

Mcophela's first wife Mazwayi had four daughters and no son and because of the lack of male issue he decided to marry a second wife and to appoint his brother's son to cohabit with her and so raise an heir. He took Nomadasidi and paid her *lobolo* from the cattle received for Nomona one of the daughters of his first wife. At the wedding ceremony it was announced that defendant was to be the person who was to co-habit with the new bride to raise a son for Mcophela and in fact that is what happened. Four years after the union Mcophela died and just after his death plaintiff was born to Nomadasidi and was recognised as the heir. All this came out in the evidence for plaintiff—defendant did not give evidence nor was any witness called on his behalf. Instead his attorney relied upon the points whether the action taken by Mcophela was in accordance with custom and if it was, whether it was not *contra bonos mores.*

Evidence was led before the Native Commissioner as to the custom of a man in his lifetime procuring a " bull " to raise an heir from his wife when he could not raise one himself and the Native Commissioner held that there was such a custom and that it was not *contra bonos mores.* He also held that defendant was liable to plaintiff in the sum of £40, one horse and 16 head of cattle and he altered the Chief's judgment accordingly. He made no order as to the costs of appeal to his Court.

Against that judgment defendant has appealed to this Court (excluding the orders as to costs) on the ground that the judgment is bad in law in that the Native Commissioner erred:—

"A. In distinguishing the case of Lusingu *v.* Pulugudhlu 1914 N.A.C. from the instant one and holding that the Court was not bound thereby;

B. In finding that the custom 'to act as bull' was in conformity with the principles of public policy or natural justice and in not finding that the said custom is repugnant to such principles;

C. In finding that the custom in question, that is, 'to act as bull' had been authoritatively proved by the plaintiff".

In this Court Counsel for appellant abandoned paragraph A of the grounds of his appeal so consideration of the point raised falls away.

Paragraphs B and C are complementary and may concisely and conveniently be put "the Native Commissioner erred in finding that there was such a custom as that described and if there were found to be such a custom he erred in finding that it was not *contra bonos mores*".

This Court called 4 assessors from Zululand and from the area in which the parties resided. The questions and answers form an annexure to this judgment.

The opinions of the assessors which are unanimous are to the effect that where a man finds himself without a son to be his heir and he has lost his virility he may approach a brother or other very close relative to "marry" a bride on his behalf and procreate children for him (the impotent man). The near relation selects the bride and is present at the marriage ceremony when the intention of the union is clearly and publicly announced. The *lobolo* is paid by the impotent man who is regarded as the husband of the bride in all respects except that the chosen relative performs for him the marital act. The near relation performs the same functions as a husband in an *ukungena* union, the impotent husband being regarded as "dead". A son born of the union becomes the heir to the impotent man and the property rights of any daughters who may be born belong to the impotent man. The underlying reason of the custom is to raise an heir and to perpetuate the impotent man and it is not regarded as repugnant to the high moral standards of the Zulu people.

It now falls on this Court to decide whether the evidence adduced before the Native Commissioner, discloses whether the custom referred to was followed and whether the existence of the custom was proved and if proved, whether it is opposed to the principles of public policy or natural justice.

It will be seen that the evidence regarding plaintiff's birth which is set out earlier in this judgment discloses a very close adherence to the custom described by the assessors and this Court must hold that the conduct of the plaintiff's father was in accordance with the actions required of him by the custom so described.

Now to decide whether the custom in question was clearly proved the Court has given consideration to the following points:—

I. Whether it is certain and definite in its incidence.

II. Whether it is reasonable.

III. Whether the evidence is conclusive.

IV. Whether the custom is in accordance with natural justice and public policy.

The opinion of the four assessors who are all in agreement raises no doubt that such a custom is and always has been in existence and this opinion confirms the evidence on the custom given before the Native Commissioner. The customs known as *ukungena*, *ukuvusa* and *ukuzalela*, which may be classed collec-

tively as *ukuzalela* customs viz. customs followed "to raise issue for", have been recognised and there is nothing uncertain or indefinite about them nor anything unreasonable in their recognition.

A The custom under consideration is only another method of attaining the object of the *ukuzalela* customs and there can be no doubt that such a custom has been followed by the Zulu people.

Counsel for appellant contended that the custom described by
B the assessors could not be accepted by the Court as it is *contra bonos mores*. He quoted section No. 144 of the Natal Code of Native Law the relevant portion of which reads ". . . . the Court may take cognisance of any relevant Native Custom which is not opposed to the principles of public policy or natural justice
C whether or not such custom is defined and dealt with under this Code; provided that where such custom is so defined and dealt with the provisions of this Code shall prevail".

It is clear that the custom is not defined or dealt with in the Code and there is nothing in the custom which would place it
D in the category described in the section. Amongst the Zulus there is and has always been a wholesome desire that a man shall not die heirless. The law of primogeniture is followed and the general heir "steps into the shoes of his father" and perpetuates his name. Various methods of ensuring an heir were
E adopted such as the *ukungena* custom already mentioned which has been accepted as valid and in accordance with the principles of public policy and natural justice—so much so is this the case that the Code contains specific provisions regarding it.

The custom described by the assessors in this case follows the
F same principles as the *ukungena* custom, the only difference being that the woman who is designed to bear an heir is not a widow in reality but only by a fiction, that is, the impotent husband though alive is regarded as "dead" because of his inability to consummate his union with the woman whom he
G marries with the sole object of bearing him an heir. The begetter—more indelicately referred to as the "bull"—behaves in the same way as an *ukungena* husband. This Court's predecessors have seen nothing against morality or contrary to good morals in the *ukungena* custom and this Court likewise holds the
H same view regarding that custom and the one now under consideration.

In the result, the Court holds that the custom was proved and that it is not contrary to public policy or natural justice and must be accepted. The judgment of the Native Commissioner
I was therefore correct but it would appear that the Native Commissioner and the parties in their pre-occupation with the custom, overlooked the fact that defendant had indicated that while he acted as plaintiff's guardian he had legitimately spent some of the estate assets and was entitled to deduct such expenditure from
J the property he held for plaintiff. This point was raised by this Court and Counsel for both parties agreed that if the Native Commissioner's judgment was upheld mention should be made that the legitimate expenses incurred could still be claimed. In giving the judgment which follows the Court desires it to be
K understood that the defendant's right to the legitimate expenditure mentioned is preserved.

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

ANNEXURE.

L Questions were put to the undermentioned Assessors and their replies are recorded as follows:—

Gilbert George Mkize, Ndesheni Zulu, Magegezi Dhlamini and Ngobongwana Keswa:

Question.—Do you know of any custom among the Zulus
M whereby a man, who has no son and heir, who is old and impotent, and would like to have an heir before he dies, *lobola's*

a young woman and gets the man who would have been his heir (if he had no son) to sleep with that woman with a view to providing him with an heir?

GILBERT GEORGE MKIZE.

Answer.—According to Zulu Custom there is such a custom. I know that custom that when a man is married to a woman himself and he himself sees he cannot get any issue from this woman. The usual custom is that the members of that kraal meet secretly and then go privately to the wife of the man and arrange for another man to go and sleep with that woman without the husband knowing about it. The family assembles secretly. The husband does not come into it at all. They select one of their people to sleep with the wife without the husband knowing. It is an open secret. It is just a pretence.

There is another different way of procreating an heir in their own kraal. When I have a brother I can send my brother to make love to another girl. He can marry that girl and I pay *lobolo* at my own kraal and so I get the heir. They stay at my own kraal. Everything must be done at my own kraal. If a son is born to the woman, that is my heir. It is an open thing. The old impotent man knows about it because he gets his brother to do it.

IN ANSWER TO QUESTIONS ARISING FROM THE REPLY PUT BY MR. ASHTON.

Answer.—If I have no power to procreate I give cattle to my brother and get him to *lobola* a girl on my behalf and marry her on my behalf. The son of such a union is my heir. It is done publicly. The man should be a brother or a very close relative. The bride and the bridegroom live in my kraal, the kraal of the man who paid the *lobolo*. When the woman makes beer it is made in the same kraal. In all respects except for sleeping with the woman, the impotent man is the husband.

If the brother or close relative was already a married man and he was selected to procreate an heir he stays for a couple of days on and off with this woman and then goes back to his own kraal.

Question.—If the impotent man died when the bride was pregnant and a son was born after his death would that make any difference?

Answer.—That makes no difference because the issue is of the house of the deceased. It is still the child of the man who provided *lobolo*.

Question.—How would this marriage be registered?

Answer.—I dot not remember of any such union that was ever registered.

Question.—Do you know of any union like this?

Answer.—Yes, I know of such people alive now. Chief Matole Butelezi was procreated the same way. His father was Tshanibezwe. He was impotent. Mkandumba was Tshanibezwe's younger brother and he married this girl and begot an heir on his behalf. There was no dispute when Matole succeeded his father. This took place in the Mahlabatini district. There are not very many cases of this nature but I know of several. The custom takes place amongst commoners as well as Chiefs.

Question put by Mr. Durr.

Question.—The instances you know of are very old instances. If you were consulted by your people today, would you, under present conditions, still approve of it?

Answer.—It is the Native custom. We cannot run away from that. This impotent man is regarded as a "dead" man. He has to be assisted.

Question put by Mr. Bulcock.

Question.—Is it correct then that the real underlying intention in this custom is to establish an heir and to perpetuate the family?

A *Answer.*—Yes.

Question put by Mr. Goosen.

Question.—Does this "bull" receive a fee per child and if so, what is the fee?

Answer.—No. If the man is incapacitated he is assisted by his B brother who does not seek payment.

Question put by Mr. Ashton.

Question.—The Zulus were very moral people. Would it not be an infringement of their high moral Code for a man to come and, in effect, commit adultery with a live man's wife?

C *Answer.*—No. It is a matter arranged by the family by agreement.

Questions by Mr. Steenkamp.

Question.—And this is only done when a man has no son?

Answer.—Yes.

D *Question.*—If he has a son it would not be customary for a man to do that to get more sons?

Answer.—No. It is not so commonly known as it is done in secret. If a man has three wives and the first wife has a son but the other two houses have no children the family could get E a man to come and give them children.

Question by Mr. Ashton.

Question.—If, in his efforts to provide an heir, the brother or close relative causes several daughters to be born, who gets the *lobolo* for these daughters?

F *Answer.*—The husband or his heir if he is deceased. The natural father has nothing to do with the offspring.

Question by Mr. Steenkamp.

Question.—What is this custom called,

Answer.—*Ukuzalela.*

G NDESHENI ZULU.

I concur with all Mkize has said. In the first custom he described the husband goes into the hut with the brother to prevent there being any allegation of adultery.

Question by Mr. Steenkamp.

H *Question.*—You know that customary unions are all registered. Before it is registered an official witness appears at the ceremony. When this impotent man marries this young woman does an official witness officiate and ask the parties whether they are doing it of their own free will and consent?

I *Answer.*—Yes. They ask the real husband, not the "bull".

MAGEGEZI DLAMINI.

I agree with all Mkize has said.

Question by Mr. Steenkamp.

Question.—Do your people follow this custom?

J *Answer.*—The same custom, just as Mkize has described, has been followed where I come from in the Harding district. The custom exists there but it is kept secret. It is kept secret because the real husband is still alive and the family is trying to assist him.

Question.—Is it not perhaps because no man wants the world to know that he is impotent?

Answer.—They hide the impotency so that when the woman is impregnated, people will think the husband was responsible. I am a brother of Chief Koko of the Hlangwini tribe. We border on Pondoland, it is just on the other side of the river. We also call it *Ukuzalela* custom. I cannot say whether the Pondos have the same custom because they are too far away from me.

NGOBONGWANA KESWA.

I am an Induna. When my Chief was ill I was acting as Chief. Solomon Zulu is my Chief.

I have heard what Mkize has said. The custom exists in my area. There is not a single word I can criticise.

I know of people who have practised that custom. There is a case I dealt with when I was acting for my Chief. I know of some people in my area who became heirs in this manner. Mpondo Duma is one. There was a case about his heirship. The case was only before the Chief and the Native Commissioner.

GILBERT GEORGE MKIZE.

Question by Mr. Ashton.

Question.—You spoke as though this custom is a very well-known one, yet in the books we have on Native Law which we have looked up, not one of them mentions this custom that you have mentioned. Can you say why?

Answer.—The only reason that I can advance is that it was very unusual for such a case to be brought before the Court. The custom was always a well-kept secret and it was difficult for the brothers of the man who selected the "bull" to say to the husband or the son that a case must be made about it.

Questions by Mr. Durr.

Question.—You have told us that if the old man is impotent he sends his brother to marry a girl and he pays the *lobolo*. What is the position where the old man himself marries the young woman and a customary union is entered into between them? Is it part of the custom that the old man should then agree with his young wife that he get his brother or a near relative to come and raise an heir with the old man's knowledge and consent?

Answer.—I have never heard of it happen that way. Usually it is the senior men of the kraal who come together and select the man.

Question.—Is an official witness present at this marriage? How is it registered?

Answer.—It is registered in the name of the old man.

Questions by Mr. Bulcock to Mkize.

Question.—In the second custom, can the old man or the "bull" choose the wife?

Answer.—Either may choose the wife but the *lobolo* must be paid by the impotent man.

Question.—Is it immaterial whether the woman is married to the impotent man or the young man, it is understood that she marries to raise an heir?

Answer.—Yes, there is a difference because the custom is not the same. When the impotent man gets the young man to marry this girl, he pays *lobolo* and the woman is regarded as his (the impotent man's) wife. Her offspring accrues to the impotent man. In such a case an official witness attends and officiates. The practice applies to "house" heirs as well.

For Appellant: Mr. N. Goosen of C. C. C. Raulstone & Co.
For Respondent: Mr. H. L. Bulcock.

NORTH-EASTERN NATIVE APPEAL COURT.

SHANDU *v.* SHANDU.

N.A.C. CASE No. 19 OF 1956.

ESHOWE: 24th July, 1956. Before Steenkamp, President, Ashton and Alfers, Members of the Court.

NATIVE LAW AND CUSTOM.

Zulu custom—Ranking of wives—Creation of "houses".

Summary: The father of plaintiff and defendant had taken three wives. To the first only sons were born one of whom is defendant and to the second were born one son, plaintiff, and four daughters. Defendant was advanced cattle to *lobola* a wife from cattle paid for plaintiff's sister and plaintiff sought to recover the loan. Against the contention that defendant's house could not be enriched at the expense of plaintiff's house defendant argued that as the father of the parties had made no declaration regarding his wives, the three wives formed the "*indhlunkulu* house" and their husband could use any of the property normally belonging to each wife's separate house for the benefit of the "*indlulunkulu* house".

Held: (1) Affiliation in Zulu customary law is not automatic.

Held: (2) In Zulu customary law each wife married creates a house with all the rights and liabilities of a house.

Held: (3) In Zulu customary law one or more houses may comprise a section such as the *indhlunkulu* or *ikohlwa* but within that section each house has its own separate and distinct entity.

Held: (4) The cattle taken from the second house to assist the first house are a returnable house debt and plaintiff must succeed.

Appeal from the Court of the Native Commissioner, Eshowe.

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

Plaintiff instituted action against defendant in a Chief's Court for nine head of cattle which he said their father had lent to defendant to pay *lobolo*. The defendant denied liability but the Chief gave judgment for plaintiff as prayed with costs. Against this judgment defendant appealed to the Court of the Native Commissioner, Eshowe, where the Native Commissioner, without dismissing the appeal upheld the Chief's judgment but reduced the number of cattle awarded from nine to seven in accordance with the abandonment of two head included in the judgment by plaintiff during the hearing of the appeal.

It appears from the evidence that Mguzu, the father of the parties, married three wives, 1. Nhlambase, mother of defendant, 2. Bibi, mother of plaintiff, and 3. Mazibane. Nhlambase had sons only and when she died Mguzu married her sister Bibi who bore plaintiff and four daughters. When defendant married he was advanced six head of cattle from the *lobolo* paid by the Cebekulus for Tandekile the daughter of Bibi and one beast from the personal property of plaintiff. It should here be stated that defendant was the admitted general heir of his father and heir to the house of his father's first wife whilst plaintiff was heir to the house of his father's second wife.

The case revolves round the questions whether Mguzu gave part of Tandekile's *lobolo* to defendant in return for the contribution by defendant of part of his earnings for the upkeep of his kraal or whether the house of Bibi was not part of the *indhlunkulu* section of Mguzu's kraal and defendant being the heir would be entitled to have his *lobolo* derived from a girl of that section and not *lent* to him. A

The matter is in reality simplicity itself. On the evidence it is clear that Mguzu did not divide his house into sections and accordingly his wives must rank in accordance with the dates of their marriage. It is equally clear that Tandekile belonged to the second house and the use of her *lobolo* for an inmate of the first house would create a debt against the latter in favour of the former. And finally it is just as clear that plaintiff being the heir of the second house would be entitled to claim back the cattle used from his house for defendant's *lobolo*—namely six head. B C

Counsel for appellant contended that when the father of the parties—the late Mguzu—entered into a customary union with his second wife Bibi a second house was not thereby created. He argued that if there were no declaration regarding the wives taken, the three of them formed the "*indhlunkulu* house" and their husband could use any of the property normally belonging to each wife's separate house for the benefit of the "*indhlunkulu* house". D E

He was unable to quote any decided cases to support the contention he made but maintained that it was in accordance with Zulu customary law. It is true that when the first married wife died Mguzu took her sister in marriage but there is nothing to show that he affiliated her to her house. Affiliation is not automatic as counsel suggested it was and as sons only were born to the first wife it is unlikely that there was any property in the first house which could have been used for the second wife's *lobolo* and so raise a presumption of affiliation. F

Much research into the point raised by Counsel for appellant has been made but this Court has found nothing which would allow it to subscribe to any contention that in Zulu customary law each wife married does not create a "house" with all the rights and liabilities of a house whatever may be the position in regard to other Native races. One or more houses may comprise a section such as the *indhlunkulu* or *ikohlwa* but within that section each house has its own separate and distinct entity. G H

It follows that the cattle taken from the second house to assist the first house are a returnable house debt.

In regard to the seventh beast it was not disputed that it was borrowed by defendant from plaintiff personally. I

The appeal cannot succeed but it will be seen from the first paragraph of this judgment that the Native Commissioner did not state whether the appeal to his Court against the Chief's judgment succeeded or not. It should be obvious that this should have been stated by him. J

In the circumstances it is ordered that the appeal to this Court be and it is hereby dismissed with costs but the Native Commissioner's judgment is altered to read "The appeal is dismissed with costs. The Chief's judgment for plaintiff as prayed with costs is upheld but the number of cattle awarded to plaintiff is reduced from nine to seven head". K

For Appellant: Mr. H. H. Kent.

For Respondent: Mr. S. H. Brien i.b. Bestall & Uys.

NORTH-EASTERN NATIVE APPEAL COURT.

MKWANAZI *v.* MKWANAZI.

N.A.C. CASE No. 26 OF 1956.

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

NATIVE LAW AND CUSTOM.

Zulu customary law—Interpretation of section 31 *of the Natal Native Code.*

Summary: Plaintiff claimed to be the heir to Stock Hulumeni and defendant contested the claim contending that immediately after plaintiff's mother, who was also his own mother, married plaintiff's father she gave birth to a child—himself—sired by her previous husband. Defendant contended that as he was born of a married woman, his mother, during the subsistence of a customary union he ranked as a child of the house of his mother and so was the eldest child of plaintiff's father and consequently his heir.

Held: (1) That although section 31 of the Natal Code of Native Law provides that a child born during the subsistence of his mother's customary union ranks as a child of his mother's house, the basic principle of Native succession is lineal descendency through males.

Held: (2) That defendant not being the lineal descendant of Stock Hulumeni cannot succeed to him as heir as against plaintiff who was such a descendant.

Cases referred to:

Mbangayiya N.O. *v.* Ngazana 1901 N.H.C. 44.

Appeal from the Court of the Native Commissioner, Hlabisa.

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

An application for the condonation of the late noting of this appeal is granted on the ground that there is a fair prospect of success if the appeal is heard.

Plaintiff in a Chief's Court claimed a declaration that he was the heir to Stock Hulumeni; defendant replied that when plaintiff's mother who was also his mother married plaintiff's father she was with child to one Manqele and consequently plaintiff could not be heir to Stock Hulumeni.

The Chief found for plaintiff and declared him to be the heir and against that judgment defendant appeal to the Native Commissioner. That officer allowed the appeal and declared defendant to be the heir. Plaintiff now appeals to this Court on the ground that the Native Commissioner's judgment is against the evidence and the weight of evidence.

Plaintiff in his evidence declared that he was a son of Poqekile Zungu who married Hulumeni Mkwanazi and he said that defendant was born of the same mother but was sired by Magqubuwejaji Manqele. He admitted that defendant was born on the day after Hulumeni married Poqekile and went on to say that fourteen (instead of fifteen) head of cattle were paid as *lobolo* by Hulumeni for Poqekile.

Magqubuwejaji Manqele gave evidence and said that defendant was his son; that Poqekile was his wife before she married Hulumeni and that she ran away from him and a few days later the marriage to Hulumeni took place. He said, too, that Poqekile was pregnant to him when she ran away from him to Hulumeni. A
Hulumeni's brother corroborated plaintiff's story and so did Hulumeni's brother's wife.

At the close of plaintiff's case defendant asked for judgment "as he had no case to answer" and the Native Commissioner thereupon allowed the appeal and changed the Chief's judgment B to one declaring defendant the heir to Hulumeni.

It is clear that the Native Commissioner based his judgment on section 31 of the 1932 Code (which it must be presumed is applicable although the date of the birth of the claimants is not mentioned) but it must be borne in mind that despite that section C the basic principle of Native Succession is lineal descendancy through males only and defendant not being the lineal descendant of Hulumeni cannot succeed to him as against plaintiff. The case of Mbangayiya N.O. *v.* Ngazana 1901 N.H.C. 44 is illuminating on this very point. D

In view of the wording of the Native Commissioner's reasons for judgment it is possible that defendant was not called on to lead evidence to challenge the truth of plaintiff's story as the Native Commissioner thought it made no difference so long as defendant was born *after* the union between his mother and E Hulumeni and the question arises whether the case should not be sent back to be heard to a conclusion but defendant did not challenge any of plaintiff's witnesses in cross-examination on the point and it seems that he accepted their version.

In the circumstances the appeal is allowed. The Native Commissioner's judgment is set aside and for it is substituted "The F appeal is dismissed with costs. The Chief' judgment declaring plaintiff to be the heir and awarding him costs is upheld". The costs of the appeal to this Court are awarded to plaintiff but by agreement with Counsel for appellant who only received his G instructions on the morning of the hearing the fees under items Nos. 1 and 4 of the Tariff are not allowed.

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

For Respondent: In default.

NORTH-EASTERN NATIVE APPEAL COURT.

TWALA *v.* TWALA.

N.A.C. CASE No. 47 OF 1956.

ESHOWE: 25th July, 1956, before Steenkamp, President, Ashton and Alfers, Members of the Court.

LAW OF PROCEDURE.

Rules of Native Chief's Courts—Extension of time within which H *to appeal from a Chief's judgment. Rule No.* 9 *of Government Notice No.* 2885 *of* 1951; *Section* 116 *of the Code of Native Law—Procedure—Onus of proof.*

Summary: Plaintiff sued his brother in a Chief's Court and defendant not being satisfied with the judgment notified the I Chief verbally that he was appealing. The parties were house heirs in the kraal of their late father. Defendant did not note the appeal within the time laid down by the rules and the Native Commissioner refused to grant an application for condonation of the late noting. Against this refusal J

defendant appealed to this Court. One of the grounds of appeal was that there was no allegation in plaintiff's claim that defendant had inherited anything from his late father and consequently plaintiff could not recover anything.

A *Held:* (1) There being no record to ascertain whether or not on the evidence led in the Chief's Court there was a prospect of the appeal being successful, there might have been such a prospect; there might have been good reason why defendant did not comply with the rules and defendant did
B in fact express timeously his intention to appeal.

Held: (2) In the circumstances the Native Commissioner should not have refused the application.

Held: (3) It is not necessary for a plaintiff to allege or prove that a defendant heir inherited sufficient to meet a claim
C arising from the estate. It is for the defendant to plead and prove his position if he wishes to rely on the provisions of Section 116 of the Natal Code of Native Law.

Statutes, etc., referred to:—

Section 116 of the Natal Code of Native Law (Proclamation
D No. 168 of 1932).

Rule 9 of Native Chiefs' Courts' Rules (Government Notice No. 2885 of 9th November, 1951).

Appeal from the Court of the Native Commissioner, Ingwavuma.

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

Plaintiff sued defendant his brother in a Chief's Court for fifteen head of cattle " being *lobolo* paid by our father in respect of defendant's mother " to Sigidi Matenjwa. Defendant denied liability and the Chief gave judgement for plaintiff as
F prayed. The Chief explained in his reasons for judgment that defendant's mother had given evidence to the effect that the cattle paid for her *lobolo* were not refunded to the *indhlunkulu* and he accordingly ordered fifteen head to be paid to plaintiff. The judgment was given on the 27th October, 1954, and
G on the 17th April, 1956, defendant made application to the Native Commissioner for an extension of time within which to appeal against it.

In his affidavit supporting the application defendant said that he informed the Chief verbally of his intention to appeal on
H the day judgment was given and that he thought the Chief would take the necessary steps to send him to the Native Commissioner's office for the necessary formalities. The affidavit went on to declare that plaintiff has no right to the fifteen head of cattle because plaintiff as heir in their father's estate had taken
I possession of the *lobolo* of two of the girls in the *ikohlwa* section of the kraal to which defendant belongs and accordingly the *ikohlwa* owes the *indhlunkulu* nothing. The affidavit concludes by contending that an important point of law is involved in the case and prays that the Native Commissioner will allow
J the appeal to be heard.

At the hearing of the application the Native Commissioner put defendant in the witness box and there he admitted that fifteen head of cattle were paid as *lobolo* for his mother and that but for the fact that plaintiff received *lobolo* for the daughters
K he would be entitled to a refund; he said that plaintiff had not taken the *lobolo* but the girls themselves one of whom had died and the other had disappeared; he contended that he had a counterclaim for *lobolo* received for Mtambosi and Konjwasi. At the end of the evidence it is recorded " Defendant does not
L dispute the fact that fifteen head is due to the plaintiff but he dislikes the plaintiff because he drove his sister away."

The application was refused by the Native Commissioner who found that no good reason was advanced for the condonation of the late noting and no good cause was shown that the appli-
M cant might succeed in his action.

The defendant has now appealed against the Native Commissioner's decision on seven grounds but Counsel for appellant relied on Nos. 2 and 4 only, which reads as follows:—

"2. The learned Native Commissioner erred in holding that the appellant failed to show good cause for extension of the prescribed period in which to appeal, which good cause the appellant did in fact show; and the learned Native Commissioner, in his reasons for judgment, in fact distinguished appellant's case from those decided cases where mere ignorance did not justify late noting of appeal.

4. There is no allegation in respondent's claim and no evidence on record that appellant inherited anything at all from his late father, and there is therefore, no good ground on which appellant could be held responsible for his father's debt, if there were any."

In regard to ground No. 4 it is not necessary for a plaintiff to allege or prove that a defendant heir inherited sufficient to meet a claim arising from the estate. It is for the defendant to plead and prove his position if he wishes to rely on the provisions of section 116 of the Code.

There being no record to ascertain whether or not on the evidence led in the Chief's Court there was a prospect of the appeal being successful it is not clear how the Native Commissioner decided that such was the case. In the circumstances in view of the possibilities that there might be such a prospect and there might have been good reason why defendant did not comply with the rules and because he did in fact express timeously his intention to appeal against the Chief's judgment. this Court feels that the Native Commissioner's refusal should be set aside.

The appeal against the Native Commissioner's refusal to condone the late noting of the appeal to his Court is upheld and his refusal to condone the late noting of the appeal to his Court is set aside and for it is substituted "The application for condonation of the late noting is granted."

For Appellant: Mr. S. H. Brien instructed by J. Gerson.

For Respondent: In default.

NORTH-EASTERN NATIVE APPEAL COURT.

SIBISI *v.* **ZONDI.**

N.A.C. CASE No. 12 OF 1956.

DURBAN: 30th July, 1956. Before Steenkamp, President, Ashton and Rossler, Members of the Court.

LAW OF PROCEDURE.

Application for postponement of hearing.

Summary: A postponement was asked for by Counsel for appellant on the ground that he was consulted only a day or so before the appeal was set down for hearing.

Held: As appellant had had ample time to consult and brief Counsel the Court refused to grant a postponement of arguments.

Appeal from the Court of the Native Commissioner, Durban.

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

Counsel for appellant when called upon to prosecute the appeal intimated that he was only consulted by appellant on Saturday the 28th of July, 1956, and not having had a copy of the record he was unable to prepare argument. He applied for postponement of the appeal. B

This Court drew Counsel's attention to the fact that appellant signed the notice of hearing (N.A. 149) on the 8th March, 1956. As he had ample time to consult and brief Counsel, the Court refused to grant a postponement.

Counsel then withdrew from the case and appellant who had C conducted his own case in the Court below was called upon to prosecute the appeal.

For Appellant: in person.

For Respondent: in person.

NORTH-EASTERN NATIVE APPEAL COURT.

GUDASE *v* E.C. SWALES N.O. & ANOTHER.

N.A.C. CASE No. 10 OF 1956.

DURBAN: 1st August 1956. Before Steenkamp, President, Ashton and Rossler, Members of the Court.

DECEASED ESTATES.

Inheritance and succession—Immovable property—Whether it is devisable by Will—Section twenty-three *of Act No.* 38 *of* 1927 *and section* 108 (2) *of the Natal Native Code.* D

Summary: Application was made before the Assistant Native Commissioner, Durban, for a declaration that certain immovable property in a deceased Native's estate was house property and not devisable by Will. E

Held: That immovable property does not fall within the provisions of sub-sections (1) and (2) of Act No. 38 of 1927 and that accordingly, whether house or kraal property, it can be devised by Will.

Held further: That section 108 (2) of the Natal Native Code cannot over-ride one of the provisions of Act No. 38 of 1927; if it purports to do so it is to that extent *ultra vires.* F

Statutes, etc., referred to:

Section 23 (9) of Act 38 of 1927.

Section 108 (2) of the Natal Code of Native Law. (Proclamation No. 168 of 1932.) H

Section 5 (1) Regulations for the Administration and distribution of Native Estates (Government Notice No. 1664 of 1929).

Appeal from the Court of the Native Commissioner, Durban.

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

This matter comes to this Court on appeal from the Assistant Native Commissioner, Durban, before whom it came as an application for a declaration that certain immovable property in the deceased estate of the late Mtwalo Gudase was house property and that as such the late Mtwalo Gudase was unable to bequeath it by Will to his wife Irene.

The matter was brought to the Assistant Native Commissioner because of the following extract from a letter addressed by the Master of the Supreme Court, Pietermaritzburg, with whom a copy of the late Mtwalo Gudase's Will was filed:—

> "If the contention is that the testator had no power to dispose of certain property because it is protected against testamentary disposition, this would not be grounds for declaring the Will invalid but might constitute a claim for the land if I am furnished with a certificate by the Native Commissioner that the land in question is non-devisable by Native Law."

It would seem that the Master was under the impression that is was necessary to call evidence to show whether the property bequeathed was "house" or "kraal" property but as the property was immovable there was no necessity to distinguish or classify it because of the provisions of sub-section (9) of section *twenty-three* of Act No. 38 of 1927. There was consequently no necessity for the matter to have been referred to the Native Commissioner as the question whether the property was devisable by Will or not rested upon the interpretation of section *twenty-three*, sub-sections 1, 2 and 3 of Act No. 38 of 1927.

Those sub-sections read as follows:—

> "23. (1) All movable property belonging to a Native and allotted by him or accruing under Native Law or Custom to any woman with whom he lived in a customary union, or to any house, shall upon his death devolve and be administered under Native Law and Custom.
>
> (2) All land in a location held in individual tenure upon quitrent conditions by a Native shall devolve upon his death upon one male person, to be determined in accordance with tables of succession to be prescribed under sub-section (10).
>
> (3) All other property of whatsoever kind belonging to a Native shall be capable of being devised by Will."

In regard to sub-section (1) above the property devised is immovable so does not fall within its provisions; in regard to sub-section (2) the property is described as a sub-division of the Wentworth Farm in the City and County of Durban and is clearly not land in a location held on quitrent conditions. It follows therefore that the land whether "house" or "kraal" property could be devised by Will.

The point has been made that section 108 (2) of the Natal Code of Native Law (Proclamation No. 168 of 1932) provides that house property may not be devised by Will but that Proclamation was proclaimed under and by virtue of Act No. 38 of 1927 and clearly cannot over-ride one of the provisions of the Act; if the section of the Proclamation purports to do so it is to that extent *ultra vires*.

It is clear therefore that the property sought to be declared devisable by Will was so devisable; the Assistant Native Commissioner was right in his judgment and the appeal cannot succeed but it is a moot point whether what amounted to nothing more than the interpretation of the law by the Assistant Native Commissioner will be of any service to the Master of the Supreme Court whose letter quoted above was the reason for the matter being brought before the Assistant Native Commissioner. In this

connection it may be profitable to refer to section 5 (1) of the Regulations for the administration and distribution of Native Estates—Government Notice No. 1664 of 1929—which imposes on a Native Commissioner a duty to furnish to an *excutor* A information regarding such property only as is referred to in sub-sections (1) and (2) of section *twenty-three* of Act No. 38 of 1927.

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

In regard to costs it is felt that the bringing of the action was B forced upon applicant in the Court below and that in all the circumstances each party should bear his or her own costs. Counsel for respondent intimated that he had no objection to such an order as to costs being granted.

For Appellant: In person.

C For Respondent: Adv. B. D. Burne (instructed by de Charmoy & Angel).

NORTH-EASTERN NATIVE APPEAL COURT.

LETLATSI *v.* MOKOTELI.

N.A.C. CASE No. 28 OF 1956.

DURBAN: 2nd August, 1956, before Steenkamp, President, Ashton and Rossler, Members of the Court.

DESERTED WIVES AND CHILDREN ACT. No. 10 of 1896 (NATAL).

Summary: Appellant was called upon to show cause why an order should not be made against him to pay maintenance for his two children born to the complainant out of wedlock.

D

Held: (1) Before an order can be made in terms of section *three* of Act No. 10 of 1896 (Natal) the presiding officer must be satisfied that the wife or child, as the case may be, is in fact without means of support and it behoves the officer conducting the enquiry to record that he is so satisfied.

E *Held:* (2) That the essentials which must be proved before an order is made are similar to those laid down in the case of Sekgabi *v.* Mahlangu 1954 N.A.C. (N.E.) 164 in respect of actions founded on Transvaal Ordinance No. 44 of 1903.

Statutes, etc., referred to:

F Section *three* Act No. 10 of 1896 (Natal).

Cases referred to:

Sekgabi *v.* Mahlangu, 1954 N.A.C. (N.E.) 164.

Appeal from the Court of the Native Commissioner, Durban.

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

G Tifu Letlatsi was brought before the Additional Native Commissioner, Durban, in terms of the Deserted Wives' and Children's Act No. 10 of 1896 (Natal) to show cause why an order should not be made against him to pay maintenance for his two children born to Lonea Mokoteli.

After hearing evidence which included a denial of paternity the Additional Native Commissioner ordered Tifu to pay £1. 10s. a month maintenance for the second child Lehlonono and against that order Tifu has appealed to this Court on the ground that "the judgment is against the evidence and against the weight of evidence more particularly in finding that there was corroboration of the plaintiff's claim that the defendant was the father of her children."

It should here be noted that despite the summons and the finding of the Additional Native Commissioner referring to two children the order was in respect of the second child only—why this was so is not clear from the record of the proceedings.

Lonea Mokoteli's evidence is clear as to the paternity of the children and it remains to ascertain whether she is supported in her evidence as Tifu has denied her evidence on oath.

Joseph Khau gave evidence to the effect that Tifu lived with Lonea for several years at Ridge View and confirmed the latter's testimony to the same effect. Lonea was recalled and gave evidence as to an injury mark in the small of Tifu's back and Tifu admitted that he had such a mark, though he denied having ever told Lonea about it.

Tifu himself said that he did not know Lonea before she made a complaint against him. He denied being her lover but then he admitted that he first saw her in 1953 and endeavoured to persuade the Court that she had a husband named Thulo. An Indian. Govender, gave evidence on his behalf and so did a woman, Lonia Motaung, who testified to Lonea having a husband Thulo Pule. Thereafter Qedimpi Zulu and Natebiso Moreime gave evidence in support of Tifu's story.

The Additional Native Commissioner describes Tifu's evidence as being most unsatisfactory and he was not impressed by the others called to support him. He accepted the evidence of Lonea, satisfied himself that she was corroborated and declared Tifu as the father of her two children. This Court can find no fault with this declaration.

Before an order can be made in terms of section *three* of the relevant Act the Magistrate, or Native Commissioner, must be "satisfied that the wife or child, as the case may be, is in fact without means of support" and it becomes necessary to ascertain whether the Additional Native Commissioner did in fact find that such was the case.

An examination of the "facts found proved" in the Additional Native Commissioner's reasons for judgment shows that he only occupied himself with the question of paternity of the two children of the complainant and it is clear that he made no finding on the question of their adequate support.

Counsel for appellant did not touch upon this aspect of the case but contented himself with an attack on the manner in which the enquiry was conducted, the lack of acceptable evidence that appellant was the father of the two children and the unsuitability of the use of Act No. 10 of 1896 (Natal) for the purpose of bringing to book fathers of illigitimate children who fail to support them. But this Court of its own motion must take the point that unless a Magistrate is satisfied that a child is in fact without means of support no order can be made in terms of section *three* of the Act regarding the child and it behoves the officer conducting the enquiry to record that he is so satisfied. It is true that the complainant mother did say in her evidence "I am not working. I am trying to look after my children. No one helps me to feed and clothe myself or my children . . . . My children are not properly cared for. I feel that £6 per month is necessary to enable me to feed my children and clothe them". But her home is apparently in Basutoland and there is nothing to show why she attempts to live at Cato Manor in Durban on her own instead of where she belongs in Basutoland.

In the circumstances the appeal must succeed on the ground that the requirements of section *three* of Act No. 10 of 1896 (Natal) have not been fulfilled. It is ordered therefore that the appeal be allowed and the Additional Native Commissioner's order is set aside. This does not mean that future appropriate steps for the enforcement of the obligations of the father of the children cannot be taken if circumstances warrant such action.

This Court is of opinion that there is more suitable and adequate machinery than that of Act No. 10 of 1896 (Natal) for the enforcement of the obligations of Native parents of illegitimate children towards the support of those children and expresses the hope that it will be made use of. If, however, this hope is not fulfilled the attention of Native Commisioners is drawn to the essentials which must be proved before an order is made and in this connection the judgment of this Court in the case of Sekgabi *v.* Mahlangu 1954 N.A.C. (N.E.) 164 which though founded on the provisions of Transvaal Ordinance No. 44 of 1903 is very much in point in construing the Natal Act.

For Appellant: Mr. H. M. Basner.

For Respondent: In person.

NORTH-EASTERN NATIVE APPEAL COURT.

NTOMBELA *v.* LANGA.

N.A.C. CASE No. 22 OF 1956.

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

PROCEDURE AND EVIDENCE.

Damages for seduction.

Summary: Plaintiff sued defendant for damages in respect of the seduction and pregnancy of his daughter. Defendant admitted having had intercourse with the girl at a time when he could not have been responsible for the pregnancy. The girl gave evidence of the seduction and her pregnancy and the report she made and was corroborated to some extent by plaintiff.

The question the Court had to decide was whether there was sufficient evidence to find that defendant fathered the child of plaintiff's daughter.

Held: (1) That an admission by a defendant of intercourse at a time when it was impossible for him to be father of the child amounts to a denial of intercourse which resulted in the pregnancy.

Held: (2) The onus is on the plaintiff to prove that defendant had intercourse with the girl at or about the time she conceived.

Held: (3) The girl's evidence to this effect does not cast a special onus on defendant to prove that he could not have been the father but he can escape liability by rebutting her evidence.

Held: (4) The admission of intercourse is corroborative of the girl's evidence that she and defendant were lovers and the evidence in rebuttal should be sufficiently strong to satisfy the Court that the evidence and the preponderance of probability favour him.

Cases referred to:

Manakaza *v.* Mhaga, 1 N.A.C. (S) 213.

Appeal from the Court of the Native Commissioner, Durban.

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

In the Native Commissioner's Court the plaintiff sued the defendant for two head of cattle or their value £10 being as and for damages he suffered as the result of defendant having seduced plaintiff's daughter Elizabeth Langa and having rendered her pregnant. A

In his plea the defendant admitted that he had intercourse with Elizabeth but denied that she was a virgin and that he could have been the father of the child as he had ceased having connection with her in August, 1954, and could therefore not have rendered her pregnant in June, 1955. B

The Additional Native Commissioner gave judgment for plaintiff for two head of cattle or their value £10 and costs. C

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

The Additional Native Commissioner has found proved that Elizabeth and the defendant were lovers up to July, 1955, at least and that defendant is the father of the child born in November, 1955, and that when defendant first had intercourse with Elizabeth she was a virgin; but the Native Commissioner has not in his reasons for judgment dealt with the element of corroboration so necessary in sexual cases. D E

The only evidence adduced is that of the girl's father, the plaintiff, and that of the girl herself.

Plaintiff's evidence is mostly hearsay and the only evidence after the hearsay evidence has been excluded is that his daughter had developed a habit of coming home late and that he questioned her. On one occasion after his wife and some other women had been to see the defendant he also went and the defendant denied responsibility. This is the sum total of plaintiff's evidence. F

The girl has testified that defendant was responsible for her pregnancy and that she reported to her parents and to the defendant. Defendant admits having had sexual intercourse with the girl but avers that she jilted him in August, 1954, when, he declared, she fell in love with another man. G

The question to decide is whether an admission of intimacy at a time when the defendant could not have been responsible for the pregnancy is sufficient corroboration of the girl's statement that the defendant fathered her child which was born on the 6th November, 1955. H

The girl's evidence was accepted by the Additional Native Commissioner and in this we are in agreement. She was corroborated by her father to the extent stated above and by the defendant to the extent that they were lovers. In the case Manakaza *v.* Mhaga 1 N.A.C. (S) 213 at page 217, Sleigh, president of the Court is reported as saying: I

> ".... On the other hand an admission by the defendant of intercourse at a time, when having regard to the possible period of gestation, it was impossible for him to be the father, amounts to a denial of intercourse which resulted in the pregnancy. The Court must then determine whether or not the defendant, in fact, had intercourse with the woman at or about the time she says she conceived and naturally the onus is on the plaintiff to prove the affirmative. The woman's evidence to this effect does not cast a special onus on defendant to prove that he could not have been the father. He can escape liability by merely rebutting her evidence. If her evidence is so palpably false that no reasonable person would possibly believe her story, then defendant, notwithstanding his admission, may even be entitled to an absolution judgment at the close of plaintiff's case. But it should J K L

not be overlooked that the admission is itself corroborative of the woman's testimony that they were lovers. Therefore, the evidence in rebuttal should be sufficiently strong to satisfy the Court that the evidence and the preponderance of
A probability favour him."

With this statement of the law this Court respectfully agrees.

It has already been pointed out that the girl's evidence was accepted as satisfactory and it remains to decide whether defendant has rebutted it.

B The Additional Native Commissioner was not impressed by defendant's evidence, in the opinion of this Court rightly so, and this Court comes to the conclusion that he decided the case correctly.

The appeal is accordingly dismissed with costs.

C For Appellant: Adv. R. G. Ruiter instructed by Cowley & Cowley.

For Respondent: In person.

NORTH-EASTERN NATIVE APPEAL COURT.

MALOKA *v.* MALOKA.

N.A.C. CASE No. 49 OF 1956.

PRETORIA: 7th September, 1956. Before Steenkamp, President, Cornell and Cowan, Members of the Court.

LAW OF PROCEDURE.

Rule 74 of the Native Commissioner's Court—Application for rescission of default judgment—Uplifting of costs.

D *Summary:* An application for rescission of a default judgment was dismissed with costs as Rule 74 (3) had not been complied with. What purported to be a second application for rescission accompanied by the amount required to be deposited in terms of Rule 74 (3) was then lodged but prior
E to the date on which it was set down for hearing, applicant's attorney advised the Native Commissioner that he had received instructions not to proceed with the application.

At a subsequent hearing on an application by plaintiff it was ordered that the amount previously deposited by
F defendant's attorneys in respect of costs be paid over to the plaintiff and against this order the present appeal is noted.

Held: (i) That the moneys deposited were in respect of the second so-called application which did not come before Court.

G *Held:* (ii) That from the wording of section 74 (6) an order regarding the payment of the moneys deposited may only be made if and when the application for rescission is heard.

Held: (iii) That if the application is withdrawn before it is heard then both sub-sections (5) and (6) of Rule 74 fall away
H and plaintiff could not make an application for the payment to him of any moneys deposited by the applicant.

Statutes, etc., referred to:

Rule 74 (3), (5) and (6) of Native Commissioner's Courts Rules (Government Notice 2886 of 9th November, 1951).

Appeal from the Court of the Native Commissioner, Hammanskraal.

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

On the 14th March, 1956, the Native Commissioner entered a default judgment in favour of plaintiff as prayed with costs. A

The defendant had filed an appearance to defend and a plea but on the day to which the case had been postponed he and his attorney were in default.

On the 28th March, 1956, the defendant filed an application for the rescission of the default judgment. This application was B set down for hearing on the 4th April, 1956. Paragraph 4 reads:—

> "Verweerder bied hiermee aan die verkwiste koste van hierdie aansoek."

When the application was heard on the 4th day of April, 1956, attorney for respondent took the preliminary objection that the C application for rescission is not properly before the Court as Rule 74 (3) of the Native Commissioner's Court rules had not been complied with.

This rule reads as follows:—

> "74. (3) Save where leave has been given to defend as a D *pro deo* litigant under rule *thirty* no such application shall be set down for hearing until the applicant has paid into Court, to abide the directions of the Court, the amount of the costs awarded against him under such judgment and also the sum of two pounds as security for the costs of the application: E Provided that the judgment creditor may by consent in writing lodged with the clerk of the Court waive compliance with this requirement."

The Native Commissioner ruled that Rule 73 (3) had not been complied with and he dismissed the application for rescission F with costs.

The next step was the filing of an affidavit dated the 13th April, 1956, signed by G. J. Smith, a clerk in the office of the attorneys for defendant (applicant). This affidavit purports to be in support of a fresh application to be made on the 9th May, 1956, for the G rescission of the default judgment granted on the 14th March, 1956.

The notice of set down reads as follows:—

> "Be pleased to place the above matter on the Roll for hearing on Wednesday the 9th day of May, 1956, at 10.30 H o'clock in the forenoon or so soon thereafter as the matter may be heard."

It is not at all clear what matter was being set down. Surely an affidavit without a prayer is no application and it is difficult for this Court to understand such laxity shown when legal I documents are drawn up.

It is only necessary to quote paragraph 4 of the affidavit dated 13th April, 1956, and which reads as follows:—

> "In terme van die reëls van die Hof word hierby inbetaal die som van £49. 6s. 6d. synde die balans, aangesien 'n bedrag J van £5. (kwitansie Nr. 642585) verwys, reeds op die 4de dag van April, 1956, in bogenoemde agbare Hof inbetaal is. Verder meer is 'n bedrag van £2. (kwitansie Nr. 642585 verwys) synde sekuriteit ook op die 4de dag van April, 1956, in bogenoemde agbare Hof inbetaal." K

Now the amount of £49. 6s. 6d. plus £5 already deposited are the costs required to be deposited in terms of Rule 74 (3) already referred to but the question arises whether the amounts deposited

were in respect of the first application which had already been dismissed or whether it was made in respect of the second application if it can be called an application.

It is obvious that what the applicant had in view was the second application as the first one had already been dismissed with costs.

If the second application had been proceeded with then the matter would have solved itself in accordance with Rule 74 (6) of the Native Commissioner's Court Rules.

There is no record whatsoever whether the so called application was heard on the 9th of May, 1956, being the day it was set down for hearing but on the record there is a letter dated 18th June, 1956, addressed by applicant's attorneys to the Native Commissioner, Hammanskraal, in which it is stated that he had received instructions not to proceed with the application for condonation and rescission of the judgment.

On the 20th June, 1956, the respective attorneys for the parties appeared before the Native Commissioner in an application by plaintiff's attorney for the uplifting of the costs viz. £54. 6s. 6d. which had been deposited. The Native Commissioner ordered that the sum of £54. 6s. 6d. be paid over to the plaintiff.

Against that order an appeal has been noted to this Court on the following grounds:—

„ Dat die voorsittende geregtelike beampte 'n regsdwaling begaan het deur te beslis dat waar daar hoegenaamd geen applikasie in terme van Reël 74 (5) van die Reëls van die Naturellekommissarishof saam gelees met Reël 74 (6) gedien het nie uitbetaling aan die respondent te magtig.

2. Dat die voorsittende geregtelike beampte nie geregtig was en/of wetlik bevoeg was om uitbetaling te magtig nie in terme van Reël 74 (6), inagnemende die omstandighede omringende die aansoek, nl.—

(*a*) Dat die aansoek die eerste keer nie op die Rol vir verhoor moes gewees het nie omrede geen sekuriteit gestel was, soos bepaal in Reël 74 (5) en dat die Hof derhalwe nie by magte was om die aansoek te hoor nie.

(*b*) Dat die aansoek nieteenstaande die wesentlike defek in terme van Reël 74 (3) wel op die Rol geplaas is; en dat op die datum van verhoor die tegniese punt in limine geneem is, en die aansoek van die Rol geskraap is.

(*c*) Dat daarna inbetaling van sekuriteit gedoen is maar geen verdere aansoek in terme van Reël 75 voor die Hof gedien het nie.

(*d*) Dat die gelde wat in die Hof inbetaal is, gestort was vir 'n voorgenome aansoek in terme van Reël 75, welke aansoek egter nooit gedoen is, en dat die Hof derhalwe geen beskikkingsreg oor die aldus inbetaalde gelde gehad het nie."

There can be no doubt that the moneys deposited were in respect of the second so-called application which did not come before the Court. Section 74 (6) reads "The Court may *also* make such order as may be just in regard to moneys paid into Court by the applicant".

The emphasis is on the word "also" which means and can only mean that an order regarding the payment of the moneys deposited may only be made if and when the application for rescission is heard. If the application is withdrawn before it is heard then both sub-sections (5) and (6) fall away and the plaintiff could not make an application for the payment to him of any moneys deposited by the applicant.

There is the question of the £5 and £2 deposited on the day the first application was heard but as no order was made on that day nor was there an application made for the disposal of the £7, this Court is not called upon to consider that aspect of the matter.

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

"The application for the uplifting of the costs deposited is refused with costs."

For Appellant: Mr. W. R. C. Kushke of Kushke & Bloch.

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

SOUTHERN NATIVE APPEAL COURT

MKUMBENI MAQABUKA *v.* MAJOZI MAQABUKA.

N.A.C. CASE No. 16 OF 1956.

BUTTERWORTH: 25th September, 1956. Before Balk, President, Warner and Botha, Members of the Court.

LAW OF SUCCESSION.

Customary for specific earmarks to be allotted by kraalhead to each House to which stock belongs. Non-rebuttal of presumption of ownership arising from possession.

Summary: In an action arising from a dispute between the heir to the Great House and the heir to the Right Hand House of a deceased Native, in regard to the ownership of stock claimed by the former as belonging to the Great House, the Court *a quo* granted absolution from the instance in respect of all the stock in dispute, in both the claim and counterclain. Defendant (plaintiff-in-reconvention) appealed.

Held: That plaintiff's evidenee that only the Great House had an earmark was not in keeping with custom, in the light of his admission that there was stock belonging to the Right Hand House.

Held further: That, as the plaintiff had not rebutted the presumption of ownership of the stock by defendant arising from possession, defendant was entitled to judgment.

Cases refered to: Gobo *v.* Davies, 1915 E.D.L.D. 136.

Appeal from the Court of the Native Commissioner, Idutywa. Balk (President):—

The plaintiff (now respondent) brought an aetion in a Native Commissioner's Court against the defendant (present appellant) in which he sought an order declaring him, as the heir of their late father's Great House, to be the owner of certain forty-seven sheep and six goats in the defendant's possession and requiring the latter to deliver and transfer these sheep and goats to him or, failing which, to pay him their value at £2. 10s. each.

The defendant denied in his plea that the plaintiff had any right to this small stock and counterclaimed for five head of cattle or their value at £20 each, twenty sheep or their value at £2. 10s. each and £88 in cash, averring, *inter alia*, in his particulars of claim that these cattle and sheep were dowry for his sister, Mtosana, which had been paid to the defendant in reconvention and that the £88 formed the proceeds of the sale of his wool clip for the year 1951 which the defendant in reconvention had received and wrongfully retained.

In his plea to the counterclaim the defendant in reconvention admitted that the plaintiff in reconvention was entitled to the twenty sheep and consented to judgment therefor but denied that any cattle had been paid to him as dowry for Mtosana. He also denied that the plaintiff in reconvention had any right to the £88 which he (defendant in reconvention) had received, averring that it had been derived from the sale of wool from the forty-seven sheep claimed by him and that in any event it had been largely disbursed for the maintenance of the Right Hand House of their late father of which the plaintiff in reconvention was the heir.

After hearing the evidence the Court *a quo* decreed absolution from the instance, with costs, on the claim in convention, and on the counterclaim it entered judgment for the plaintiff in reconvention for twenty sheep and absolution from the instance, with costs, as regards the remaining items claimed i.e. the five head of cattle and £88.

The appeal is brought against the decree of absolution from the instance, with costs, on both the claim and counterclaim and is based on the following grounds:—

"1. Generally that the said judgments are against the weight of evidence adduced.

2. With special reference to the judgment in convention that there is no evidence on record to support respondent's claim in as much as there is no evidence as to the ownership of the sheep in question or as to what earmarks they bore when they came under the control of respondent.

3. With special reference to appellant's claim for £88 (prayer c. of the counterclaim) for the wool clip, that the judgment of absolution thereanent was wrong in law in that:—

(*a*) The sheep in question being in the possession though not under the control of appellant,

(*b*) Respondent having admitted that respondent received the said sum of £88 for the wool clip of the said sheep, and

(*c*) Respondent having set up the special plea that the sheep in question belonged to respondent.

the onus was upon respondent and respondent failed to discharge same and a judgment of absolution is not competent under such circumstances."

It is common cause that the plaintiff in convention is the heir of the Great House of his late father, Maqabuka (hereinafter referred to as "the deceased") and that the defendant in convention is the eldest son and heir of the deceased in his Right Hand House.

The plaintiff's case is that when he returned home from work at the mines some years prior to the deceased's death, he found that the deceased had transferred all the sheep and goats to his Right Hand House. He objected to this transfer and, although the deceased eventually said that he would put matters right he had not done so when he died. At the time of the transfer the defendant was a herdboy. On the deceased's death, the plaintiff took charge of the stock and became the defendant's guardian. On the defendant's attaining majority, he (plaintiff) took the matter of the transfer of the sheep and goats up with him but they did not reach agreement. The forty-seven sheep and six goats in dispute all bear the earmark of the deceased's Great House and are, therefore, his (plaintiff's) property.

The defendant's version is that the forty-seven sheep and six goats in dispute had their origin in six sheep and three goats earned by his mother in doctoring and in ten sheep which formed part of the dowry paid for his sister, Nomafengwana, and are, therefore, the property of his house i.e. the Right Hand House. The original sheep were given the earmark of his house but this earmark was changed by the planitiff to that pertaining to his house i.e. the Great House.

It is manifest from the plaintiff's evidence that, to establish his case, he relies on the allegation that the forty-seven sheep and six goats bear the earmark of his house. Not only was it found by the Court *a quo* on an inspection *in loco* that a number of the forty-seven sheep did not bear that earmark but the fact that the plaintiff admitted in cross-examination that the twenty dowry sheep due to the defendant bore the same earmark i.e., that pertaining to his (plaintiff's) house, bears out the defendant's version that the plaintiff changed the earmark on other of the sheep from his (defendant's) earmark to that of the plaintiff so that the fact that the latter's earmark predominates amongst the forty-seven sheep does not assist him.

Then the plaintiff denied that any sheep had been paid as dowry for the defendant's sister, Nomafengwana, but his (plaintiff's) witness, Mtswaru Mcana, admitted in cross-examination that ten sheep had been paid as part of her dowry, thus not only contraverting the plaintiff's testimony but confirming that of the defendant in this respect.

Again the evidence for plaintiff that only his house i.e. the Great House, had an earmark is not in keeping with custom in the light of his admission that there was stock belonging to the Right Hand House other than the stock in dispute.

Furthermore, the evidence for the plaintiff in regard to the enquiry before Acting Headman Edgar Mamba is not inconsistent as to the purpose for which this enquiry was held but the allegation in that evidence that it was held at the instance of the plaintiff is refuted by the testimony of the Acting Headman from which it is clear that it was held at the instance of the defendant and his mother.

It follows that the Assistant Native Commissioner cannot be said to be wrong in his conclusion, implicit in his reasons for judgment, that the plaintiff had not established his case.

The Assistant Native Commissioner was doubtful as to whether the defendant was a truthful witness, firstly, because his evidence that he had been admitted to family discussions when he was a herd boy of about seven to eight years of age was improbable and, secondly, because, according to the evidence for plaintiff of the boy who herded the six goats in dispute, which was accepted by the Court *a quo*, the defendant had tampered with their earmarks during the course of the trial in that Court.

Be that as it may, the defendant's version is corroborated by his mother's testimony and also by that of his witness, Sokutshemla Fesi. Moreover, the defendant's version also finds support from the unsatisfactory features in the plaintiff's evidence dealt with above to an extent which, to my mind, results in a preponderance of probability in the defendant's favour.

But even assuming that the Assistant Native Commissioner was justified in his finding that, on the evidence, it was not possible to decide which party was entitled to the forty-seven sheep and six goats in dispute, the plaintiff cannot, as pointed out by Counsel for appellant, be said to have rebutted the presumption of the ownership of this stock in the defendant arising from the latter's possession thereof, which is admitted in the pleadings, so that, in any event, the defendant is entitled to judgment in respect of this stock, see Gobo *v.* Davies, 1915 E.D.L.D. 136, at pages 139 and 140.

Turning to the counterclaim, there is no evidence in support therefore in so far as the five head of cattle are concerned and the absolution judgment, is, therefore, correct as regards this item, as was conceded by Counsel for appellant.

According to the plea of the defendant in reconvention, the £88 formed the proceeds of the sale of wool from the forty-seven sheep in dispute and, as for the reasons given above, it is clear that the defendant in convention is entitled to these sheep, it follows that he is also entitled to the money derived

from their wool. It is manifest from the evidence as a whole, however, that the defendant in reconvention gave £2 thereof to the mother of the plaintiff in reconvention and retained the balance of £86 and, as there is no proof that the defendant in reconvention used any of this sum for the maintenance of the Right Hand House of the deceased, the plaintiff in reconvention is entitled to judgment therefor.

The appeal, therefore, succeeds on the first ground and it is unnecessary to consider the remaining grounds.

In the result I am of opinion that the appeal should be allowed in part, with costs, and that the judgment of the Court *a quo* should be altered to read:—

> "On the claim in convention, for defendant in convention, with costs. On the claim in reconvention, for plaintiff in reconvention for twenty sheep or their value at £2. 10s. each and £86 in cash, with costs. Absolution from the instance in respect of the five head of cattle."

H. W. Warner (Permanent Member): I concur.

P. S. Botha (Member): I concur.

For Appellant: Mr. Wigley, Idutywa.

For Respondent: Mr. Shelver, Idutywa.

SOUTHERN NATIVE APPEAL COURT.

TINGATINGA *v.* PETSENGE.

N.A.C. CASE No. 20 OF 1956.

BUTTERWORTH: 25th September, 1956. Before Balk, President, Warner and Botha, Members of the Court.

NATIVE CUSTOM.

Seduction contrary to custom when woman abducted for customary union.

Summary: Defendant (now appellant) having been sued for damages for seduction and pregnancy of plaintiff's sister, admitted the abduction but denied the seduction, and consented to judgment on the abduction portion of the claim. Judgment was given against him on the whole claim. He appealed against the portion of the judgment based upon the seduction claim, the appeal in the essence being on fact.

Held: That seduction of a *twalaed* girl is contrary to custom.

Appeal from the Court of the Native Commissioner, Idutywa.

Balk (President):

This is an appeal from the judgment of a Native Commissioner's Court for plaintiff (now respondent) as prayed, with costs, in an action in which he sued the defendant (present appellant) for two head of cattle or their value, £20, as damages for the abduction and seduction of his sister, Nontwaza.

In his plea the defendant admitted the abduction and consented to judgment for one beast or its value, £10, with costs to date in respect thereof but denied the seduction and the appeal is brought only against the award by the Court *a quo* of a beast for the alleged seduction and costs subsequent to the defendant's plea, and is based on the following grounds:—

> "1. The judgment was wrong in law in that the judicial officer having found that the evidence of the girl in question, Nontwaza, was unsatisfactory, the judicial Officer should have entertained a reasonable doubt as to whether or not seduction had taken place and did in fact state that he entertained such a doubt.

2. The judicial officer erred in holding that the facts as alleged by defendant (now appellant) were not in accordance with Native Custom and therefore improbable and, conversely, the judicial officer erred in holding that seduction could be inferred from abduction in accordance with Native Custom.
3. The judgment with regard to the seduction beast was generally against the weight of evidence adduced."

Nontwaza, in her evidence for the plaintiff, stated that, on her abduction on a certain Monday, she was taken to the defendant's kraal where she was detained that night and during the next two days and nights and that the defendant had sexual intercourse with her on each of these three nights. She resisted him and fought and screamed throughout the whole of the first night and also resisted him on the other two nights but he effected his purpose. She did not sleep during the day nor during the three nights. In resisting the defendant she sustained certain injuries which she pointed out to the medical practitioner when he examined her on the Thursday.

In his testimony the defendant admitted that he had caused Nontwaza to be abducted for the purpose of marrying her but denied that he had seduced her. He stated that she was at his kraal only the one night, i.e. the Monday night, that on that night he had placed her in his main hut and that his mother and sister had shared that hut with Nontwaza whilst he had slept with his Great Wife in her hut.

In his reasons for judgment, the Assistant Native Commissioner states that in cross-examination Nontwaza gave the impression that she was exaggerating and that it is improbable that she did not have any sleep whilst detained at the defendants kraal or that she resisted him vigorously for the lengthy period alleged by her. He considered, however, that her testimony that the defendant had seduced her fell to be accepted in the light of the other evidence adduced, adding that, in view of the general tendency amongst Natives to exaggerate, especially in regard to events favourable to their case, her evidence could not be entirely rejected. He also found that the evidence of the medical practitioner called by the plaintiff did not prove or disprove any of the facts in issue, and that the evidence of Nontwaza's brother, Stanford, supported her testimony that she was detained at the defendant's kraal for three nights.

But the medical evidence is not merely negative, as found by the Assistant Native Commissioner, as it is clear therefrom not only that Nontwaza did not point out any of her alleged injuries when she was medically examined but also that she did not in fact then bear the injuries alleged by her, so that she falls to be regarded as an untruthful witness and her evidence cannot be accepted. Moreover, Stanford's evidence strikes me as being improbable on the face of it, as will be apparent from what follows. He stated that he had gone to the defendant's kraal on the Tuesday and wanted to take Nontwaza away but that the defendant refused to let him do so. He went on to say that he had left the defendant's kraal at dusk that evening and had returned there later the same evening with the Sub-Headman. Yet he failed to explain why he had not taken advantage of the sub-Headman's presence at the defendant's kraal to secure Nontwaza's release. This omission not only makes Stanford's testimony improbable but lends colour to the defendant's version that Nontwaza was detained at his kraal on the Monday night only.

Turning to the Assistant Native Commissioner's strictures regarding the defence evidence, he gives as his reasons for disbelieving the defendant, firstly, that the latter's allegation that he did not have anything to do with Nontwaza could not be true because the defendant had admitted that he had abducted her with the intention of marrying her and that he needed a young wife very badly, in particular Nontwaza; and, secondly, that the defendant had not been co-operative in paying the customary

fine for the abduction, had taken no active steps to secure Nontwaza as his wife and finally allowed her to disappear from his kraal without his knowledge and in a manner he could not describe

A These reasons do not, however, strike me as cogent, firstly in that it does not necessarily follow from the fact that the defendant had abducted Nontwaza because he very much wanted to marry her that he seduced her, particularly as such seduction would have been contrary to custom in the circumstances; and
B secondly, because the defendant explained that Stanford had demanded £10 for the seduction whereas he only had £8, which finds support from Stanford's evidence; and the defendant also explained that Nontwaza was taken from his kraal during his absence and he does not appear to have been questioned as to
C why the marriage negotiations had broken down. That such negotiations were commenced is manifest not only from the defendant's evidence but also that of Stanford.

> The Assistant Native Commissioner also stated in his reasons for judgment—"If defendant can be believed, it is
D difficult to understand why, he ever arranged for the abduction to take place. His evidence and behaviour after the abduction do not provide an answer. If defendant, indeed wished to marry Nontwaza, it is difficult to understand why he did not arrange the marriage in the customary manner."

E But here again the criticisms do not appear to be warranted for it is clear both from the defendant's and Stanford's evidence not only that the defendant abducted Nontwaza because he wanted to marry her but also that the abduction was duly reported to Stanford by the defendant on the Tuesday consonant
E with custom; and, as pointed out above, the defendant does not appear to have been questioned as to why the marriage negotiations broke down.

The defendant's version that Nontwaza was detained at his kraal only on the Monday night and was then placed in the
F main hut with his mother and sister whilst he slept with his Great Wife in her hut, is borne out by his witness, Sambuqu. It is true that the Assistant Native Commissioner states in his reasons for judgment that Sambuqu was vague and could not tell under what circumstances Nontwaza left the defendant's
G kraal and that Sambuqu was not present when the discussion between Stanford and Nontwaza took place. Here it would seem that the discussion which the Assistant Native Commissioner has in mind is that between Stanford and the defendant as it is the only one covered by Sambuqu's evidence. But Sambuqu's
H testimony as recorded does not appear to be vague and the Assistant Native Commissioner does not state in what respect it is vague except for the two instances referred to above which are of no significance; for it is clear from Sambuqu's evidence that Nontwaza left the defendant's kraal during his (Sambuqu's)
I absence and that appears to be no good reason for holding against him the fact that he was not present at the discussion between Stanford and the defendant on the Tuesday.

It follows that not only can the plaintiff not be said to have established the seduction alleged by him but the probabilities
J favour the defendant's case that he did not seduce Nontwaza.

In the result I am of opinion that the appeal should be allowed, with costs, and that the judgment of the Court *a quo* should be altered to read "For plaintiff for one head of cattle or its value, £10, on the claim for abduction and for defendant on the claim
K for seduction. Costs to date of the defendant's plea i.e. up to the 10th February, 1956, are awarded to the plaintiff and the remaining costs to the defendant."

Warner (Permanent Member): I concur.

Botha (Member): I concur.

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

For Respondent: Mr. B. Shelver, Idutywa.

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