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REPORTS

OF THE

NATIVE APPEAL COURTS

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SOUTHERN NATIVE APPEAL COURT.

NCINCA AND MAPOZA *v.* MANKANTSHU.

N.A.C. CASE No. 28 OF 1954.

PORT ST. JOHN'S: 30th September, 1954. Before Israel, President, Wakeford and Holdt, Members of the Court.

NATIVE CUSTOM.

Damages for adultery where woman given in second union during subsistence of a former union—Practice and procedure—Forfeiture of bopa *beast explained.*

Summary: Plaintiff sued defendants jointly and severally as tortfeasor and tortfeasor's kraalhead for five head of cattle or their value £40 in respect of first defendant's adultery with plaintiff's customary union wife with whom first defendant has a child. The position is that during the subsistence of a valid Native customary union with plaintiff, the woman's guardian gave her away in a second customary union with first defendant who alleged, in his plea, that he and not plaintiff is her lawful husband, and that he had paid dowry for her.

Judgment was awarded to plaintiff as prayed and defendants appealed on the grounds that this judgment is against the weight of evidence.

Held: The finding that a valid customary union had been contracted between plaintiff and Mamolande and never been dissolved is undoubtedly in accordance with the weight of evidence and the probabilities are in favour of the payments in question being what plaintiff claimed them to be.

Held further: The horse, at least, was paid in consideration of plaintiff's union at the time the elopement was reported.

Held further: The plea that the horse was taken to be a *bopa* beast is untenable as a *bopa* beast is forfeited only when the abductor of a girl fails to offer marriage after elopement or when he offers marriage but is rejected by the girl's guardian. In this case, neither of these contingencies has been shown to exist.

Cases referred to: Siyeza *v.* Tsekwana, 4 N.A.C., 15.

Appeal from the Court of the Native Commissioner, Bizana.

Israel (President): —

Plaintiff, who is now the respondent in this appeal, sued in the Native Commissioner's court defendants (Appellants), the first as tortfeasor and the second as the tortfeasor's kraalhead, for five head of cattle or their value £40 in respect of first defendant's adultery with his wife, Mamolande, basing his claim on the facts that he is the woman's lawful husband by Native Custom and that she has been living for some time past and is still so living in adultery with first defendant and has a child by him. Defendants admitted that the woman is living with first defendant and has a child by him, but denied that plaintiff is her lawful husband. They pleaded that first defendant had contracted a valid Native customary union with the woman and had paid dowry for her.

The Native Commissioner awarded plaintiff judgment as prayed and defendants have now appealed on the grounds that the judgment is against the weight of evidence.

The undisputed facts of the matter are that some four or five years ago plaintiff eloped with the woman Mamolande. The elopement was duly reported to Mamolande's guardian and an offer of marriage accompanied by certain payments, was made and accepted by her people. She remained at plaintiff's kraal and lived with him until he left for work a few months afterwards. After she had lived at plaintiff's kraal for a year her people took her back and later gave her in marriage to first defendant who paid dowry after he, too, had abducted her from her people's kraal.

To prove that a valid customary union had been contracted between him and Mamolande, plaintiff gave and led evidence to show that when his elopement with her had been reported and the marriage negotiations opened, one ox and a horse were sent to her people on account of the relative dowry and £8 as *imvulamlomo*. These were duly accepted, but the ox was returned as it had not been transferred in the dipping books. According to plaintiff's witnesses no demand was specifically made for further payments but £5 in cash was later sent spontaneously to Mamolande's people on behalf of plaintiff as an additional payment on account of the dowry owing. The young ox that was returned was, according to plaintiff, eventually uplifted by Mamolande's people and used by them to pay a Native doctor for treating one of their women, and this was confirmed by the doctor himself who explained in detail how the payment was effected.

Mamolande's guardian, however, disputed that any payments were made on account of dowry. He maintained that when the elopement was reported only the horse was physically delivered. Three head of cattle, one of which, a heifer, was to represent the £8 *imvulamlomo* fee, were admittedly also brought at the time but were taken back by the messengers. When he tried to get these cattle back, Mamolande's guardian stated, plaintiff's uncle, who had negotiated the proposed marriage, told him he could not effect transfer of the cattle and was abandoning the idea of the marriage. He therefore left the horse with the woman's people as a *bopa* beast, and it was after this that she was taken back. The payment of the Native doctor with the beast that plaintiff claimed accompanied the horse, was denied, as was the fact that the doctor ever treated a woman at the kraal. An uncle of Mamolande repeated her guardian's story in general but stated that only one head of cattle was shown to them; the other two were merely pointed out by word of mouth. Both these witnesses—there were no other witnesses on these particular points—had to admit that the alleged agreement to abandon the marriage and to pay as a *bopa* fee the horse that had been delivered was made while Mamolande was still at plaintiff's kraal.

In giving judgment in favour of plaintiff, the Native Commissioner found that the payment of dowry in part had been established, and as the other essentials of a valid customary union were present, namely, the consent of all parties and the handing over of the bride (she was allowed to remain at plaintiff's kraal for a year), he concluded that a valid customary union had been contracted between plaintiff and Mamolande and had never been dissolved. In the opinion of this Court such finding is undoubtedly in accordance with the weight of evidence, and the probabilities are in favour of the payments in question being what plaintiff claimed them to be. But whether plaintiff's version or that of the defendant be accepted the one fact remains that the horse, at least, was paid in consideration of plaintiff's union with Mamolande at the time their elopement was reported. The plea that it was taken to be a *bopa*

beast is untenable. Such a beast is forfeited only when the abductor of a girl fails to offer marriage after the elopement, or when he offers marriage but is rejected by the girl's guardian. In this case neither of these contingencies has been shown to exist.

The position, then, is that during the subsistence of a valid union between plaintiff and the woman in question her guardian gave her away in a second union to first defendant. In these circumstances, as has been ruled in several cases in this and other Native Appeal Courts (notably Siyeza *v.* Tsekwana, 4 N.A.C. 15), first defendant must be held to have committed adultery with Mamolande and plaintiff was entitled to judgment.

The appeal is dismissed with costs.

Wakeford (Member): I concur.

Holdt (Member): I concur.

For Appellant: Mr. F. Stanford, Flagstaff.

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

SOUTHERN NATIVE APPEAL COURT.

ZADUKA *v.* **SONTSELE.**

N.A.C. CASE No. 38/54.

PORT ST. JOHN'S: 30th September, 1954. Before Israel, President, Wakeford and Holdt, Members of the Court.

NATIVE LAW OF SUCCESSION.

Interpleader Action.—Estate property falls within the purview of section twenty-three (1) *of Act* 38 *of* 1927*—Effect of Certificate of Appointment of Administration to estate involving house property under Regulation* 4 *of Government Notice No.* 1664 *of* 1929 *on* dominus *of heir—Legal* persona *"Estate" under Native and Common or Statute Law distinguished—Costs—Manifestly unfair to order heir, who is not a party to action to pay—Repondent having been successful in Court* a quo *and Appeal Court, is entitled to be reimbursed. Claimant to bear all costs* de bonis propriis.

Summary: During 1954 respondent (Sontsele) judgment creditor in Court *a quo* sued the heir (Bomwana Zaduka) for certain cattle for which he obtained judgment and which were attached in satisfaction there. Claimant, (Lusu Zaduka) judgment debtor's younger brother then instituted the present interpleader action on the strength of the certificate appointing him as representative of the late Zaduka Ndzipo's estate issued by the Native Commissioner, Bizana, purporting to act by virtue of the powers vested in him under section 4 (1) of Government Notice No. 1664 of 1929.

The Court *a quo* declared the cattle executable and costs were ordered to be borne by the estate.

Held: Estate property under Native Law clearly falls within the purview of section *twenty-three* (1) of Act No. 38 of 1927 and its devolution is subject to Native Law under which it is an established principle that upon the death of the father the estate property devolves upon his eldest son and heir who not only inherits the estate property but is its sole representative and administrator or executive.

Held further: In Native Law there is no such legal *persona* as an "estate" as there is in Common or Statute Law; in the former the "estate" is simply the property left by the deceased while the heir *qua* heir assumes in his personal capacity the ownership of the estate property and the powers and responsibilities of the legal *persona* known as an "estate" in our Common Law.

Held further: The appointment of claimant as administrator under section 4 of Government Notice No. 1664 of 1929 was bad and the letter of appointment issued to him impotent as far as the administration of the estate and the divestment of the heirs *dominium* of property to which he succeeded under Native Law and Custom, is concerned.

Held further: The cattle were rightly declared executable and the order of the Court *a quo* is confirmed.

Held further: That to order the estate to pay the costs is, in effect, to order the heir, the judgment debtor in this case, to pay the costs. But as he has adopted a purely possessive attitude in the matter and is not even a party to this interpleader action, to place the responsibility on him would be manifestly unfair.

Held further: Respondent is entitled to be reimbursed in the costs he incurred in successfully opposing both the application in the Court *a quo* and the appeal in this Court.

Held further: Costs in the Court *a quo* and in this Court to be borne by claimant (appellant) *de bonis propriis.*

Cases referred to:

Sikeleni *v.* Sikeleni 21 S.C. 118.
Sigcau *v.* Sigcau 1941, C.P.D. 346.

Statutes referred to:

1. G.N. No. 1664 of the 20th September, 1929, section 4.
2. Act No. 38 of 1927, section *twenty-three* (1).

Appeal from the Court of the Native Commissioner, Bizana.

Israel (President):—

This is an interpleader action in which the judgment debtor is Bomvana Zaduka, the rightful and undisputed heir to his father Zaduka Ndzipo, and the claimant is the younger brother, Lusu Zaduka, who purports to act *nomine officii* as representative of the estate of the late Zaduka Ndzipo.

The facts of the matter are that the late Zaduka Ndzipo had two wives by Native Custom and Bomvana is the eldest son and consequently his heir, while Lusu, the claimant, is the younger son in the same hut as Bomvana. During the year 1952, after the death of Zaduka, differences appear to have arisen between Bomvana on the one hand and Lusu and the two widows on the other regarding the disposition of the estate property. On the 26th July, 1952, the Native Commissioner at Bizana, purporting to act by virtue of the powers vested in him under sub-section (1) of section 4 of Government Notice No. 1664 of the 20th September, 1929, appointed Lusu Zaduka "to represent the estate of the late Zaduka Ndzipo and to assume responsibility of (sic) the general administration thereof. It is not clear what preceded the issue of such a letter of appointment or how the appointment came to be made, but it is likely that it resulted from complaints by Lusu and the widows about the way Bomvana was dealing with the property of the estate to their alleged detriment.

Then, during the early part of 1954 Bomvana was sued by one Sontsele. Judgment was given against him and on the 9th February, 1954, certain cattle were attached in his possession in satisfaction of this judgment. Thereupon, Lusu, on the strength of the "appointment" referred to above, instituted the present interpleader action, as I have said, *nomine officii* as "representative of the estate of the late Zaduka" and claimed the cattle as being estate property and not liable to execution. The cattle were declared to be executable, the Court *a quo* having come to that conclusion by reason of the fact that they were attached in the possession of Bomvana, the judgment debtor, and that Bomvana was the heir to the estate and as such had a real right in and to the assets of the estate. The costs were ordered to be borne by the estate.

Against this judgment appeal has been noted on the ground: "That the Assistant Native Commissioner erred and failed to attach any weight and significance at all to the letter of appointment No. 1/4/3(6/52) which has not in any way been set aside or declared invalid, appointing Claimant to assume responsibility of the general administration and distribution of the said estate in terms of Law while the said letter of appointment is still of force and effect as admitted by Respondent's attorney in his argument and address to the Court."

There is a second ground of appeal on a question of alleged estoppel which it is claimed is operative in the instant case by reason of certain proceedings in an earlier case referred to by claimant in his evidence. But as no details of the proceedings in this earlier case were given nor was the record produced, there is nothng before this Court for its consideration on that particular point, and in any case the determination of the first ground of appeal will render consideration of any other ground superfluous.

To give consideration to the points at issue it will be necessary to determine the rights of the judgment debtor as the acknowledged rightful heir under Native Law of the late Zaduka, over and to the property in the latter's estate, and to decide on the effectiveness of the claimant's appointment to administer the estate and the extent to which those rights of the judgment debtor have been affected thereby.

The first point is simply and conclusively determined. The estate property clearly falls within the purview of section *twenty-three* (1) of Act No. 38 of 1927 and its devolution is therefore subject to Native Law. Under Native Law it is an established principle that the property devolves on the heir upon the death of the deceased, and this principle has been unequivocally confirmed in the case of Sikeleni *v.* Sikeleni 21 S.C. 118. In the absence of evidence of any act of disinherision, then, the judgment debtor, Bomvana succeeded to and became the *dominus* of the property left by the late Zaduka.

Again, it is also an established principle of Native Law that the heir not only inherits the estate property but is its sole representative and administrator or executor. What, then, is the effect of the Native Commissioner's appointment under section 4 of the relevant regulations of the heir's younger brother, Lusu the claimant, as administrator? In the case of Sigeau *v.* Sigeau, 1941 C.P.D. 346, it was ruled that it was not competent for a Native Commissioner to appoint under regulation 4 any person as an administrator of a Native estate involving house property (as here) except that person to whom Native Law and Custom points as the proper person, for this would entail the administration of the estate otherwise than in accordance with Native Law and Custom and thus contrary to the provisions of

section *twenty-three* (1) of the Act. In the case before us, the proper person as I have pointed out, is Bomvana and, therefore, the appointment of Lusu (claimant) as administrator was bad and the letter of appointment issued to him impotent, as far as the administration of Zaduka's estate is concerned.

Much less could such an appointment divest the heir of his *dominium* of the property to which he succeeded under Native Law and Custom.

The cattle in question were thus rightly declared to be executable.

As to the question of costs, it should be remembered that in Native Law there is no such legal *persona* as an "estate" as there is in Common or Statute Law; in the former the "'estate" is simply the property left by the deceased while the heir *qua* heir assumes in his own personal capacity the ownership of the estate property and the powers and responsibilities of the legal *persona* known as an "estate" in our Common Law. Consequently to order the estate to pay the costs as the Assistant Native Commissioner did in this case, is in effect to order the heir, the judgment debtor, to pay the costs. But as he has adopted a purely passive attitude in the matter and is not even a party to this interpleader action, it would be manifestly unfair to place the responsibility of paying the costs on him. Respondent, equally clearly, is entitled to be reimbursed in the costs he incurred in successfully opposing both the application in the Court *a quo* and the appeal in this Court. Who, then, is there to pay these costs but claimant in his personal capacity? He not only placed his reliance on a so-called appointment which could not hold water, but his institution of the present action was substantially for the purpose of vindicating his own patrimony, for in his evidence he stated that of the seven cattle attached not less than four had been apportioned to him by his father before his death.

The appeal is dismissed and the order of the Court *a quo* declaring the cattle executable is confirmed. Costs in this Court and in the Court *a quo* are to be borne by claimant (appellant) *de bonis propriis.*

Wakeford (Member): I concur.

Holdt (Member): I concur.

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

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

SOUTHERN NATIVE APPEAL COURT.

MTSHENGU *v.* **MAWENGU.**

N.A.C. CASE No. 41/54.

PORT ST. JO.N'S: 30th September, 1954. Before Israel, President, Wakeford and Holdt, Members of the Court.

PRACTICE AND PROCEDURE.

Damages for adultery under Common and Native Law distinguished—Action for adultery where parties married by civil rights must be decided under Common Law—Evidence: Inadmissibility of documents not translated for the information of the Court—Onus: Plaintiff to prove adultery to satisfaction of a reasonable mind—Proof: Degree of proof required under Common and Native Law distinguished.

Summary: Plaintiff (now appellant) sued defendant (now respondent), for £60 damages for adultery committed with his wife to whom he is married by civil rites.

Held: Action for adultery where the parties are married by civil rites must be decided under the Common Law.

Held further: The onus lies on plaintiff to prove the adultery to the satisfaction of a reasonable mind.

Held further: A more Draconian assessment of evidence is called for in an action for damages for adultery under Native Law than is required under the Common Law.

Held further: As neither party is entitled to judgment absolution from the instance was the correct decision.

Cases referred to:

Dlamini *v.* Mbele, 1953, (1) N.A.C., 37.
Notenjwa *v.* Mapeke, 1940 (C & O), 146.
Gates *v.* Gates, 1939, A.D., 154 and 155.

Appeal from the Native Commissioner's Court, Flagstaff.

Israel (President):—

Plaintiff, now the appellant, sued defendant (Respondent) in the Court of the Native Commissioner for £60, being damages for adultery comitted by defendant with plaintiff's wife, Mahotela, to whom he is married by civil rights. The matter was first brought before the parties' headman, who had civil jurisdiction, but after much of the evidence had been led in that Court, it transpired that the marriage was a civil one and the headman declined to give judgment.

In the Native Commissioner's Court the woman gave evidence to the effect that during 1952 when plaintiff was away at work she began a love affair with defendant. They first slept together at plaintiff's kraal, where she was living alone during his absence, but later, during the hoeing season of 1952 (November or December), with a woman named Mangwanya acting as go-between, they transferred their place of meeting to a spot outside the kraal. Still later, during the winter of 1953, a meeting was arranged one night at Mangwanya's kraal. A hut and a sleeping mat were provided by the go-between and there they cohabited until awakened in the morning by Mangwanya. It was presumably as a result of this meeting that she sought to show that she became pregnant. She says she reported her pregnancy to defendant who, after sending her to someone in Umtata for concealment, sent her money there and wrote her letters in connection with the matter, two of which she produced. These in themselves, however, are of little, if any, probative value as they were not translated for the information of the Court, nor signed, nor proved to have been written by defendant. Moreover, it appears that they should not have been admitted at all, for in Dlamini *v.* Mbele, 1953 (1), N.A.C. 37, it was ruled by our sister Court in Pretoria that documents not in one of the official languages were not admissible without translations of their contents. Plaintiff then returned, discovered her pregnancy and in accordance with Native Custom "took the stomach" to defendant's people within a week, she avers, of his arrival home. Defendant then denied responsibility for her condition.

The only other deponent to the actual events was Mangwanya, the go-between, and she spoke only of the alleged meeting at her kraal. She says that she had been commissioned by defendant to call plaintiff's wife to her kraal and that she did so. She provided them with a hut and a sleeping mat and they stayed in the hut together the whole night until awakened by her at dawn. Her evidence, however, differed from that of plaintiff's wife as to times for she said the cohabitation at her kraal

happened "during scoffling" (summer) and not winter, and the "stomach was taken" to defendant's people a month, not a week, after plaintiff's return. Yet the child was born round about February, 1954. She also admitted that in the headman's Court she had stated that, after leaving defendant and plaintiff's wife in the hut at her kraal, she returned only a short while afterwards and found defendant gone.

Defendant in his evidence denied ever committing adultery with plaintiff's wife or ever having written to her and indeed said he could not write at all and had never been to school. He stated that the pregnancy was reported to his people a month after plaintiff's return, and in this he was supported by his father, who was his only witness. But he was contradicted by his father regarding his schooling, for his father told the Court that defendant used to go to school some days and some days not and had been, he thought, in Sub. A.

The Assistant Native Commissioner who presided in the Court *a quo* absolved defendant from the instance, with costs, and appeal was then noted on the grounds:—

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

2. That the judgment is bad in Law in that—

(*a*) plaintiff's wife Mahotela, found to have been a truthful witness by the Court, was sufficiently corroborated in Law for apart from the bare denial of defendant's plea, coupled with the fact that the Court found defendant to have been an untruthful witness, his (defendant's) false statement and deceit of the Court that he (defendant) had never been to school in his life, in order to show the Court that he could not have written any letters suggesting "*inter alia*" plaintiff's wife to hide her pregnancy by going to Umtata via Nkozo and contradicted by defendant's own father that defendant attended school, and also defendant's false denial that he never at any time visited plaintiff's kraal though his (defendant's) attorney cross-examined that he (defendant) visited plaintiff's kraal with Makayise, were strong corroborative facts of the story of plaintiff's wife;

(*b*) that plaintiff's wife's evidence was corroborated by Mangwanya's evidence, in that latter called plaintiff's wife who was not pregnant then, to meet defendant in her (Mangwanya's) hut, showing opportunity for defendant to commit adultery with plaintiff's wife and the Court should have entered judgment for plaintiff.

Incidentally, I can find nothing in the record to substantiate the statement in the last sentence of paragraph 2 (*a*) above.

Now, it has been ruled in these Courts, notably in the case of Nontenjwa *v.* Mapeke, 1940, N.A.C. (C & O), 146, that an action for adultery, where the plaintiff and his wife are married by civil rites, must be decided according to the Common Law of the land. The degree of proof required in such actions was considered in the case of Gates *v.* Gates, 1939 A.D., at pages 154 and 155. In that case Watermeyer, J. A., laid down that the proof required was proof sufficient to carry conviction to a reasonable mind, but he pointed out that when charges of criminal or immoral conduct are made in a civil case the reasonable mind will be required to be more firmly convinced, because the probabilities against such conduct are stronger than they are against conduct which is not immoral or criminal.

In the present case, can it be said that plaintiff, on whom the onus lay, had proved the adultery to the satisfaction of a reasonable mind? The Assistant Native Commissioner in his reasons states that the discrepancies in plaintiff's wife's evidence and that of Mangwanya, to which reference has already been made, are so contradictory as to raise serious doubts in his mind as to whether Mangwanya was ever the go-between and whether her evidence could be said to afford plaintiff's wife's story the requisite corroboration. He intimated, furthermore, that while the defence was able to discover no fault in the evidence of plaintiff's wife this did not necessarily imply that she should be considered to be a truthful witness. The Assistant Native Commissioner was thus not satisfied that the adultery had been proved "either factually or by inference". This Court is likewise far from satisfied, in the circumstances, that plaintiff had discharged the *onus* resting on him and, consequently, the answer to the question posed at the beginning of this paragraph must, of necessity, be in the negative.

From his references in his reasons to certain decided cases, it would seem that the Assistant Native Commissioner decided the matter as if the marriage between plaintiff and his wife had been by Native customary union, which would require a somewhat different degree of proof and involve a different method of approach to some of the salient factors of the action than if the marriage had been by civil rites. A more Draconian assessment of the evidence is called for in the former event than in the latter. Then, how much more justified would the Court *a quo* have been in finding against plaintiff had it decided the matter, as I have already intimated it should have done, on the basis of Common, not Native, Law?

Plaintiff is, therefore, clearly not entitled to judgment. Nor could judgment be given in defendant's favour in view of his unconvincing and even untruthful evidence and the general picture of evasiveness which, the assistant Native Commissioner says, he presented in the Court *a quo*.

Absolution from the instance was the correct decision and the appeal is consequently dismissed with costs.

Wakeford (Member): I concur.

Holdt (Member): I concur.

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

For Respondent: M. F. C. W. Stanford, Flagstaff.

NORTH-EASTERN NATIVE APPEAL COURT.

DHLAMINI *v.* NKOSI AND ANOTHER.

N.A.C. CASE No. 48 OF 1954.

VRYHEID: 4th October, 1954: Before Steenkamp, President, Ashton and Leibbrandt, Members of the Court.

ZULU CUSTOM.

Seduction—Extinction of claim for damages where seduced girl dies—Claim for damages made before death of seduced girl can be prosecuted to conclusion—Meaning of "action taken" in Native Law—Novation of claim by admission of liability.

Summary: Plaintiff successfully sued defendants in a Chief's Court for damages for the seduction of the former's daughter by the first defendant. Second defendant is the father of defendant No. 1. On appeal to the Native Commissioner the Chief's judgment was altered to one for defendants with costs.

Defendant No. 1 had seduced plaintiff's daughter who was delivered of a child in the winter of 1953. The daughter died in December, 1953. Before she died, defendants had sent a young ox as the *mvimba* beast, but this was rejected by plaintiff.

Held: That in Native Law, a seduction claim is extinguished by the death of the seduced girl but if the claim itself is made before the death, it can be prosecuted to its conclusion.

Held: That a report of pregnancy to the seducer, coupled with a claim for damages amounts to „taking action" in Native Law; and once such action has been taken the father of the girl does not lose his right to recover damages for prenuptial seduction.

Held: That the liability incurred by defendants had been novated by an agreement to pay the plaintiff two head of cattle.

Cases referred to:

Matolo *v.* Mhlapo, 1947, N.A.C. (C. & O.), 32.
Gebeliseni *v.* Sakumani, 1947, N.A.C. (C. & O.), 105.
Mayile *v.* Makawula, 1953, N.A.C., 262 (S).

Statutes, etc. referred to:

Section 137 (3) of Natal Code of Native Law, 1932.

Appeal from the Court of the Native Commissioner, Mahlabatini.

Ashton (Permanent Member):—

This is a claim by the father of a girl for damages against a male minor and his father for the seduction by the former of his daughter followed by pregnancy. It came before the Native Commissioner having been brought by defendants on appeal from a Chief's Court where judgment was entered for the plaintiff for two head of cattle or £10.

The Native Commissioner did not record the pleas of defendants in the proceedings in his Court but after hearing evidence he allowed the appeal, set aside the Chief's judgment and for it substituted a judgment " for defendant with costs ".

Against this decision the plaintiff now appeals to this Court on the following grounds:—

" 1. That the judgment was against the weight of evidence.
2. That defendant No. 2, Moses Nkosi, actually paid one beast when I approached him regarding the pregnancy of my daughter caused by his son the 1st defendant.
3. That the Court should have taken recognisance (sic) of the fact that defendant No. 2 paid a beast by doing so acknowledged the fact of the alleged pregnancy caused by his son defendant No. 1.
4. Although defendant No. 1 was at Mahashine School in the Nongoma District, he was still under the control of his father, No. 2. Defendant slept as he slept at defendant's kraal every evening.
5. That my daughter Margaret died after child birth and she informed me before her death that defendant No. 1 had caused her pregnancy.
6. That my daughter and defendant No. 1 were at the same school and had traversed the same road backward and forward from school each day.

7. That on one occasion I chased defendant No. 1 from my kraal after finding him in my daughter's hut in the early morning."

The Native Comisisoner in his reasons for judgment found only one fact proved, namely—

"Margaret, the daughter of plaintiff, for whose seduction he claims damages from defendants, died about six months after the birth of the child alleged to have been born as the result of the seduction."

Having found this fact the Native Commissioner invoked the provisions of section No. 137 (3) of the Natal Code of Native Law and stating that there was an absence of evidence that death was due to childbirth, he gave judgment for the defendants without further ado.

Section No. 137 (3) of the Code reads as follows:—

"Any claim for damages in respect of the seduction of or illicit intercourse with a girl or woman is extinguished by the death of such girl or woman unless her death is due to childbirth consequent upon such seduction or illicit intercourse."

The seduction is stated to have taken place in 1952 and second defendant sent as the *mvimba* beast a young black ox, which was rejected by plaintiff, who demanded payment of full *lobolo*.

A child was born to plaintiff's daughter in the winter of 1953 and she died in December of the same year. In the interim, plaintiff sued the defendants for full *lobolo* and the Induna refused to bring the matter before the Chief because second defendant wanted to pay. Subsequently plaintiff took a beast from him and slaughtered it but was later ordered to return a beast in its place. It was only after his daughter died that plaintiff instituted action for the usual seduction damages in the Chief's Court and then defendants denied liability.

The Chief, in his reasons for judgment, found the seduction and pregnancy proved as well as an offer by second defendant to pay an *mvimba* beast; he found for plaintiff because he was of the opinion that the defendants, having previously admitted liability, were trying to avoid payment of damages because of the provisions of section 137 (3) of the Natal Code of Native Law now that the seduced girl had died.

The question for dicision then is whether the claim was in fact extinguished in such a manner as to wipe out the liability created by an admission made prior to the girl's death.

In Gebeliseni *v.* Sakumani, 1947, N.A.C. (C. & O.), at page 106, it was stated:—

"... this Court has frequently held that a report of pregnancy to the seducer, coupled with a claim for damages amounts to 'taking action' in Native Law; and once such action has been taken the father of the girl does not lose his right to recover damages for prenuptial seduction."

In Matolo *v.* Mhlapo, 1947, N.A.C. (C. & O.), at page 33, it was stated:—

"... it is established law that when the woman dies before the charge of seduction or pregnancy is taken to a defendant's kraal her guardian has no right of action against the seducer ... but the right of action of the guardian is not extinguished by the death of the woman after the seduction or pregnancy has been reported in the usual manner to the seducer's kraal."

In a claim for damages for adultery the same principles were applied—1953, N.A.C., at page 263—when it was ruled:—

> "In Native Law action is taken when the adultery is reported at the adulterer's kraal and damages are demanded. It thus follows that where the union has been dissolved without such action having been taken the husband cannot recover damages for adultery committed with the woman prior to the dissolution."

At Common Law the effect of the death of the girl upon the right of action would seem to be that the action would pass to the executor of the girl's estate; provided she has before her death already instituted an action against the seducer but not when action had not previously been instituted by her.

Although these decisions are not directly in point it would seem that the principle involved in the statement of Native Law to the effect that a seduction claim is extinguished by the death of the seduced girl is that the claim itself must be made before the death otherwise it lapses but if it is made before the death it can be prosecuted to its conclusion.

In the case now on appeal the claim was made timeously and part payment of the damages claimed was made. The Native Commissioner, I think, directed himself wrongly and should have disallowed the appeal against the Chief's judgment.

The appeal to this Court should therefore, be allowed, and the judgment of the Native Commissioner should be altered to:—

> "The appeal from the Chief's Court is dismissed with costs."

Steenkamp (President):

I have read my brother Ashton's judgment and I agree therewith.

According to the reasons for judgment furnished by the Chief before whose Court the case was first tried, the plaintiff, now appellant, sued the defendants for two head of cattle which defendants had previously admitted and settled the matter out of Court, but when the girl, who was seduced by defendant No. 1, died, the defendants refused to liquidate the liability and relied on section 137 (3) of the Natal Code.

The Chief gave judgment in favour of plaintiff but the appeal to the Native Commissioner was allowed and the Chiefs' judgment altered to one for defendants with costs.

In his reasons for judgment the Native Commissioner states that in the absence of any evidence that the death of the girl was due to childbirth and in view of the provisions of section 137 (3) of the Code the Chief's judgment was reversed.

When the appeal was noted to the Native Commissioner, plaintiff's claim was stated to be for damages for seduction and pregnancy but in view of the statement by the Chief the case before him was in fact one in respect of an agreement by defendant No. 2 to pay the plaintiff the usual damages of two head of cattle. In other words the liability incurred by defendants to pay damages was novated by an agreement to pay to the plaintiff two head of cattle and it was in fact on this agreement the plaintiff relied.

I admit the notice of hearing of the appeal before the Native Commissioner was not correctly drawn up but when the Native Commissioner had the Chief's statement before him he should have cleared up the matter by calling on the plaintiff to amplify the pleadings.

From the record there can be no doubt that defendant No. 2 agreed to pay the damages and he cannot now get out of this undertaking because the girl his son seduced had died before he liquidated the debt.

There is abundant evidence that an agreement had been made and that defendant No. 1 had seduced the girl.

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

"Appeal from the Chief's Court is dismissed with costs."

Leibbrandt (Member): I concur.

For Appellant: In person.

For Respondents: Both in Person.

SOUTHERN NATIVE APPEAL COURT.

DIKO *v.* PRETORIUS.

N.A.C. CASE No. 24/54.

KOKSTAD: 13th October, 1954. Before Israel, President, Warner and Kelly, Members of the Court.

RENTS ACT - EJECTMENT ORDER.

Onus on defendant to show that he was protected by Rents Act and the existence of the Verbal Agreement to renew the lease for a further period of three years.

Application of amendments to Rents Act considered—Act does not envisage farms—True test to apply in deciding whether property leased is a farm or dwelling considered.

Summary: Plaintiff (now respondent) sued for an ejectment order against defendant who refused to vacate leased property after the lease had expired.

Defendant (now appellant) pleaded that he was protected by the Rents Act and that plaintiff had verbally agreed to a renewal of the lease for a further period of three years.

On the date of hearing defendant's attorney asked the judicial officer to recuse himself. This application was refused. After hearing evidence, judgment was given for plaintiff as prayed with costs and defendant appealed.

Held: No good reason has been shown why the judicial officer should have recused himself.

Held further: That the onus was on defendant to show that he was protected by the Rents Act and that plaintiff agreed to a renewal of the lease after its expiration which he has failed to discharge.

Held further: That it seems that the intention of the legislature was that the position which obtained prior to the enactment of sub-section (*e*) of section 33 (1) of Act No. 43 of 1950 should be restored.

Held further: That the true test to apply in deciding whether leased property is a farm or dwelling is to ascertain the dominant purpose and principal user of the premises.

Held further: That if plaintiff had agreed to a renewal of the lease, it is difficult to understand why defendant did not mention this to plaintiff's attorney instead of agreeing to remove to other premises especially as the lease gave him an option of purchasing the property on its expiration.

Cases referred to:

Rex *v.* Moshesh, 1924, E.D.C. 24.
Morris *v.* Louw, 1939, C.P.D. 395.
Matthews *v.* Kemp, 1946, C.P.D. 200.

Statutes referred to:

Act No. 13 of 1920.
Act No. 33 of 1942.
Act No. 43 of 1950, section 33 (1) (*e*).
Act No. 53 of 1951.

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

Warner (Permanent Member):—

Plaintiff is the registered owner of certain property known as Erf No. 287 and Erf No. 288 Mount Frere situate in the Village Management Board area of Mount Frere in the district of Mount Frere measuring 5 morgen 22 square roods and 4 morgen 481 square roods respectively. Defendant was lessee of these properties under a written lease which expired on the 31st August, 1953.

Plaintiff sued for an order of ejectment on the ground that defendant had refused to vacate the property after the lease had expired.

Defendant pleaded that he was protected by the Rents Act and also alleged that, in April, 1953, plaintiff had agreed verbally to a renewal of the lease for a further period of three years.

When the case came on for hearing before the Assistant Native Commissioner, defendant's attorney asked that the judicial officer should recuse himself on the ground that, when defendant was a member of the Public Service, the officer presiding in the case had submitted an adverse report on defendant's conduct. This application was refused.

The Assistant Native Commissioner gave judgment for plaintiff as prayed with costs and the defendant has appealed on the following grounds:—

1. That the Assistant Native Commissioner in view of the circumstances that were in his knowledge should have recused himself when application was made.
2. That the property leased was not described as a farm in the lease and although the ground was ploughed by defendant the crops were mainly used for the support of himself and his family.
3. That as defendant's witnesses are both employed in the service of the Native Affairs Department and no suggestion against their integrity was made their statements should have been accepted as against the plaintiff's who made a bare denial of ever attending at a discussion at which these witnesses were present. Some discrepancies in their evidence were pointed out by the Assistant Native Commissioner but these were not material to the essential facts viz. that a meeting did take place and that it was agreed that the lease be renewed.

The first ground of appeal is without substance and must be dismissed. In the case of Rex *v.* Moshesh, 1924, E.D.C. 24, the magistrate trying a criminal case had, when the accused was serving under him, rebuked him and had further suspended the accused from the service. In that case it was held that the reasons given by the accused were not of sufficient importance to have required the magistrate to recuse himself. In the present case, defendant has not shown any good reason why the Assistant Native Commissioner should have recused himself. Mr. Zietsman has not pressed this ground of appeal.

Defendant pleaded that he was protected by the Rents Act and the onus was on him to show that this was the case. In the case of Morris *v.* Louw, 1939, C.P.D. 395, it was held that Act No. 13 of 1920 did not envisage farms. The Act, on the interpretation of which this decision was based, was repealed and Act No. 33 of 1942 was substituted. In the case of Matthews *v.* Kemp, 1946, C.P.D. 200, it was held that the latter Act also did not apply to farms. Act No. 33 of 1942 has also been repealed and Act No. 43 of 1950 has been substituted therefor. Mr. Zietsman has argued that the lastmentioned Act has altered the position which obtained previously so that the decisions quoted are no longer applicable. It becomes necessary, therefore, to consider the position.

When the legislature enacted Act No. 43 of 1950 it must have been aware of the decisions in the cases of Morris and Matthews and if it intended that the position should be altered by making the Rents Act applicable to farms, such an intention would have been expressed in clear terms but this has not been done.

The Act provides for the control of rents of dwellings and business premises. In the definition of "business premises" a farm is excluded. In the Acts of 1920 and 1942 "Dwelling" was defined as "any room or place occupied as a human habitation if any money is stipulated to be paid to the lessor in respect of its use or occupation". In the definition of "dwelling" in the 1950 Act, the words "if any money is stipulated to be paid to the lessor in respect of its use or occupation" have been omitted. Except for the omission, the provisions on which the decisions quoted were based have been substantially re-enacted.

Section 33 (1) (*e*) of Act No. 43 of 1950 provided that the Act should not apply to any dwelling situated on ground let therewith, and to be used in connection with such dwelling only, where the said ground comprises at least one morgen in area. This provision was deleted by Act No. 53 of 1951. This deletion cannot, in my opinion, be construed as an intention on the part of the legislature that the Act should apply to a farm, irrespective of its size, as long as there is a dwelling-house situated thereon. It seems to me that it was the intention of the legislature that the position which obtained prior to the enactment of sub-section (*e*) of section 33 (1) of Act No. 43 of 1950 should be restored.

I consider that the dictum laid down in the case of Morris *v.* Louw and supported in the case of Matthews *v.* Kemp, that the Rents Act does not envisage farms and that the true test to apply, in deciding whether property leased is a farm or dwelling, is to ascertain the dominant purpose and principal user of the premises, should be applied in the present case.

The two properties concerned are about ten morgen in extent. According to an extract from the Valuation Roll of the Mount Frere Village Management Board, which was put in by consent, one property has a site-value of £125 with buildings worth £85 while the other has a site-value of £120 with buildings worth £5. From this it would appear that the dominant purpose and user of the properties is farming. Defendant states that he leased the properties for residential purposes while he was employed in the village of Mount Frere. He has not brought any evidence to show what the dominant purpose and user of the properties are but admits that he did make use of the properties for growing crops, portion of which he sold. In my opinion he has failed to discharge the onus of proving that the property in question is a "dwelling" as defined in the Rents Act and the second ground of appeal must fail.

Defendant states that, in April, 1953, when he was employed at the Magistrate's Office in Mount Frere, he wished to plant forage on the properties and, as the forage might not be ready for harvesting when the lease expired, he asked plaintiff to agree to a renewal of the lease when it expired. He says that he met plaintiff at the bus and asked him to come to the Magistrate's Office for a discussion as he wanted witnesses to be present; plaintiff came and defendant called Sodwele and Tantsi, who were also employed in the Magistrate's Office, and, in their presence, defendant asked plaintiff to extend the lease for a further period of three years and plaintiff agreed. This statement is supported by the witnesses Sodwele and Tantsi.

Plaintiff denies that he ever made a verbal agreement to extend the lease. He also denies that he had a discussion about it with defendant at the Magistrate's Office. He says that his son is always at the buses so that, if defendant had asked him to come for a discussion, he would have taken his son to be a witness on his side. Plaintiff's son states that, in August, 1953, defendant came to him to pursuade plaintiff to extend the lease for another four years.

Defendant admits that he interviewed plaintiff's attorney who wanted him to vacate the property as it had been sold to someone else who wanted to take possession of it. He also admits that he agreed to remove to another property. He says that he did so on condition that the owner of this other property accepted him as a tenant but he refused to do so. He also admits that he did not tell plaintiff's attorney about the verbal agreement to renew the lease. He says that he did not do so because he wanted to buy the property in question from plaintiff but the attorney refused to agree to this. If plaintiff had agreed to a renewal of the lease, it is difficult to understand why defendant did not mention this to plaintiff's attorney instead of agreeing to remove to other premises especially as the lease gave him the option of purchasing the property on its expiration.

In view of the probabilities of the case, evidence of a satisfactory nature would be required to substantiate defendant's statement that plaintiff agreed to renew the lease. The Native Commissioner has pointed out various discrepancies in the evidence of defendant and his witnesses. He has analysed the evidence carefully and I consider that he has come to a correct decision in finding that defendant has failed to discharge the onus of proving that plaintiff agreed to a renewal of the lease.

The appeal should be dismissed with costs.

Israel (President): I concur.

Kelly (Member): I concur.

For Appellant: Mr. Zietsman, Kokstad.

For Respondent: Mr. Elliot, Kokstad.

NORTH-EASTERN NATIVE APPEAL COURT.

NDHLOVU *v.* NDHLOVU AND ANOTHER.

N.A.C. CASE No. 56/54.

PIETERMARITZBURG: 18th October, 1954. Before Steenkamp, President, Ashton and de Souza, Members of the Court.

ZULU CUSTOM.

Customary Union—Dissolution on grounds that parties were not in harmony with each other and conditions were such that continued living together was insupportable.

Lobolo—Refund of, on dissolution.

Children—Custody of, on dissolution of customary union.

Summary: Plaintiff sued his wife, defendant No. 1, for a divorce and sued her guardian, defendant No. 2, for the return of five head of cattle in respect of *lobolo* paid by him for his wife. Plaintiff based his claim on the grounds of wilful desertion by his wife. It appears that plaintiff severely assaulted his wife whereupon she returned to her father's kraal. Efforts at reconciliation failed.

Held: That the circumstances were sufficient to show that the parties were not in harmony with each other and conditions were such that continuous living together was insupportable.

Held further: That a decree of divorce should have been granted.

Held further: As there is nothing to show that it will be prejudicial to the children if their father has their custody, an order awarding them to him should be made.

Held further: That at least one beast must be ordered to be returned and that plaintiff has not made out a case for the return of more than one, as the woman's *lobolo* value in the "marriage market" must be very low and as plaintiff admitted that he had more or less been responsible for the disruption of the union.

Cases referred to:

Dikazana *v.* Nozinga, 1916 N.H.C. 211.
Mkize *v.* Mkize, 1941 N.A.C. (T. & N.) 125.

Statutes, etc., referred to:

Section 76 (1) (*f*) of Natal Code of Native Law, 1932.

Appeal from the Court of the Native Commissioner, Pietermaritzburg.

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

In the Court of the Native Commissioner, plaintiff, now appellant, claimed a decree of divorce on the grounds of wilful desertion from defendant No. 1, his wife, who was assisted by her brother and guardian, who was also cited as defendant No. 2. He claimed at the same time the return of five head of cattle of the *lobolo* he paid and asked for the custody of the four surviving children of the union.

The defendants replied to the effect that the wife did not wilfully desert her husband because he, so she averred, drove her away from his kraal and after challenging the number of cattle paid as *lobolo* they asked the Court to grant judgment in their favour.

The Acting Assistant Native Commissioner having found that a valid customary union subsisted between plaintiff and defendant No. 1, and that the latter left the former and returned to her father's kraal, found it also proven that plaintiff had severely thrashed his wife and that although she had left him her conduct did not constitute such a desertion as would entitle plaintiff to a decree of divorce. He therefore concluded that plaintiff had no grounds for a divorce and gave judgment in favour of the defendants.

Against this judgment the plaintiff appeals on the grounds that the judgment was bad in law and against the weight of evidence.

It is well-established in Native Law as practised in Natal (see case of Dikazana *v.* Nozinga, 1916 N.H.C. 211) that when the partners to a customary union cannot live together in harmony the Courts will endeavour to find a way of affording them relief by granting a decree of divorce with such compensating orders regarding the *lobolo* cattle as may be regarded as just.

The evidence in this case established that the union took place in 1935, that plaintiff's wife had left his kraal some nine years ago and that after initial efforts to get her back to him, which were not successful, he instituted proceedings for divorce. The wife stated without any equivocation, " I do not love my husband any longer as a result of his actions ", and plaintiff admitted that he gave his wife a thrashing which was so severe that she had to have treatment at hospital and that he had not tried to get his wife back for five years because he thought that she had good grounds for divorcing him and would apply for a decree herself.

The circumstances were sufficient to show that the parties were not in harmony with each other and conditions were such that continuous living together was insupportable—see paragraph 76 (1) (*f*) of the Natal Code of Native Law.

It is our view that the Acting Assistant Native Commissioner should have granted a decree of divorce and that he erred in not doing so.

Having reached this view there remains to be considered the orders which must follow on the granting of a decree of divorce.

There were four children of the union, the youngest of whom must be about eight or nine years of age. In Native Law the father usually is given the custody except where a child is of very tender years and is too young to leave its mother. There is nothing to show that it will be prejudicial to the children if their father has their custody and an order awarding them to him should be made.

In regard to the return of the *lobolo* the Acting Assistant Native Commissioner made no finding as to how many were paid but the particulars in the registration of the union show that eight head and the *ngqutu* beast were pointed out and two head were to be paid before the end of 1935. Plaintiff stated he paid ten head as *lobolo* and defendant No. 2 in his plea contended that seven head and the *ngqutu* beast were paid to his father.

The latter gave no confirmatory evidence of his contention and it is safe to accept that ten head were paid.

In Mkohliswa Mkize *v.* Nokuweja Mkize d.a. 1941 N.A.C. (T. & N.) 125, the Court held that although there was insufficient evidence to disclose a case of desertion against the wife, the union was unhappy and there were frequent quarrels and approved of the grant of a divorce decree where the husband brought the action against his wife. It went on to say:—

> "If the evidence in the case had disclosed that the woman was the only party in the wrong then the plaintiff would have been entitled to a refund of 12 head of cattle but if the divorce had been granted on her application because of his misdeeds, then he would not have been entitled to a refund. Although the divorce was granted at his instance the parties were, it appears, both to blame—he more than she, apparently. In these circumstances we consider that there should be an order for the refund of six head of cattle only." (It was held that 14 out of 15 head had been paid as *lobolo*.)

In the case now on appeal there were four children of the union, which took place some nineteen years ago for ten of which the partners lived together as man and wife, the woman's *lobolo* value in the "marriage market" must be very low and plaintiff admitted that he had more or less been responsible for the disruption of the union. It seems to us therefore, that his claim for the return of five head of cattle is unreasonable.

At least one beast must be ordered to be returned and we do not consider that plaintiff made out a case for more than that one.

In our view the appeal should be allowed.

It is accordingly ordered that the appeal be and it is hereby allowed with costs and the judgment of the Court below is altered to read:—

> "It is ordered that the customary union existing between the plaintiff and defendant No. 1 be dissolved.
>
> It is further ordered that the custody of the four children be awarded to the plaintiff; that the woman remain under the guardianship of Mfanawenduna Zondi; that the guardian Mfanawenduna refund to plaintiff one beast or its value £5. No order as to costs."

Appellant in person.

Respondents: Both in person.

NORTH-EASTERN NATIVE APPEAL COURT.

DHLAMINI *v.* NDHLOVU.

N.A.C. CASE No. 35/54.

PIETERMARITZBURG: 19th October, 1954. Before Steenkamp, President, Ashton and de Souza, Members of the Court.

LAW OF PROCEDURE.

Interpleader—Cattle attached in possession of claimant—Onus of proof rests on execution creditor.

Practice and Procedure—Handing in record of previous proceedings is only evidence to establish that on a certain day judgment for a certain amount was, on certain pleadings, given against a party in another party's favour, unless the parties agree that the evidence in the one case shall be accepted in the other.

Summary: Ndhlovu removed seven head of cattle from the possession of Dhlamini, who then sued Ndhlovu and obtained judgment for seven head of cattle or their value £35—Ndhlovu paid the £35 but Dhlamini was not satisfied and removed seven head of cattle from Ndhlovu's kraal. Ndhlovu thereupon sued Dhlamini and obtained judgment for the return of seven head of cattle or their value £116. On this judgment the three head of cattle in question were attached. It was admitted that the three head of cattle in question were sold by Dhlamini in 1950 to the claimant who thereupon *sisaed* them to Dhlamini.

Held: That as the cattle in question were attached in possession of the claimant, the onus of proof rested on the execution creditor.

Held further: That once the execution creditor has admitted that the cattle were the property of claimant, having been *sisaed* by him to the execution debtor, then he is out of Court and cannot now be heard to say that there was no *sisa* notwithstanding his admissions.

Held further: That even though the record of the previous proceedings was handed in by consent, in the absence of the defendant's consent, express or implied, the evidence of the other record would not become evidence in the case; that what is really required is an agreement between the parties that evidence in one case shall be accepted in another.

Held further: That the handing in of Exhibit A by consent was only evidence to establish that on a certain day judgment for a certain amount was, on certain pleadings, given against defendant in plaintiff's favour.

Cases referred to:

Fourie *v.* Morley & Co., 1947 (2), S.A. 218.

Appeal from the Court of Native Commissioner, Pietermaritzburg.

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

This is an interpleader action in which the claimant claims that certain three head of cattle viz. two red cows and one red tollie are his property and should not have been attached in satisfaction of a judgment the execution creditor obtained against the execution debtor.

The cattle were attached in possession of the claimant and it was therefore accepted that the onus rested on the execution creditor whose personal evidence is to the effect that he removed seven head of cattle forcibly from the kraal of one Lindi Dhlamini who then sued him and obtained judgment for seven head of cattle or thirty-five pounds (£35), their value. The execution debtor in that case viz. Moffat Ndhlovu (now respondent and execution creditor) paid the £35 but Lindi was not satisfied and went to the kraal and removed the seven head of cattle. The execution creditor, Moffat Ndhlovu, sued Lindi and obtained judgment for the return of the seven head of cattle or their value £116 plus £5 damages. It was on this judgment that the Messenger of the Court attached the three head of cattle, now forming the Interpleader action, in possession of the claimant. The execution creditor, Moffat Ndhlovu, admitted in evidence that if Lindi Dhlamini had sold these cattle to the claimant in 1950, he (execution creditor) had no right to have them attached.

After the execution creditor had given evidence, and from the record it is not clear whether he had completed his evidence, the legal representatives informed the Court that the following facts are admitted as being common cause:—

"(1) That prior to 1950 Lindi Dhlamini sold the three head in dispute to Gesi Ngcobo (claimant) who left them at Dhlamini's kraal under *sisa*.

(2) That subsequently, about 1950, respondent forcibly removed seven head of cattle (including the three in dispute) from the possession of Dhlamini.

(3) Subsequently, Dhlamini instituted action against respondent for the return of seven head of cattle or payment of their value £35. Case was defended and judgment given in favour of Dhlamini (case No. 52/52 N.C.'s Court P.M. Burg).

(4) Respondent then paid the £35 and kept the seven head of cattle (which seven head included the three head in dispute).

(5) Subsequently, Lindi Dhlamini removed the seven head from respondent who instituted action against him for the return of the seven head of cattle or their value £129. Respondent got judgment for the return of the seven head of cattle or payment of their value £116 plus £5 damages and costs, and issued a writ and attached the three head of cattle in claimant's possession in respect of which this interpleader summons now stands."

Both claimant and respondent (execution creditor) closed their cases after these admissions had been recorded.

The presiding officer reserved judgment but on the day he should have given judgment the original record in civil case 52/52 i.e. the case in which Lindi Dhlamini obtained a judgment against execution creditor for seven head of cattle or £35, was by consent put in as an exhibit and marked A.

Why this record was handed in, is difficult to understand because the parties, through their legal representatives, had already admitted that a judgment for seven head of cattle or their value £35, had been obtained. This point will, however, be referred to again later on.

After the record had been handed in the Additional Native Commissioner called Lindi Dhlamini i.e. the execution debtor to give evidence. He was not cross-examined by either of the legal representatives and he definitely states that the three head of cattle were sold by him to the claimant during 1950 and that the claimant thereupon *sisaed* them to him. This was admitted, *vide* fact 1 mentioned above and this Court can see no reason why he should have been called upon to re-iterate admitted facts.

The Additional Native Commissioner declared the three head of cattle in question as being non executable and the execution creditor has now through his legal representative noted an appeal to this Court on the following grounds:—

"In that the Native Commissioner's judgment was against the weight of the evidence and bad in law in that:—

(*a*) The Native Commissioner found that the evidence of the interpleader claimant was sufficiently corroborated by the evidence given by a certain Lindi Dhlamini (plaintiff in the main action) regarding the sale of the oxen in question during 1950, while the evidence given by the said Lindi Dhlamini is in fact completely contradictory to the evidence given by the latter in the main action and in a previous action, brought by himself against the appellant, copy of which record has been filed and is now forming part of the record of this action and that the evidence before the Court.

(*b*) That the learned Commissioner should furthermore have found that the said Lindi Dhlamini was estopped from denying that the said cattle was his property as he admitted that he was the owner of the said cattle in the previous action referred to above.

(*c*) That the learned Commissioner should have found that the evidence of the said Lindi Dhlamini was untrustworthy and unbelievable.

(*d*) That the learned Commissioner should have found that the Appellant, by virtue of the Judgment in the action, mentioned in para. (*a*) above, obtained a real right in the said cattle and that as a result thereof, appellant was at that time the owner of the said cattle and not the interpleader claimant.

(*e*) That the learned Commissioner should have given judgment i.f.o. appellant and should have declared the said cattle executable with costs."

The appeal would appear to be based entirely on the allegation that the execution debtor gave evidence in conflict with the evidence he had given in Case No. 52/1952, the record of which was handed in as Exhibit A.

The execution creditor hereinafter referred to as the appellant, has misconceived very important factors apparent in the case. He has overlooked the fact that the handing in of Exhibit A by consent was only evidence to establish that on a certain day judgment for a certain amount was, on certain pleadings, given against a defendant in plaintiff's favour (see the case of Fourie *v.* Morley & Co., 1947 (2), S.A. 218, on page 223 line 5-9 N.P.D.) In that case the question of the handing in of a record of a previous case was fully dealt with and the conclusion arrived at was that in the absence of the defendant's consent, express or implied, the evidence of the other record would not become evidence in the case. Broome J. goes further in his judgment on page 222 and states:—

> "What is really required is an agreement between the parties that evidence in one case shall be accepted in another."

In the present appeal there is no such agreement and as already mentioned the handing in of the record was no more than to prove that a judgment had been obtained on a certain day on certain pleadings, etc. Evidence given in that case can in no circumstances be referred to by the legal representatives or the presiding officer and the appellant's attorney and the judicial officer would appear to have been labouring under a misapprehension.

Once the execution creditor has admitted that the cattle were the property of the claimant, having been *sisaed* by him to the execution debtor before any litigation took place between the latter and the appellant, then he is out of Court and cannot now be heard that there was no *sisa* notwithstanding his admissions.

In the circumstances the appeal is dismissed with costs.

For Appellant: Adv. J. H. Niehaus, instructed by C. C. C. Raulstone & Co.

For Respondent: Adv. R. C. C. Feetham, instructed by Randles & Davis.

NORTH-EASTERN NATIVE APPEAL COURT.

DHLAMINI *v.* **GCWENSA.**

N.A.C. CASE No. 53 OF 1954.

PIETERMARITZBURG: 20th October, 1954. Before Steenkamp, President, Ashton and de Souza, Members of the Court.

ZULU CUSTOM.

Customary Union—Celebrated in Transvaal—Subsequently registered in Natal—Woman's mother, instead of her guardian, giving consent—cannot impugn record of registration after twenty odd years.

Quaere: If a Native female who is in terms of the Natal Native Code a perpetual minor, unless emancipated, purports to act on behalf of the heir of her late husband and guardian and the minor heir does not within a reasonable time of reaching majority take steps to set aside the union, should he not be taken to have given his consent tacitly thus making the union invulnerable against attack on the ground that the guardian's consent was not given?

Summary: Plaintiff entered into a customary union with a woman, Lesiah, in the Transvaal. The *lobolo* was paid to Lesiah's mother, who transmitted it to her son, Klaas, who was heir to her late husband.

Plaintiff being a Natal Native subsequently went to his home in Natal, accompanied by his bride and her mother, and had the union registered there in 1930.

An official witness presided at the subsequent wedding ceremony in Natal.

After the birth of her second child, Lesiah went to live with defendant, taking her two daughters with her.

The property rights in the two girls are now in dispute.

Held: That it is clear from the evidence that Lesiah and plaintiff had already lived together as man and wife and that *lobolo* payments had been made in the Transvaal.

Held further: That as it is recorded that when registration of the Union was effected the then Magistrate went into the matter, he must be presumed to have accepted the union as having been validly celebrated and must have accepted the guardian's mother as his representative because it is recorded that she raised the point that she wanted twelve head of cattle.

Held further: That Lesiah, the wife, cannot be heard to impugn at this late stage the record of the event in the customary union register as far back as 1930.

Held further: That it is significant that defendant paid plaintiff £20 damages for adultery with plaintiff's wife and did not appeal against the judgment.

Cases referred to:
Cili *v.* Cili, 1944 N.A.C. (T. & N.), 29.
Sangweni *v.* Sangweni, 1945 (N.A.C.(T & N.), 103.

Statutes, etc., referred to:
Section 27 (2) of the Natal Code of Native Law, 1932.

Appeal from the Court of the Native Commissioner, Msinga.

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

A customary union between Nyangweni Dhlamini, the present plaintiff (now Appellant) and Lesiah Masuku (also known as Layisana or Mpindile) was registered before the Native Commissioner, Msinga, on 13th February, 1930.

She bore the plaintiff two children viz. Sarafinah and Ndombolozi, both females. Thereafter she left plaintiff.

The issue in this case is the property rights in two girls, Sarafinah and Ndombolozi.

Although a customary union was registered, the defendant (now Respondent) avers that there had not been a proper customary union between the plaintiff and the woman Lesiah owing to the fact that her guardian Klaas, eldest brother, did not give the necessary consent. The woman, Lesiah, went and lived with defendant. Defendant admits he did not enter into a customary union with Lesiah He also admits that plaintiff is the natural father of the two girls but they were very small when they came to him and he supported them. He admits he received cattle for both these girls but did so on behalf of Klaas, eldest brother of the woman, Lesiah, and that there are still seven of the cattle remaining.

The Native Commissioner found that no valid customary union exists between plaintiff and the woman Lesiah, and gave judgment for defendant with costs.

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

"1. That the learned Assistant Native Commissioner erred in holding that there was no valid marriage between plaintiff and the woman Myisana *alias* Lesiah *alias* Mpindile.

2. That judgment should accordingly have been entered for plaintiff against defendant in respect of so many cattle or their value £10 each as defendant admitted having received from the seducers and impregnators of the girls Saraphinah and Ndombolozi."

It is clear from the evidence that Lesiah and plaintiff had already lived together as man and wife—they actually had a child—and *lobolo* payments had been made in the Transvaal when plaintiff, being a Natal Native, wanted to register this union. He was rightly told that registration of customary unions is not possible in the Transvaal and so he went to his home in Natal to effect registration. He was accompanied by his bride and her mother. An official witness officiated at the wedding ceremony which became necessary before registration could take place and he registered the union as having been legally celebrated.

Plaintiff and Lesiah thereafter lived together in Natal as man and wife and a second child was born. Then Lesiah formed an attachment with defendant and went and lived with him, taking her two daughters with her. It is recorded that Klaas, the brother of Lesiah, duly took the *lobolo* which plaintiff paid to him through his mother. It is recorded too that when registration of the union was effected the then Magistrate, went into the matter and he must be presumed to have accepted the union as having been validly celebrated and must have accepted the guardian's mother as his representative because it is recorded that she raised the point that she wanted twelve head. It is probable that the actual position was that plaintiff and Lesiah were already husband and wife when they were still in the Transvaal.

As against this evidence, Lesiah, the wife, denies that there was any celebration of a union in Natal; but she cannot be heard to impugn at this late stage the record of the event in the customary union register as far back as 1930. It was admitted on behalf of the defendant that registration did take place and it cannot be lightly accepted that official witness, Sikuku Kumalo was such a dishonest official as to register a fictitious event.

The defendant lived with Lesiah for about twenty years and took no steps to legalise his union with her. He told the Court in evidence that: "The Europeans said I could never marry her. I have never tried." It is significant too that he paid twenty pounds (£20) "when plaintiff sued him for living with his wife" and did not appeal against that judgment. The Court must have accepted that there was a customary union between plaintiff and Lesiah otherwise damages for adultery could not have been awarded.

Taking the defence evidence as a whole it is extremely weak and cannot be described as the "strong" evidence which is required to impugn the record of registration in the customary union register—*vide* Sangweni *v.* Sangweni, 1945 N.A.C. (T. & N.), page 103.

In his reasons for judgment the Assistant Native Commissioner accepts plaintiff's evidence that Lesiah's mother, Palisane, was present to consent to the union but for lack of evidence he did not find what her *locus standi* was. He does not criticise the manner in which plaintiff gave his evidence but extols the defendant's witnesses, Lesiah and Klaas, who had every reason to give evidence favourable to defendant.

The Assistant Native Commissioner says of them: "both witnessess described the affair of her lover almost exactly down to the type of money paid and unless there had been collusion between them, this evidence must disprove the plaintiff's allegation that the guardian was very young at that time." But the recorded evidence, to our minds, does indicate that there was collusion.

Defendant at no time had any right to accept the cattle for the seduction of the two girls and his story that he accepted them for Klaas is too thin for credence. He could not even say for certain how many head he held for Klaas.

The probabilities are entirely in favour of the plaintiff's case and in accepting the defence evidence as being strong and conclusive enough to set aside the evidence of the plaintiff supported by the registration of the union we think the Assistant Native Commissioner was wrong and he should have found for plaintiff for seven head of cattle or £70 and costs (the number of cattle or their value being what Counsel for Appellant asked for).

It is accordingly ordered that the appeal be and it is hereby allowed with costs and the judgment of the Assistant Native Commissioner is altered to read:—

> "For plaintiff for seven head of cattle or their value £70 and costs."

Rider by Steenkamp (President):—

The facts in this case raise the question whether the mother of a girl may on behalf of a minor heir, give a valid consent to her daughter's union. According to section 27 (2) of the Code a Native female is a perpetual minor unless emancipated but where she supports to Act on behalf of the heir of her

late husband and guardian, and the minor heir after reaching majority does not within a reasonable time take steps to set aside the union, should he not be taken to have tacitly given his consent, thus making the union invulnerable against attack on the ground that the guardian's consent was not given? It would seem so from the judgment in the case of Cili *v.* Cili, 1944 N.A.C. (T. & N.), 29.

Klaas, the brother of the woman Lesiah, stated that plaintiff and Lesiah eloped when he was already a major and no approach was made to him to give consent to a customary union. He took no steps to follow up his sister and demand *lobolo* or damages from the plaintiff and if he is to be believed that he was a major at the time, then I must accept that he tacitly ratified the consent given by his mother.

For Appellant: Adv. O. A. Croft-Lever, instructed by Nel & Stevens.

Respondent in default.

NORTH-EASTERN NATIVE APPEAL COURT.

MAKHAYE *v.* SIBETHE AND OTHERS.

N.A.C. CASE No. 57 OF 1954.

PIETERMARITZBURG: 20th October, 1954. Before Steenkamp, President, Ashton and de Souza, Members of the Court.

LAW OF DELICT.

Damages—Where a person has a legal right to perform an act, and if he performs that act in the ordinary mode of doing so and nevertheless causes damage to another person, he is not considered to have done any wrong.

Summary: Plaintiff sued defendants for damages for assault, loss of a fence and contumelia. Plaintiff had erected a fence on land to which he had no claim and when the land was allotted to defendant No. 2, the latter removed the fence. The fencing material subsequently disappeared.
Defendants consented to damages of £1 for the assault but denied liability in respect of the rest of the claim.

In a majority judgment, with which Ashton, Member, dissented:—

Held: That once defendant No. 2 was allotted the land he had a right to remove the fencing encroaching on to his land.

Held further: That if a person has a legal right to perform an act and if he performs the act in the ordinary mode of doing so and nevertheless causes damage to another person, he is not considered to have done any wrong.

Held further: That it is clear from the evidence that any loss suffered by plaintiff was entirely due to his own dilatoriness in not removing the fencing material which he knew was lying about on the land.

Appeal from the Court of the Native Commissioner, Pietermaritzburg.

Steenkamp (President):—

In his summons plaintiff claimed from the four defendants (1) £10 damages for assault, (2) £25 being the value of a fence and (3) £10 contumelia.

During the course of the proceedings the following note appears on the record:—

> "Mr. Feetham informs Court that it has been agreed by the parties that an offer of £1 by defendants in respect of the assault threat be recorded and the plaintiff accepts this offer, further that plaintiff abandons his claim for damages for contumelia, and that the only point at issue now is the amount of damages to which plaintiff is entitled in respect of the fence.
>
> Mr. Theron formally admits that the fence was pulled down by his clients and accepts the onus of leading evidence in this connection."

During arguments in this Court Mr. Feetham conceded that the words "if any" should have been inserted after the word "damages" where that word appears in line 9 of the above passage.

On the claim for damages for assault judgment was entered for £1 and in respect of the damages to the fence for £4. 2s. and costs.

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

"1. The learned Judicial Officer erred—

(*a*) in not taking into consideration that the plaintiff had acted without any colour of right or authority in trespassing upon the defendant's property and in erecting the fence;

(*b*) in not taking into consideration the evidence that the defendants, in removing the fence did so after receiving the consent and permission of their own tribal authorities to do so;

(*c*) in not accepting that the preponderance of probability exists, and was proved by the defence evidence. That the timber of which the fence was made was returned by the defendants and accepted by the plaintiff and that, plaintiff therefore, was not entitled to any damages at all in respect of the said fence;

(*d*) in rejecting the defence evidence which is to the effect that the plaintiff himself removed the timber to his kraal after the fence had been demolished and the timbers placed by defendants near the plaintiff's boundary when they became aware of the fact that the timber belonged to the plaintiff;

2. The defendants further aver—

(i) that there is a strong probability that the evidence for the defence is true in all the main and essential features and that of the plaintiff unsatisfactory, unreliable and uncorroborated, in no way disproving or refuting the evidence given by the defendants;

(ii) that on the premises contained in paragraph 1 and 2 (i) hereof, the plaintiff was not entitled to judgment as granted and, therefore, not entitled to any costs as the amount that is due to him is out of all proportion to the amount claimed by him in the summons, *alternatively* that the Judicial Officer erred in overlooking the fact that both plaintiff (in trespassing onto defendants' property and there erecting a fence, where he had never been granted any right or permission to do so) and defendants (in demolishing the fence) were at fault and equally responsible for the resultant litigayion (sic) and, that being so, no order as to costs should have been made."

The facts are that defendant No. 2 had been informed at the Chief's place that a certain land had been allotted to him by the Native Commissioner. There was a fence on this land and the following Saturday defendant No. 2 pulled down the fence and piled the fencing materials on vacant ground near his land and next to plaintiff's ground. Plaintiff, however, states that the materials were scattered about but for the purposes of this case it does not seem material what the position was.

After removing the fence the defendant No. 2 ploughed the ground.

There is a conflict of evidence as to whether plaintiff removed the fencing material after defendant No. 2 had demolished the fence. Defendant No. 2 states that he saw plaintiff doing so. Plaintiff denies this but the fact remains that plaintiff knew the fencing materials were there. After defendant No. 2 received the summons he went to the Induna and Plaintiff was called to a conference. Defendant No. 2 states he only became aware of the owner to the fencing material when he received the summons.

Plaintiff admits that on the day of the conference the poles were lying where the fence had been and to his knowledge they were there for two weeks and disappeared during the third week. He also admits that after the fence was pulled down he did nothing about the poles and thought he would wait for the case.

Plaintiff's own witness states that after the conference the Induna, plaintiff and he went to inspect the poles which were lying around.

There is no question that the land belonged to the plaintiff and the evidence that the land had been allotted to defendant no. 2 is not refuted.

I am of opinion that once defendant No. 2 was allotted the land he had the right to remove the fencing encroaching on to his land. He had the legal right to perform that act and if he performs the act in the ordinary mode of doing so and nevertheless causes damage to another person, he is not considered to have done any wrong (see Principles of South African Law by Wille, page 492, third edition).

Defendant No. 2 is the only person who had the right to that land and the mere fact that plaintiff withdrew his action in respect of contumelia, which could only have succeeded if defendant No. 2 had acted unlawfully, goes to show that only defendant No. 2 had a right to that land. Even if I am wrong in my conclusions and assuming that defendant No. 2 acted wrongly in removing the fence, it became plaintiff's duty to mitigate the damages by removing the fencing material to a place of safety. He failed to do so and the only damages he might have been entitled to if defendant No. 2 had no right to remove the fence was the damages for infringing any rights which he might have had and which, according to the record, he had not.

I wish to return to the admissions made during the course of the proceedings. At first blush it would appear that defendant No. 2 admitted he had infringed plaintiff's rights and that the only issue in dispute was the value of the fencing materials but in view of the statement made by plaintiff's Counsel during the course of arguments in this Court, the question to be decided was whether plaintiff had suffered any damages due to some wrongful act on the part of defendant No. 2. It is clear from the evidence that any loss suffered by plaintiff was entirely due to his own dilatoriness in not removing the fencing material which he knew was lying about on the land.

In the circumstances in my opinion the appeal succeeds and the Native Commissioner's judgment should be altered to read as follows:—

"(1) Judgment for plaintiff by consent for £1 damages for assault against all four defendants, jointly and severally the one paying the others to be absolved.

(2) Balance of claim for defendants.

(3) No order as to costs."

De Sousa (Member): I concur.

Ashton (Permanent Member): Dissentiente: I regret that I am unable to agree with the majority.

The evidence is full of contradictions and discrepancies but the issue was narrowed down at the hearing on the 22nd July, at page 16 of the record when Mr. Feetham, for the plaintiff, said that the parties had *inter alia* agreed that "the only point at issue now is the amount of damages to which plaintiff is entitled in respect of the fence". Mr. Theron for the defendants thereupon admitted the fence was pulled down by his clients and accepted the onus of leading the evidence in this connection.

It was argued that all that the parties agreed to and admitted in relation to the fence was that Defendants had pulled it down. But there would have been no point in such a restricted admission by defendants at that stage. To my mind it was admitted that there was a right to damages if any damages in fact were suffered and defendants took upon themselves the onus of proving that no damage was suffered by plaintiff. They attempted to discharge this onus by showing that plaintiff collected the fence materials but in this they failed.

The land on which the fence was erected was claimed by the 2nd defendant to be his own and when he found the fence he reported to the Chief who said he had been allotted it by the Native Commissioner. Thereupon he pulled it down without consulting the plaintiff to whom the land previously belonged. It was only when he got a summons that he went into the matter at a conference at the Induna's kraal. It was sought to show that the fencing materials were collected by plaintiff but the evidence led did not establish this. What became of the materials is not clear but there was no proof that plaintiff recovered them. Defendants' actions were unauthorised and they must be taken to be liable for the consequences of their wrongful acts. I think the Acting Assistant Native Commissioner was right and his assessment of the value of the materials cannot be quarreled with.

To my mind the appeal should be dismissed with costs.

For Appellant: Adv. J. H. Nichaus, instructed by D. B. Theron.

For Respondent: Adv. R. C. C. Feetham, instructed by J. R. N. Swain.

NORTH-EASTERN NATIVE APPEAL COURT.

MBUYAZI *v.* MBUYAZI.

N.A.C. CASE No. 31/54.

ESHOWE: 27th October, 1954. Before Steenkamp, President, Ashton and Cowan, Members of the Court.

ZULU CUSTOM.

Native Custom: Ukuvusa *wife.*

Lobolo: Refund of, where woman dies before giving birth to any children.

Summary: Plaintiff sued his uncle, the defendant, for 8 head of cattle from the estate of plaintiff's late father used as *lobolo* for a woman, Nomgwaqo. Plaintiff alleged that when defendant paid the *lobolo* for Nomgwaqo he married her as his own wife. Defendant alleged that he had paid the *lobolo* in order that Nomgwaqo could become an *ukuvusa* wife of plaintiff's late father.

Held: That as plaintiff's late father was courting Nomgwaqo at the time of his death, it would be in accordance with custom for deceased's brother (defendant) to take her as an *ukuvusa* wife for deceased.

Held further: That only if a woman dies within 12 months of her having entered into a customary union without having any surviving issue is a portion of the *lobolo* repayable and then only not exceeding one-half of the number of cattle delivered.

Statutes referred to:

Section 94 (1) of the Natal Code of Native Law, 1932.

Appeal from the Court of Native Commissioner, Ubombo.

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

In the Chief's Court the Plaintiff's claim was for the return of 8 head of cattle paid for *lobolo* of plaintiff's father's *nhlonzi* wife.

Defendant denied liability but the Chief gave judgment for plaintiff for the return of 8 head of cattle and costs.

Defendant appealed to the Native Commissioner who allowed the appeal with costs and altered the Chief's judgment to one for defendant with costs.

At the pre-trial conference held by the Native Commissioner the plaintiff stated:—

> "This woman was not an *nhlonzi* wife nor was she an *ukuvusa* wife. Defendant called an *Inyanga* and he killed her. I mean the *Inyanga* gave her medicine and killed her before she bore children".

Defendant's statement was:—

> "The woman was taken by me as an *ukuvusa* wife."

The Chief's reasons for judgment dated 5th June, 1953, read as follows:—

"*Facts found proved.*

1. That the plaintiff's father the late Mananga Mbuyazi was the brother of Mahlatini Mbuyazi, the defendant, and the father of Sifile Mbuyazi, the plaintiff.

2. That a certain woman, daughter of one Manguza Nxumalo, was *lobolaed* and brought to plaintiff's father's kraal, after the death of plaintiff's father as an *ukuvusa* wife, by Mahlatini Mbuyazi, the defendant.
3. That this woman, an *ukuvusa* wife died at the kraal of plaintiff, plaintiff's father, Mananga Mbuyazi, leaving no issue.
4. That eight head of cattle were paid for *lobolo* of this woman by the defendant.

Reasons for judgment.

1. The woman having died at the kraal of plaintiff's father showed that the woman became an *ukuvusa* wife of the late Mananga Mbuyazi father of plaintiff.
2. That defendant, Mahlatini Mbuyazi, after having been advised by the Chief's Court to fetch and return these cattle from Nxumalo to the plaintiff, defendant refused to do so, I therefore gave judgment against defendant to refund these cattle to plaintiff.".

There can be no doubt that the woman, Nomgwaqo Nxumalo, was *lobolaed* by the defendant but the issue to be decided is whether he had *labolaed* her as an *ukuvusa* wife for his late brother, Mananga, or whether she was *lobolaed* as his own personal wife.

Plaintiff avers that it was not an *ukuvusa* wife but that defendant married her as his own wife. Defendant, on the other hand, testifies that he did not take Nomgwaqo as his wife but that she was an *ukuvusa* for the late Mananga's estate.

The Chief found that the woman was an *ukuvusa* wife but yet he gave judgment in favour of the plaintiff for the refund of 8 head of cattle the defendant is alleged to have used out of the late Mananga's estate to *lobolo* the woman. The Chief based his judgment on the assertion that defendant was ordered to fetch the eight head of cattle from the woman's *lobolo* holder and give them to the plaintiff and because defendant refused to do so judgment was given by the Chief in favour of plaintiff.

It is not understood why the Chief made such an order unless he was under the erroneous impression that because the woman had died before giving birth to any children the *lobolo* was refundable. Only if the woman dies within 12 months of her having entered into a customary union without having any surviving issue is a portion of the *lobolo* repayable and then only not exceeding one-half of the number of cattle delivered; *vide* section 94 (1) of the Natal Code of Native Law.

The Native Commissioner also found proved that it was an *ukuvusa* union and although the evidence could have been stronger in defendant's favour we are not prepared to hold that he has arrived at a wrong conclusion especially as plaintiff's evidence is very weak and based on hearsay.

Sight must not be lost of the fact that according to defendant's evidence, which the Native Commissioner has believed, the late Mananga was courting the woman, Nomgwaqo at the time of his death and that it would be in accordance with custom for his brother (defendant) to take her as an *ukuvusa* wife. This strongly favours defendant's case and we see no reason to interfere with the Native Commissioner's judgment.

The appeal is dismissed with costs.

For Appellant: Mr. S. H. Brien of Wynne and Wynne.

Respondent in Person.

NORTH-EASTERN NATIVE APPEAL COURT.

ZULU *v.* MTETWA.

N.A.C. CASE No. 45/54.

ESHOWE: 27th October, 1954. Before Steenkamp, President, Ashton and Cowan, Members of the Court.

LAW OF PROCEDURE.

Practice and Procedure.—Cause of action—Infringement of rights—summons issued when rights were no longer infringed—Costs of action.

Summary: Plaintiff sued defendant for an order for the return of a certain beast alternatively for an order declaring that the beast is the property of plaintiff. When the summons was issued the beast had already been returned to plaintiff and defendant pleaded that he had no interest in the beast.

The Native Commissioner gave judgment, declaring plaintiff to be the owner of the beast, with costs. Defendant noted an appeal against the order for costs.

Held: That when plaintiff issued the summons his rights were no longer infringed.

Held further: That unless rights are infringed there can be no cause of action.

Held further: In allowing the appeal with costs, that plaintiff must pay the costs in the Native Commissioner's Court.

Apeal from the Court of the Native Commissioner, Mtunzini.

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

This is an application for condonation of the late noting of an appeal. The reasons contained in the affidavit by the applicant are such that this Court would normally not condone the late noting, but on the record the applicant has a reasonable prospect of success and therefore the Court grants the condonation.

In the Native Commissioner's Court the plaintiff, now respondent, sued the defendant, now appellant, for the return of a certain black and white cow or its value, £12, which beast defendant wrongfully and unlawfully seized and took away from plaintiff's lawful possession on the 9th October, 1953. The said cow was the property of the plaintiff. Defendant's plea reads:—

> "Defendant denies that he has a beast belonging to the plaintiff and that one black and white cow (ilungakazi) which was removed by defendant's Tribal Police under defendant's instructions was removed by plaintiff from Tribal Induna's kraal before the beginning of this action."

After this plea was filed the plaintiff filed an application for amendment of his summons to add an alternative claim which reads: "Alternatively, for an order declaring that the aforesaid beast is the property of the plaintiff."

On the day of the hearing of the case the amendment was granted but defendant also filed a further plea which reads: "Defendant states that he has no interest in the beast mentioned in his plea of defence, dated 19th February, 1954." No evidence was led and the following note appears on the record "Mr. Schreiber (attorney for plaintiff) applies for beast to be declared as property of plaintiff and that it was no fault of his that he was put to this expense. Defendant admits that he has no right or further interest to the black and white cow and that it was removed from plaintiff's possession by his Tribal Induna." The Acting Assistant Native Commissioner then entered judgment as follows "For plaintiff, with costs. The black and white cow is declared the property of plaintiff."

Defendant has now noted an appeal to this Court against that part of the judgment which ordered him to pay the costs.

His grounds of appeal read as follows:—

"(1) The judgment in favour of plaintiff for costs against the defendant (appellant) is against the weight of evidence and is bad in Law in as much as that plaintiff's case did not establish the defendant to be liable in the suit.

(2) That the judgment should have ordered costs for the defendant against the plaintiff."

The Acting Assistant Native Commissioner, in his reasons for judgment, states that when the defendant filed a futher plea to the effect that he had no interest in the beast, this plea of defendant can be correctly interpreted as a consent to judgment and that he entered judgment to this effect in favour of plaintiff's claim, with costs. The Acting Assistant Native Commissioner goes further and states that the attachments were wrongful in as much the defendant admits this impliedly in his further plea.

We do not think that the presiding officer officer was justified in reading into the pleas any admissions of this nature. Defendant made it clear in his plea that plaintiff had reposessed himself of the beast before he brought the action.

When the plaintiff issued the summons, his rights were no longer infringed and unless rights are infringed, there can be no cause of action. It is therefore clear that it was not necessary for him to go to Court for a declaration as to whether he was or was not the owner of the beast. This was in fact conceded by Respondent's Counsel. In the circumstances we cannot see how the defendant can be called upon to bear the costs of an action that was not necessary.

The appeal is allowed with costs and the Acting Assistant Native Commissioner's judgment is altered to read:—

"For plaintiff. The black and white cow is declared the property of plaintiff. plaintiff to pay the costs of this action."

Appellant: In Person.

For Respondent: Mr. M. M. Schreiber of G. D. E. Davidson.

NORTH-EASTERN NATIVE APPEAL COURT.

NTOBELA *v.* ESTATE NTOBELA.

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

DURBAN: 2nd November 1954. Before Steenkamp, President, Slarke and Ashton, Members of the Court.

LAW OF PROCEDURE.

Practice and Procedure—Late noting of appeal—Condonation of—Appeal noted seven years after judgment—Acquiescence in judgment.

Native Estate: Right of administrator of estate to be heard at application for condonation of late noting of appeal.

Summary: In 1946 an estate inquiry was held and the widow of the deceased was held to be the heir. In 1953 an appeal was noted against the 1946 finding of the Native Commissioner.

Held: That applicant had tacitly acquiesced in the judgment and had taken no steps for the long period of seven years.

Held further: That even if the applicant had every prospect of success on appeal, it does not necessarily follow that condonation must be granted.

Held further: That the maxim *interest reipublicae ut sit finis litium* is applicable in cases where the aggrieved party has delayed in noting an appeal.

Held further: That prospect of success is not the only criterion and the rights of a successful party must also be considered.

Held further: That as the estate is cited as respondent, the administrator of the estate is entitled to be represented at the hearing of the application.

Held further: That in the circumstances no good cause for condonation has been made and the application is accordingly refused with costs.

Cases referred to:

Cairn's Executors *v.* Gaarn, 1912 A.D., 347.
Ex parte Baraitser: in *re* Rex *v.* Baraitser, 1946 C.P.D., 786.
Rex *v.* Tucker, 1953 (3) S.A., 150 (A.D.)

Application for condonation of the late noting of appeal from the Court of Native Commissioner, Umzinto.

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

On 16th September, 1946, the Native Commissioner of Umzinto held an enquiry to determine the name of the heir to the estate of the late Frank Ntobela

At the enquiry were present Bella Ntobela, the widow of the late deceased. Daniel Ntobela (now applicant) and Solomon Ntobela, brother of the deceased and uncle of the present applicant.

No evidence was led but the parties present agreed to the following facts:—

"1. Deceased was a Native.

2. That deceased was not exempted from Native Law.

3. That deceased left no Will.

4. That deceased married by civil rights as per marriage. certificate produced (No. 127/1923), dated 24/10/1923 and solemnised at Pretoria.

5. That deceased left no issue but only is survived by his widow Bella. She was his only wife.

6. Deceased died in April, 1946, at Umkomaas on Lot No. 25 of 26a Woodland Lodge No. 2364.

7. That under Native Law the heir of deceased would be Daniel Ntobela son of Mahlwate Ntobela (deceased).

8 That deceased owned a piece of land known as Lot No. 25 of 26a Woodland Lodge No. 2364 in extent 8 acres 15·888 perches held under Transfer Deed No. 261/1916."

The Native Commissioner came to the conclusion and gave a finding that in terms of Government Notice No. 1664 of 1929 the deceased, having been married in the Transvaal prior to the passing of Act No. 38 of 1927, the marriage was in community of property and European Law must be applied. He further held that as the estate must be administered as if the deceased was a European in terms of section 2 (*c*) of Government Notice No. 1664 of 1929, an amount not exceeding £600 must devolve on the widow in terms of Act No. 13 of 1934.

Solomon Ntobela was appointed to administer the estate and if necessary to transfer the immovable property.

That finding of the Native Commissioner remained unchallenged until 19th May, 1953, when application was made by Mr. Attorney Blamey on behalf of Daniel Ntobela for the hearing of the enquiry to be re-opened on the grounds that there was a patent error in the previous proceedings, in that the Native Commissioner did not call evidence as to the place of domicile of the deceased at the time of his marriage and that he only enquired as to the place where the marriage was solemnised.

After argument it was held by the Assistant Native Commissioner that it was not competent for the Native Commissioner to reverse the finding of 16.9.1946 as the proper procedure would appear to be an appeal in terms of section 3 (5) of Government Notice No. 1664 of 1929.

Thereafter applicant's attorney noted an appeal dated 19.3.1954 against the following portions of the decision of the Native Commissioner dated 16.9.1946:—

> "In terms of Government Notice No. 1664 of 1929 I hold that as deceased was married in the Transvaal prior to passing of Act No. 38 of 1927, the marriage was in community of property and European Law must be applied. The marriage was not contracted under Natal Law No. 46 of 1887 and therefore section *eleven* of that Law does not apply. This is apparent of S. 5 of Act No. 44 of 1903 which applies other sections of Law No. 46 of 1887 but not section *eleven*.
>
> As the estate must be administered as if the deceased was a European in terms of section 2 (*c*) of Government Notice No. 1664 of 1929 the estate up to the extent of £600 must go to the widow in terms of Act No. 13 of 1934."

The grounds of appeal are that such decision is wrong in law for the following reasons:—

"(*a*) That the said Native Commissioner erred in failing to hold that the law governing the consequences applicable to a marriage, is the law of the place where the husband was domiciled at the time of such marriage;

(*b*) That the said Native Commissioner erred in holding that the marriage was not contracted under Law No. 46 of 1887 (Natal) and that section *eleven* of that Law did not apply;

(*c*) That the said Native Commissioner erred in holding that the marriage of the said Frank Ntobela was in community of property and that therefore European law must be applied to the estate of the said Frank Ntobela.

(*d*) That the said Native Commissioner erred in failing to hold that the estate of the said Frank Ntobela should be administered according to Native Law and custom under the provisions of section 7 (*d*) of Government Notice No. 1664 of 1929."

Application is now made for the condonation of the late noting of the appeal against the finding of 16.9.46. The application is supported by an affidavit made by the applicant. It is not necessary to quote the affidavit *in toto* but the gist thereof may be summarised to mean that the Native Commissioner, in declaring the widow to be entitled to the estate of the deceased, erred in that the estate should have devolved according to Native Law and Custom, in which case the applicant was the heir.

The reasons why he did not timeously appeal against the finding are that the presiding officer, since retired from the Public Service, was a very well-known and highly respected man, possessing a vast knowledge of Native Law and that he, applicant, accordingly believed that the decision given was correct.

Bella Ntobela, the widow has also filed an affidavit to the effect that the deceased was domiciled in Natal at the time they entered into a civil marriage and that she had no objection whatsoever to an application being made for the condonation of the late filing of an appeal. It is noted she does not consent to the application being granted.

Notwithstanding that she has no objection to the application being made, this Court still has to consider whether an aggrieved party may after a period of over seven years succeed in asking for the indulgence which is now before this Court.

Solomon Ntobela, who was appointed by the Native Commissioner to administer the estate of the late Daniel Ntobela, was represented before this Court by Counsel. It is observed that the estate is cited as the Respondent and therefore we accept that Solomon was entitled to be represented and to be heard when the application for condonation was argued. In fact, Counsel for applicant, conceded this and raised no objections to an affidavit opposing the application being filed. From this affidavit it is apparent that if condonation is granted certain rights acquired by Solomon would be in jeopardy and this Court may not lose sight of such an important factor in dealing with the application.

Bella Ntobela appeared in person but she was not called upon to argue before this Court.

In the case of *ex parte* Baraitser: in *re* Rex *v.* Baraitser, 1946, C.P.D., 786, the question of the condonation of the late noting of an appeal was fully dealt with. That was a criminal case but the principle decided is applicable to civil cases and in that case it was remarked on page 797:—

> "The mere fact that since the accused's conviction, another Court has decided the Law in a sense contrary to such conviction, will not *per se* entitle that accused to claim an extension of time within which to appeal against his conviction."

and on page 798:—

> "Public policy demands that finality should be reached in all legal proceedings whether civil or criminal and if the Court were to allow applicant to review these proceedings now, the effect would be most far-reaching and chaotic."

and on page 799:—

> "In civil law the rule is well established that the mere fact that other Courts have subsequently to the judgment, from which it is sought to appeal, come to a different decision on a material question of law is not sufficient ground for extending the time for appealing (see Cairns Executors *v.* Gaarn [1912 A.D. 347 *re* Berkeley (1944 (2) A.E.R. 395)]. This rule has equal application in the Criminal Law [see Rex *v.* Broide (supra); Rex *v.* Rigby (supra) and Slaman *v.* Attorney General (supra)]. In this last cited case the fact that another person convicted of a similar offence to the applicant had succeeded in obtaining on appeal a decision on the law from the Appelate Division, which in effect established that, if the applicant were allowed an extension of time within which to note an appeal, he must inevitably succeed in getting his conviction set aside, was held insufficient ground in itself to grant such an extension."

In the case of Cairns Executors *v.* Gaarn, 1912 A.D., 347, leave to appeal out of time was refused because applicant had decided to abide by an adverse judgment and had deliberately elected to take no steps for a period of more than twelve months.

Applicant tacitly acquienced in the judgment and elected to take no steps for the long period of seven years.

As will be observed from the extract of the judgment in the case of *ex parte* Baraitser (supra) just quoted that even if the applicant has every prospect of success, it does not necessarily follow that condonation must be granted. In that case there was a delay of only three months as compared with this one in which a period of some seven years elapsed

During the course of the proceedings before the Assistant Native Commissioner, Umzinto, it was pointed out by the Attorney for Applicant that the Transfer documents were in Pietermartizburg pending and he asked for the revocation of the certificate of appointment of Solomon Ntobela to administer the estate pending the decision in regard to the lawful distribution of the assets; it was said that if transfer were effected in terms of the 1946 decision, Daniel Ntobela (applicant)) would suffer loss. The Assistant Native Commissioner therefore revoked the certificate—whether or not he acted correctly is not a matter for this Court to decide.

Appellant was satisfied with the finding during all these years and as remarked by Hoexter (J. A.) in the case of Rex *v.* Tucker, 1953 (3) S.A., 150 (A.D.), the maxim *interest reipublicae ut sit finis litium* is applicable in cases where the aggrieved party has delayed in noting an appeal.

In that case, Hoexter (J. A.) also remarked:—

"I wish to make it clear that consideration of public policy may preclude the Court from granting any indulgence to applicants whose cases have been finally disposed of by the Courts."

Prospect of success is not the only criterion and the rights of a successful party must also receive consideration. We hold the view that in the circumstances no good cause for condonation has been made and the application is accordingly refused with costs.

For Appellant: Mr. R. A. F. Swart of C. O. Burne, Hudson and Swart.

For Respondent: Mr. N. R. F. Steven.

NORTH-EASTERN NATIVE APPEAL COURT.

ZIKALALA d.a. *v.* **CELE.**

N.A.C. CASE No. 42/54.

DURBAN: 2nd November, 1954. Before Steenkamp, President, Slarke and Ashton, Members of the Court.

LAW OF DELICT.

Defamation—Damages for—Publication of defamatory statement. Cattle—Alternative value of.

Summary: Plaintiff sued defendant in a Chief's Court for damages for defamation. It is alleged that defendant, in the presence of others at a beer drink, accused plaintiff of having given medicine to her daughter as a result of which the daughter did not give birth to healthy children.

Defendant's appeal to the Native Commissioner's Court was dismissed with costs.

Held: That there can be no doubt that defendant did utter words defamatory of plaintiff.

Held further: That as there were a number of people in the hut, and once it is accepted that the words uttered concerned and were directed at the plaintiff, then there is sufficient publication.

Held further: That paragraph 6, page 150 of Stafford's Principle's of Native Law correctly sets out the law concerning the value of cattle.

Statutes, etc., referred to:

Rule 9 (1) of the Rules for Native Appeal Courts.

Appeal from the Court of the Native Commissioner, Umzinto.

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

In the Chief's Court plaintiff obtained judgment against the defendant for £10 or one beast being damages for defamation of character in that defendant said plaintiff is a witch alleging that he killed defendant's children.

The Native Commissioner, on appeal to his Court, confirmed this judgment and dismissed the appeal with costs.

An appeal has now been noted to this Court on the grounds that the judgment is bad in law and against the weight of evidence. It is also set out in the Notice of Appeal in what respect the Native Commissioner has come to the wrong conclusion but it is not necessary to detail these for the purpose of this judgment.

According to the Native Commissioner in his reasons for judgment, he was satisfied that defendant made a defamatory statement concerning the plaintiff.

The witnesses for plaintiff differ concerning the actual words used but the gist thereof may be gathered from the evidence which is to the effect that while the people were in a hut drinking beer the defendant said:—

> "In this hut there is someone who has given medicine to my daughter and thus she does not give birth to healthy children. This man is married himself and has healthy children. I am going to retaliate and kill his children also."

He further states he knew that defendant was referring to him because the accusation against him had previously been discussed. An old man, who was not called as a witness, asked the defendant whether she was referring to the plaintiff. Defendant did not deny that plaintiff was the man she was referring to but confirmed it and remarked that she was a Christian and could not smell out people as she was not a pagan.

The next witness called by the plaintiff states that defendant was speaking about her daughter's affairs and said that plaintiff had done something bad by poisoning her daughter.

The other witness called confirms that defendant was using the words or the gist thereof but this witness does not state that the words used were said in such a way as to connect the plaintiff therewith.

Defendant, on the other hand, denies that she had made use of any of the words. The Native Commissioner has disbelieved the defendant and on the evidence this is a reasonable conclusion. It follows then that defendant had uttered words which, if it can be accepted were aimed at the plaintiff, would make her liable for damages.

It must not be overlooked that the people in the hut were drinking beer and therefore one cannot expect them to relate exactly what was being said but there can be no doubt that defendant did utter words defamatory of the plaintiff. There is sufficient evidence to confirm this and that there was publication.

Plaintiff himself and two witnesses testified on his behalf, but there is evidence that there were a number of people in the hut and once it is accepted that the words uttered concerned and were directed at the plaintiff, then there is sufficient publication to affect his character.

Counsel for appellant (defendant) has strongly argued that evidence of publication is lacking but with this contention we do not agree. Defendant's denial that she ever uttered the words strongly favours the probabilities that whatever she said was aimed at the plaintiff.

The Native Commissioner did not set out specifically the facts he found proved as provided in Rule 9 (1) of Government Notice No. 2887/1951. Had he done so the work of this Court would have been simplified.

The Native Commissioner's remarks in the last paragraph of his reasons for judgment were apparently made under a misapprehension and his attention is drawn to paragraph 6, page 150 of Stafford's Principles of Native Law, which correctly sets out the law concerning the value of cattle.

The appeal is dismissed with costs.

For Plaintiff: Adv. A. J. Milne, instructed by J. O. Blamey.

Respondent in default.

NORTH-EASTERN NATIVE APPEAL COURT.

MDLULI *v.* **CELE.**

N.A.C. CASE No. 51/54.

DURBAN: 2nd November, 1954. Before Steenkamp, President, Slarke and Ashton, Members of the Court.

LAW OF THINGS.

Immovable property: Sale of: Failure by seller to sign documents to effect transfer against payment of purchase price.

Practice and Procedure: Summons: Prayer for order on Messenger of Court to sign transfer documents if defendant fails to do so.

Summary: Plaintiff and defendant entered into an agreement whereby plaintiff would pay defendant £89. 7s. 11d. for a certain portion of land. The agreement provided that the purchase price should be held in trust by plaintiff's attorney. The money was paid by plaintiff to his attorney but defendant refused to sign the necessary documents to effect transfer.

The Native Commissioner held that he had jurisdiction to make the order prayed, viz. that in default of defendant's signing the documents, the Messenger of the Court be authorised to sign them.

Defendant noted an appeal.

Held: That it is a well recognised procedure followed in a Court of law to order a Messenger of the Court to perform certain acts in case the judgment debtor fails to do so.

Held further: That following the usual practice in transactions of this nature this Court must hold that the money was to be kept (in trust by the attorney) until such time as the transfer of the property is effected in plaintiff's name.

Statutes, etc., referred to:

Rule 69 (4) of the Rules for Native Commissioner's Courts.

Appeal from the Court of the Native Commissioner, Durban.

Steenkamp (President): Delivering the judgment of the Court.

In the Native Commissioner's Court, Durban, the plaintiff sued the defendant for an order to sign all the necessary documents to enable him to obtain transfer of a certain property viz. Erf No. 1918, Township of Clermont, situate in the Public Health area of Clermont and in the Pinetown Water Supply area, County of Durban, Province of Natal, in extent 6.000 square feet, which he avers he purchased from the defendant for £89. 7s. 11d.

To the summons is attached a copy of the Memorandum of Agreement (Exhibit "A") dated 2.9.1953 entered into by the parties. The various clauses of the agreement will be referred to during the course of the remarks hercin contained.

There is also attached to the summons a copy of a letter dated 2.12.53 (Exhibit "B") addressed to the defendant by plaintiff's attorney confirming that defendant, at an interview with plaintiff's attorney and at which plaintiff was also present, refused to sign a Power of Attorney to transfer to plaintiff the property in question. In the letter defendant is called upon to execute the Power of Attorney and other documents necessary to effect transfer of the property.

Defendant filed an exception to the order prayed in the summons on the ground that the Native Commissioner's Court has no jurisdiction under the Rules of the Court to grant the order. In the same document is contained the defendant's plea which is to the effect that plaintiff has not performed his part of the contract in that the purchase price of the property has not been paid in full.

On the day of the hearing the Preciding Officer heard arguments on the exception to the jurisdiction and dismissed it, holding that his Court has jurisdiction to make the order prayed.

Evidence was thereupon adduced by both parties and the Native Commissioner gave judgment for plaintiff as prayed with costs.

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

"1. His Worship the Native Commissioner wrongly and erroneously dismissed the Exception raised by defendant to the jurisdiction of the Court below to grant the Order prayed in that the Native Commissioner was precluded by the Rules of his Court from claiming any such jurisdiction enabling him to grant the Order prayed.

2. The Native Commissioner wrongly and erroneously held that plaintiff "had done all required of him by the Agreement" and that "the evidence showed that plaintiff had complied with the terms thereof".

On the contrary, the evidence shows that plaintiff had paid defendant only part of the purchase price and not the whole thereof, and further that plaintiff made no tender to defendant of the balance of £20. 19s. 7d. due to defendant. Plaintiff had therefore not performed all his obligations under the contract as held by the Native Commissioner.

3. Plaintiff says in evidence that he wrote the letter (Ex. "B") to defendant but that "none of the documents asked for in that letter have been signed" and that "all these documents are essential before transfer can be effected.".

But notwithstanding no tender of the balance is made even in this letter against documents the learned Native Commissioner has held that plaintiff had fulfilled all his part of the contract.

4. In the said letter (Ex. "B") plaintiff does not tender the amount of the Transfer Duty which he had undertaken to pay by clause (4) of the agreement against signing of the documents, yet nevertheless, the learned Native Commissioner has held that plaintiff has fulfilled all his obligations under the contract.

5. In the said letter (Ex. "B") plaintiff states defendant failed to sign the papers in his attorney's office on 25th November, 1953, though called upon to do so. But at this date, the 25th November, 1953, the plaintiff had not discharged all his obligations as to paying the purchase price as appears from the evidence.

Yet, nevertheless, the Native Commissioner held that at that date the plaintiff had fulfilled all his obligations under the contract.

6. By clause (2) of the Agreement plaintiff undertook to pay off the Clermont Township the balance of £16. 14s. 2d. owing to them. Defendant says that he paid off £12 of this balance and puts in receipts thereof.

   Plaintiff, on the contrary, claims that he was going to pay off this same amount to the Township but puts in no receipts or other evidence from the Township.

   Notwithstanding these two antigonistic claims given in evidence the learned Native Commissioner has held that plaintiff has performed all his part of the contract without ascertaining which party, in truth, has paid the money to the Township. Therefore in this instance the Native Commissioner has given judgment against the weight of evidence.

7. Defendant says that at the date of the summons right of action had not accrued to plaintiff in that he had not performed all the conditions of the agreement devolving upon him entitling him to issue the summons.

   Wherefore defendant says that the summons was prematurely issued. The learned Native Commissioner ought, therefore, to have dismissed the summons on this ground.

8. Defendant submits that on the above facts and on the weight of evidence and the probabilities judgment should have been given for the defendant with costs.".

Ground 1 of the appeal as well as the wording of the Exception is vague and this Court only received for the first time at the hearing any indication on what grounds the Exception was based.

It was argued that a Native Commissioner's Court could not make an order on a Messenger of the Court as that officer may only act after a judgment has been given and a writ has been issued. Counsel quoted Rule 69 (4) of the Native Commissioners' Courts Rules.

This Court is at a loss to understand Counsel's submission as it is a well recognised procedure followed in a Court of Law to order a Messenger of the Court to perform certain acts in case the judgment debtor fails to do so.

To enable this Court to dispose of ground 2 of the Notice of Appeal it is necessary to refer to clause 2 of the agreement of sale. This clause reads as follows:—

"The purchase price is the sum of £89. 7s. 11d. and shall be paid by the purchaser as follows:—

(*a*) The sum of £70 on execution of this agreement, and shall be paid to L. Podbielski, of 1 Royal Exchange Buildings, 357 Smith Street, Durban, by him to be held in trust, and the sum of £2. 13s. 9d. by 31.10.1953.

(*b*) The sum of £16. 14s. 2d. which is to be paid by the purchaser to the Clermont Township (Pty.), Limited, being the balance of the purchase price owing by the seller to the Company on the land hereby sold.".

While this clause provides specifically that an amount of £70 and £2. 13s. 9d. should be held in trust by Mr. attorney L. Podbielski, i.e. plaintiff's attorney, it is not stated until when the money is to be so held but following the usual practice in transactions of this nature this Court must hold that the money was to be kept until such time as the transfer of the property is effected in plaintiff's name. In other words, payment is to be made against delivery. There is evidence that his attorney paid over to the defendant an amount of £50 on instructions from the plaintiff who states in evidence that because defendant said he was financially embarrassed he asked the attorney to pay over this amount. Defendant in his evidence admits that he told plaintiff he was in difficulties and wanted money "So I got the £50.".

This admission by the defendant in fact confirms that he was only entitled to receive the purchase price on delivery i.e. on transfer of the property.

The balance of £20. 19s. 7d. is still in the hands of the attorney and we hold that this balance is not payable until transfer is effected.

The contention referred to in ground 3 of the notice of appeal is of no substance as surely once it is accepted that the money is to be held in trust by the attorney against transfer, there is no need to tender it against the signing of the documents.

Paragraph 4 of the Notice of Appeal must be read with Clause 4 of the agreement of sale.

Clause 4 reads as follows:—

> "The date of sale is the 27th August, 1953, from which date all adjustments shall be made and the purchaser shall from such date be subject to all laws and regulations made by lawful authority, and be liable for and pay all rates (if any) which may be levied and become payable hereafter on the land hereby sold, either by the registered owner, tenant or occupier in respect thereof. And the purchaser acknowledges that he knows that unless the transfer duty be paid within six months of the date of sale, a penalty of twelve per cent (12%) per annum, will accrue upon the amount of the said transfer duty.".

This clause means that the purchaser (plaintiff) is to bear the costs of transfer. If he has to bear such costs then it is no concern of defendant if plaintiff delays in paying transfer duty and other charges after defendant has signed the necessary documents. The last sentence of this clause indicates that the purchaser is liable to pay the transfer duty and that being the case there is no obligation on plaintiff's part to pay over to the defendant or tender to defendant this money.

The remaining grounds in the notice of appeal can be dealt with together. Defendant cannot shield behind a debt due to the Township Company which plaintiff has undertaken to liquidate. It naturally follows that plaintiff cannot be expected nor is there any obligations on his part to pay the debt until he is certain of obtaining transfer of the property.

Defendant's action in commencing to pay the debt to the Township Company after he had been called upon to sign the necessary documents, is regarded with suspicion as he had already received £50 from plaintiff as an act of grace.

The appeal is dismissed with costs.

For Appellant: Mr. J. Roveppan.

For Respondent: Adv. R. M. Cadman, instructed by L. Podbielski.

SOUTHERN NATIVE APPEAL COURT.

KABI *v.* **PUTUMANI.**

N.A.C. CASE No. 34/54.

BUTTERWORTH: 3rd November, 1954, Before Israel, President, Warner and Zietsman, Members of the Court.

XOSA CUSTOM.

Native Law—Xosa Customary Union—Declaration of rights in girl born during subsistence of previous union where wife deserts to live with another man discussed—Lack of physical consummation does not invalidate—Dissolution—Dowry rights vest in lawful guardian of deserting mother once dowry returned—Demand and acceptance of return of dowry amounts to repudiation of customary union rights.

Heir-successor in title cannot assume greater title to abandoned rights than predecessor had—No principle of law whereby a claimant, as against a defendant in possession, can be vested with rights to which he is not entitled simply because rightful dominus who is privy to neither party is not exerting his undoubted rights.

Summary: Plaintiff (now respondent), heir to the late Putumani Jingayo, sued defendant (now appellant) for declaration of rights in a girl Nomapoco and delivery of 9 dowry cattle paid for her.

Nomapoco now about 20 years of age, was born to the late Putumani's customary wife, Nonayini who had left him owing to his alleged impotency to live with defendant during the subsistence of that marriage. She had three children by defendant of whom Nomapoco was the first born.

In 1940 Putumani sued Nonayini's father for her restoration or for the eight head of cattle paid as dowry for her, and obtained judgment by default as prayed. In July of the same year a writ was issued and the cattle attached when Nonayini, who is now apparently married to defendant by Native Custom did not return.

After hearing evidence, judgment for plaintiff as prayed with costs, less one *isondhlo* beast, was given and against this judgment defendant has appealed.

Held: That there is uncontradicted evidence that Putumani had five children by a subsequent lawful wife of whom plaintiff is the eldest son and his father's heir, so that the allegation of impotency is thus untrue.

Held further: That the Assistant Native Commissioner was correct in holding that there had been a valid customary union between Nonayini and Putumani and that the lack of physical consummation does not invalidate a union.

Held further: That the customary union between the late Putumani and Nonayini was not dissolved until 1940 and Nomapoco was born to Nonayini during the subsistence of that customary union, albeit away from Putumani's kraal.

Held further: That defendant is clearly non-suited and has no claim whatsoever to the girl Nomapoco or her dowry. These rights are vested in the lawful guardian of the mother who unequivocally disclaimed his rights.

Held further: That by demanding and accepting the dowry in full in 1940 Putumani in effect repudiated the girl Nomapoco and plaintiff, his successor in title and representative of his estate cannot now come and claim to be entitled to the girl, the rights in whom were so abandoned, for he cannot assume a greater title to them that his predecessor had at the time of his death. Nor can the disclaimer of Nonayini's guardian restore to Putumani's heir the right which Putumani himself deliberately abandoned.

Held further: That the Assistant Native Commissioner rightly found that defendant had no claim to the girl Nomapoco. He also rightly found that the girl rightly belonged to Nonayini's people, whose representative is Wright Bunge, yet he has awarded the ownership to plaintiff solely because of Bunge's disclaimer of his rights. Here, the judicial officer erred, as there is no principle of law whereby a claimant, as against a defendant in possession, can be vested with rights to which he is not entitled simply because the rightful dominus who is privy to neither party is not exerting his undoubted rights.

Held further: That as neither party was entitled to judgment absolution should have been awarded.

Cases referred to:

Siluva *v.* Zibonela, 1947 N.A.C. (C. & O.), 41.
Kos *v.* Lephaila, 1945 N.A.C. (C. & O.), 4.
Mapekulu *v.* Zeka, 3 N.A.C., 7.
Magwala *v.* Mbo, 5 N.A.C., 27.
Zenzile *v.* Tuntutwa, 4 N.A.C., 45.

Appeal from the Court of the Native Commissioner, Willowvale.

Israel (President):—

In 1931 the late Putumani Jingayo entered into a customary union with a woman Nokolisile, now known as Nonayini, and paid dowry for her, but their cohabitation did not last long, for she finally deserted him about six months afterwards after she had run away from him and had been brought back on several occasions. The validity of this customary union was challenged in the Court *a quo* on the grounds that it had never been physically consummated owing to Putumani's alleged impotency. There is uncontradicted evidence, however, that Putumani had five children by a subsequent lawful wife, of whom plaintiff is the eldest son and his father's heir, so that the allegation of impotency is thus untrue. Nonayini's admission in evidence that she was prepared to marry Putumani but left him because of his alleged (but falsely asserted) impotency, similarly disproves that her consent to the union was lacking. This being so, and the other essentials of a valid customary union, as laid down by a succession of decisions in these Courts, having been proved to have been present, the Assistant Native Commissioner was correct in holding that there had been a valid customary union between Nonayini and Putumani. He also correctly held that the lack of physical consummation does not invalidate a union [Siluva *v.* Zibonela, 1947 N.A.C. (C. & O.), 41].

Immediately after her final desertion of Putumani, Nonayini went to live with defendant and had three children by him of whom a girl Nomapoco now about 20 years of age was the first born.

In 1940 Putumani sued Nonayini's father for her restoration or payment of eight head of cattle, the full dowry paid for her, on the grounds of the desertion referred to above, and obtained judgment by default as prayed. Nonayini was not restored and a writ was issued and cattle attached in July of the same year. No deductions were claimed or admitted in that case or allowed in the judgment.

Nonayini is now apparently married by Native Custom to defendant, but there is no positive indication of the date of such union.

This then is the background of the action with which we are now concerned, which plaintiff, as heir of the late Putumani has brought against defendant and which is an application for a declaration of his rights of guardianship over the girl Nomapoco and a claim to the dowry which, it is common cause, has recently been received for her by defendant.

The Assistant Native Commissioner gave judgment for plaintiff as prayed with costs, less one *isondhlo* beast, and defendant has now appealed on the following grounds:—

1. That the judgment is against the weight of evidence adduced.
2. That the Magistrate erred in finding a marriage according to custom proved between the late Putumani Jingayo and the said Nokolisile in that the latter declined to consumate same.
3. That, should the Magistrate be correct in finding the said customary marriage proved, then he nevertheless erred in finding same to have been dissolved in 1940 and not in 1931 *vide* the action instituted by the late Putumani Jingayo case No. 248/1940 and more particularly paragraph 5 of the allegations made by the late Putumani therein, as per the record put in as evidence by consent.
4. That, should the Magistrate be correct in the matters attacked in paragraphs 2 and 3 above, then it is submitted that he erred in holding that the said late Putumani Jingayo had not abandoned and lost all rights in the said Nomapoco by claiming a refund of the full dowry and obtaining a judgment by default therefor.

Ground 2 has been disposed of in my opening remarks.

Ground 1 which was partially dealt with in those same remarks will be wholly disposed of in considering ground 3. The paragraph mentioned was a statement by the late Putumani in his particulars of claim in the 1940 case that he had accepted an undertaking by Nonayini's father, then defendant, to restore the dowry cattle then in dispute upon the marriage of another of his daughters and that "the marriage was thereby dissolved". But according to the next paragraph of Putumani's claim in that same case this undertaking was never fulfilled and no cattle from that source ever passed. And it must be accepted that no cattle from any other source were ever paid to Putumani in restoration of Nonayini's dowry before the 1940 case, otherwise Putumani could not have obtained the judgment he then got.

Now, in the case of Kos *v.* Lephaila, 1945 N.A.C. (C. & O.) 4, this Court confirmed the established principle of Native Law that until dowry cattle are restored, or are forfeited by the husband, the customary union is not dissolved. In the case now before us there is no question of forfeiture of the dowry by the late Putumani and no evidence, as I have already found, of any cattle having been restored until execution was levied in July, 1940, in respect of the judgment of the 1940 case. The case of Mapekulu *v.* Zeka, 3 N.A.C. 7, clearly enunciates the principle that a judgment for the return of the wife or, failing that, for the return of the dowry constitutes a complete dissolution of the customary union, it having been held that the

order for the return of dowry is equivalent to its actual return, for the order places the plaintiff in a position to recover it by judicial attachment. This was the position in Putumani's 1940 case. The Assistant Native Commissioner was therefore correct in holding that according to the evidence the customary union between the late Putumani and Nonayini was not dissolved until 1940, and as Nomapoco was about 20 years of age at the hearing of the matter now under consideration, it follows that she was born by Nonayini during the subsistance of that customary union, albeit away from Putumani's kraal.

This brings us to ground 4 of the appeal. In the case of Magwala *v.* Mbo, 5 N.A.C. 27, the circumstances of which are markedly similar to those with which we are now concerned, and which followed several cases decided on much the same lines, it was held (1) that a native who is the natural father of an adulterine child and who marries the mother subsequent to the dissolution of her prior customary union which still subsisted when the child was born, has no rights whatsoever in the child, and (2) that when the full dowry has been restored to the mother's first husband, the child belongs to her people.

In view of the ruling in (1) above, defendant is clearly non-suited and has no claim whatsoever to the girl Nomapoco or her dowry. It is equally clear that according to (2), these rights are vested in the lawful guardian of the mother, in this case one Wright Bunge. Wright Bunge, however, in his evidence unequivocally disclaimed his rights by stating that he was "making no claim to the child Nomapoco". Is plaintiff, then as heir to the late Putumani, and the only other party concerned entitled to the girl and her dowry? I think not, for it was rulec in the case Zenzile *v.* Tuntutwa, 4 N.A.C. 45, that when the return of full dowry is demanded with no claim in regard to ar adulterine child, no subsequent claim for the child or her dowry can be made by the claimant. By demanding and acceptin the dowry in full in 1940 Putumani in effect repudiated the girl Nomapoco [see Ngxanum *v.* Sibaca, 1949 N.A.C. (S. D.) a p. 145], and plaintiff, his successor in title and representative of his estate cannot now come and claim to be entitled to the girl, the rights in whom were so abandoned, for he cannot assume a greater title to them than his predecessor had at the time of his death. Nor can the disclaimer of Nonayini' guardian restore to Putunani's heir the rights which Putuman himself deliberately abandoned.

The Assistant Native Commissioner rightly found that defendant had no claim to the girl Nomapoco. He also rightly found that the girl lawfully belonged to Nonayini's people whose representative is Wright Bunge, yet he has awarded the ownership to plaintiff solely because of Bunge's disclaimer of his rights. Here , I think, the judicial officer erred, for I know of no principle of law whereby a claimant, as against a defendant in possession, can be vested with rights to which he is no entitled simply because the rightful dominus who is privy to neither party is not exerting his undoubted rights.

Neither defendant nor plaintiff was entitled to judgment and absolution should have been awarded.

The appeal is allowed with costs and the Assistant Native Commissioner's judgment is set aside and substituted by "absolution from the instance with costs.".

Warner (Permanent Member): I concur.

Zietsman (Member): I concur.

For Appellant: Mr. Wigley, Willowvale.

For Respondent: Mr. Dold, Willowvale.

SOUTHERN NATIVE APPEAL COURT.

MASETI *v.* MASETI.

N.A.C. CASE No. 49 OF 1954.

KING WILLIAM'S TOWN: 24th November, 1954. Before Warner, Acting President, Key and Schaffer, Members of the Court.

PRACTISE AND PROCEDURE.

Native Commissioner's Court Rules—Application for rescission of default judgment in terms of Rules 73 *and* 74 *compared and distinguished with an application under Rule* 84 (5) *made in manner prescribed by Rule* 56 (1) *for extension of the time limit laid down by Rule* 74 (1).

Summary: Plaintiff (now respondent) sued his widowed mother (now appellant) for delivery of 15 sheep and 4 lambs or their value £95. In the absence of appearance being entered on the day of trial a default judgment was obtained and a warrant of execution issued on 22nd October, 1953. On 30th March, 1954, application for rescission of the default judgment was made ostensibly by virtue of Rule 73 (*a*) which was ruled out of time and refused.

Held: That as sub-rule (1) of Rule 74 provides that an application to rescind a default judgment shall be made within one month after such judgment has come to the knowledge of the judgment debtor, the presiding officer in the Court *a quo* was perfectly correct in ruling the application in question out of time.

Held further: That the existence of an application for an extension of time cannot be presumed or established simply by a casual reference to it in the course of argument, and where, as in the present case, the time limit has been exceeded, the consideration of the question of granting an extension of time is an essential prerequisite to further proceedings and application therefor must be made formally.

Held further: That no application in the manner prescribed in Rule 56 (1) was made in the present case and there is no evidence that the respondent consented to an extension or was even approached for his consent; applicant merely came to the Court of the Native Commissioner and asked for a rescission. In doing so out of time and failing to ask for the Court's indulgence for an extension of time in the prescribed manner, he was out of Court and could not, therefore, be granted the relief sought.

Statutes, etc., referred to:
Government Notice No. 2886 of the 9th November, 1951. Rules Nos. 39 (1); 41 (2); 56; 73; 74 (1); 84 (5) (*b*).

Cases referred to:
Pier Street Mosque Trustees *v.* Abrahams 1922 E.D.L. 330.

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

Warner (Acting President):—

On the 7th October, 1953, plaintiff issued summons in the Court of the Native Commissioner, against defendant, his widowed mother, who had been married by Christian Rites, for the delivery of fifteen sheep and four lambs or their value £95. In his particulars of claim he stated that during his minority defendant had given him a sheep from time to time as a reward for his services in looking after her stock and that such sheep have increased to the number claimed and are all earmarked with his earmark with the exception of the four lambs.

Defendant not only failed to enter appearance in terms of Rule (39) (1) for Native Commissioner's Courts but was in default on the day of hearing, the 20th October, 1953, and plaintiff thereupon applied for and obtained a default judgment on 21st October, 1953, in terms of Rule 41 (2) and issued a writ of execution thereon on 22nd October, 1953.

On 30th March, 1954, defendant, who will hereafter be referred to as applicant, applied for rescission of the default judgment, ostensibly by virtue of paragraph (*a*) of Rule 73. She stated in her supporting affidavit:—

"3. That the first time I became aware that a default judgment had been entered against me was on the 27th October, 1953, when the writ was served on me.

4. That on the 14th October, 1953, after summons was served on me, I wrote to plaintiff's attorney on the advice of Joel Nyati, an ex-teacher of Indwe to the effect that judgment had already been granted in my favour by the headman in September, 1953, and that plaintiff had been ordered to remain under my control.

5. I am ignorant of Court procedure and I was honestly of the opinion that in view of my explanation to plaintiff's attorney the case would not go on and I would not be required to appear in Court on the return day of the summons.

6. That when a writ was served on me I wrote to the Native Appeal Court at King William's Town on the advice of the aforesaid Joel Nyati, lodging an appeal against the attachment.

7. That by letter dated 3rd November, 1953, the Registrar of the Native Appeal Court advised me that the matter had been referred to the Native Commissioner, Lady Frere for attention.

8. That thereafter, by letter dated 13th November, 1953, I was called to the Native Commissioner at Lady Frere and I was advised that I had followed the wrong procedure and that nothing could be done to assist me. I was further advised to employ the services of an attorney, but I informed the Native Commissioner that I had no money to pay the attorney's fees.

9. That I have a good defence to the action, namely:—

(*a*) That when I earmarked the sheep for plaintiff it was on condition that ownership would pass to him only after my death.

(*b*) That in any event as legal guardian of defendant the earmark of the sheep which he acquired during his minority vests in me."

The application was refused for the reasons that—

(1) the Court was not satisfied that the applicant's conduct was bona fide;

(2) the application was not made within the time limit laid down by Rule 74 (1) and no application in terms of Rule 84 (5) (*b*) was made for extension of that time limit; and

(3) the applicant had very little prospect of establishing her defence.

Against this decision and these findings appeal has been noted on the grounds:—

"(1) That the judicial officer erred in holding that the application for the rescission should have been made within one month since the said application was made in terms of section 73 of the Rules of Court.

(2) That in any event the judicial officer should have allowed the application for the extension of the time limit.

(3) That the judicial officer erred in finding that the applicant was in wilful default."

Now, in formulating the first ground of appeal, applicant's attorney clearly overlooked or chose to ignore Rule 74. This attitude is not tenable, for, as this Court reads them, Rules 73 and 74 cannot be regarded as separate and distinct. They are mutually complementary in that while Rule 73 confers on the Native Commissioner the power to rescind upon application a default judgment given by it (I am confining myself to the particular action before us), Rule 74 does not envisage another and different or distinct line of action but merely provides, in its respective sub-rules, for the procedure which has to be followed in an application under Rule 73. This inter-dependence of the two rules is clearly implicit in sub-rule (8) of Rule 74, which lays down that Rule 74 shall *mutatis mutandis* govern all proceedings for recission instituted in terms of Rule 73. Therefore, as sub-rule (1) of Rule 74 provides that an application to rescind a default judgment shall be made within one month after such judgment has come to the knowledge of the judgment debtor, the presiding officer in the Court *a quo* was perfectly correct in ruling the application in question out of time.

As the presiding officer points out in his reasons, however, the deficiency could have been remedied by an application under Rule 84 (5) made in the manner prescribed in Rule 56 (1), for an extension of the time limit laid down by Rule 74 (1). But no such application was specifically filed or could have ever been implied from the terms of the application for rescission, which merely asked for the default judgment to be rescinded, the execution to be set aside and the proceedings to be re-opened. All that the Court *a quo* had before it in this connection (no *viva voce* evidence apart from the applicant's affidavit was led) was, the presiding officer informs us, "an allegation by the defendant's attorney in his address to the Court that such application was made". But the existence of an application for an extension of time cannot be presumed or established simply by a casual reference to it in the course of argument, and where, as in the present case, the time limit has been exceeded, the consideration of the question of granting an extension of time is an essential prerequisite to further proceedings and application therefor must be made formally. In the case of Pier Street Mosque Trustees *v.* Abrahams, 1922 E.D.L. 330, which discussed the effect and incidence of Magistrate's Courts rules identical in wording with those with which we are now concerned, it was ruled that—

> "If application (for re-opening) is not made within the month then the applicant has to apply to the respondent for his consent, and if he does not give his consent the applicant has to apply to the Court, not for a rescission of the judgment, but for an extension of time within which to apply for that rescission."

As I have already said no application in the manner prescribed in Rule 56 (1) was made in the present case and there is no evidence that the respondent consented to an extension or was even approached for his consent; applicant merely came to the

Court of the Native Commissioner and asked for a rescission. In doing so out of time and in failing to ask for the Court's indulgence for an extension of time in the prescribed manner she was out of Court and could not, therefore, be granted the relief she sought.

In these circumstances, there is no necessity to consider the third ground of appeal, and the appeal must be dismissed with costs.

Key (Member): I concur.

Schaffer (Member): I concur.

For Appellant: Mr. Tsotsi, Lady Frere.

For Respondent: Mr. Kelly, Lady Frere.

SOUTHERN NATIVE APPEAL COURT.

YOBILE *v.* **NOCANDA.**

N.A.C. CASE No. 69 OF 1954.

KING WILLIAM'S TOWN: 24th November, 1954. Before Warner, Acting President, Key and Schaffer, Members of the Court.

PRACTISE AND PROCEDURE.

Native Law—Damages for adultery—Onus—Shifts to defendant to invalidate customary union established by plaintiff, by defendant's establishing existence of his prior union with same woman—Not discharged—Plaintiff entitled to damages claimed —Native Commissioner's Court Rule 41 (7)*—Default judgment involving damages—Duties of Clerks of Court.*

Summary: Plaintiff claims from defendant five head of cattle or their value £50 as damages, alleging that defendant is living in adultery with plaintiff's customary wife with whom defendant admits living as man and wife but denies that she is plaintiff's wife.

Held: That plaintiff has established his allegation that he contracted a customary union with the woman and the onus has shifted to defendant to establish that a customary union existed between him and the woman at the time so that plaintiff's union with her was invalid.

Held further: That defendant has failed to establish his allegation that he contracted a customary union with the woman.

Held further: That as defendant has admitted that he is living with the woman as man and wife and plaintiff has proved that he contracted a valid customary union with her, plaintiff is entitled to damages.

Held further: That the Court has dealt with the case as if the default judgment had been rescinded. In any case the default judgment was irregular. As this was a claim for damages the Clerk of the Court should have referred the request for judgment by default to the Court in terms of sub-section (7) of section *forty-one* of the Native Commissioner's Court Rules promulgated under Government Notice No. 2886 of 1951.

Statutes etc., refererd to:
Rule 41 (7) Government Notice No. 2886 of 9th November, 1951.

Appeal from the Court of the Native Commissioner, Queenstown.

Warner (Acting President):—

Plaintiff claims from defendant five head of cattle or their value £50 as damages, alleging that defendant is living in adultery with his (plaintiff's) customary wife Sofi also known as Nosimiti. Defendant admits that he is living with the woman Sofi as man and wife. He denies, however, that she is plaintiff's wife.

After hearing evidence, the N.C. gave judgment of absolution from the instance with costs. Plaintiff has appealed against this judgment on the following grounds:—

1. That the evidence establishes that the plaintiff was married to Nosimiti *alias* Sofi Lingani by Native Custom, and that such marriage subsisted at the accrual of the plaintiff's action against the defendant.
2. That the evidence establishes that the defendant was married to Amelia Kapha by Christian Rites in Johannesburg in 1944, and that such marriage still subsists, and any prior customary union of the defendant to anyone else is thereby dissolved.
3. That judgment is against the evidence and the weight of evidence.

Plaintiff says that he contracted a customary union with Sofi after the eclipse of the sun in 1940. He paid five head of cattle and £19 as *lobolo* to William Vellem. A beast was slaughtered and Sofi was handed over to him by Nyaliso Pendu. She lived with him as his wife and bore him three children, one of whom died. In 1952, while he was at work, Sofi left his home. He found her living with defendant but she refused to return to him.

William Vellam states that Sofi is his cousin (his mother and her father were sister and brother) and was brought up in his household. Acting on behalf of her brother Joseph Lingani, who was a minor at the time, he agreed to a customary union being contracted between plaintiff and Sofi and received five head of cattle and £19 as *lobolo*. Daniso Mpendu acted for him, a beast was slaughtered for the marriage and plaintiff and Sofi lived together as man and wife. Plaintiff has issued summons against him for return of wife or refund of *lobolo* and he is not defending the case.

Daniso Mpendu says that, on instructions of William, he handed Sofi to plaintiff and a beast was slaughtered to mark the marriage. He was not present when *lobolo* was paid.

Defendant says that he contracted a customary union with Sofi in 1930, and paid £45 as *lobolo* to her brother Joseph Lingani. They lived together in Johannesburg until 1940, when she went to her aunt in Molteno. While she was there she committed adultery with plaintiff who paid him four head of cattle as damages. In 1952, she returned to him.

Alison Nocanda, defendant's younger brother, says that defendant and Sofi contracted a customary union at his kraal in Whittlesea. Nine head of cattle were paid as dowry to Sofi's brother and a beast was slaughtered.

Sofi says that she contracted a customary union with defendant in 1930. She lived with him in Johannesburg and then went to live with Mina, her aunt, in Molteno. Plaintiff was her neighbour. She committed adultery with him as a result of which she gave birth to two children, both of whom died. Plaintiff paid Mina four head of cattle as damages and Mina handed them to defendant. The witness denies that she contracted a customary union with plaintiff.

Dealing with the second ground of appeal first, "it is common cause that, in 1944, defendant contracted a civil marriage with a woman named Amelia. This ground of appeal seems to suggest that, even if defendant did contract a customary union with Sofi in 1930 so that plaintiff's alleged customary union with her in 1940 would be invalid, defendant's action in dissolving his customary union in 1944 by contracting a civil marriage with another woman, would have the effect of validating plaintiff's customary union with Sofi. I am unable to agree with this contention. If Sofi was defendant's customary wife in 1940 but entered into a union with plaintiff, such union would have been an illicit one. Plaintiff could have contracted a legal union with Sofi after her union with defendant had been dissolved but could not ask the Court to declare that an illicit union had been converted into a legal one by the dissolution of the woman's union with defendant. Mr. Kelly has not pressed this ground of appeal.

The Native Commissioner has not commented on the demeanour of the witnesses but has stated that the supporting evidence on both sides is far from satisfactory and as a final judgment would have far reaching effects on the persons and property of minor children, he feels that the parties should and could bring further evidence to disclose at least within the preponderance of probabilities on which side the truth lies.

It seems to me, however, that the evidence of William Vellem affords strong corroboration of plaintiff's statement that he contracted a customary union with Sofi. It would have been in the interest of this witness to have supported defendant's statement that plaintiff paid damages for adultery and did not pay *lobolo*. He has stated, however, that he received *lobolo* which he has not handed over to Sofi's brother so that he is liable for its return. It is improbable that he would make himself responsible for return of *lobolo* which he had not received. Daniso Mpendu says that he handed over Sofi to plaintiff with her consent and a beast was slaughtered. He does not appear to have any interest in the case and no reason has been shown why his evidence should not be accepted.

I consider that plaintiff has established his allegation that he contracted a customary union with Sofi and the onus has shifted to defendant to establish that a customary union existed between him and the woman at the time so that plaintiff's union with her was invalid.

The defence evidence contains several discrepancies and improbabilities. Defendant says that a marriage ceremony was held and a beast slaughtered at Molteno but his brother says that this took place at his home in Whittlesea. The latter also says that nine head of cattle were handed to Sofi's brother who was present at the wedding ceremony at his kraal but he does not know the name of the brother. Sofi says that nine head of cattle were paid to her brother in Johannesburg after the marriage. Plaintiff says that, after they were married, Sofi followed him to Johannesburg and lived with him there for some years and then went direct to Molteno. His brother says that they had been living in Johannesburg before the marriage and after it had taken place, defendant returned to Johannesburg but Sofi stayed at his kraal and then went to Molteno, that defendant returned to his kraal and Sofi's people brought her back, that they lived together for some time

and then defendant returned to Johannesburg and Sofi again went back to her people. Although it is alleged that Joseph received the dowry and that Mina received from plaintiff damages which she handed to defendant, these witnesses have not been called and no satisfactory explanation has been given as to why this has not been done. I consider that defendant has failed to establish his allegation that he contracted a customary union with Sofi.

As defendant has admitted that he is living with Sofi as man and wife and plaintiff has proved that he contracted a valid customary union with her, he (plaintiff) is entitled to damages.

The appeal should be allowed with costs and the judgment of the Native Commissioner altered to one for plaintiff as prayed with costs.

It appears that, in this case, a default judgment was granted by the Clerk of the Court on 7th May, 1954. On 11th May, 1954, application was made for a rescission of this default judgment. There is nothing on the record to show whether the application was granted or not. Counsel in this Court have both agreed that the attorneys in the Native Commissioner's Court must have agreed to the default judgment being rescinded but neglected to ask the presiding officer to make the necessary note on the record. This Court has, therefore, dealt with the case as if the default judgment had been rescinded. In any case, the default judgment was irregular. As this was a claim for damages the Clerk of the Court should have referred the request for judgment by default to the Court in terms of sub-section (7) of section *forty-one* of the Rules of the Native Commissioners' Courts promulgated under Government Notice No. 2886 of 1951.

Key (Member): I concur.

Schaffer (Member): I concur.

For Appellant: Mr. H. J. C. Kelly, Lady Frere.

For Respondent: Mr. T. Stewart, King William's Town.

CENTRAL NATIVE APPEAL COURT.

KABE AND INGANGA *v.* INGANGA.

N.A.C. CASE No. 20 OF 1954.

JOHANNESBURG: 14th December, 1954. Before Marsberg, President, Menge and Oelschig, Members of the Court.

NATIVE CUSTOM.

Native customary union—Rights of father to custody of children —Rights of mother to payment of maintenance for children.

Summary: Second appellant has left her husband by customary union (respondent) and returned to her father, taking the two young children with her. The husband sued for custody of the children and second appellant counterclaimed for maintenance. She gave evidence of ill-treatment by her husband. The latter led no evidence at all.

Held: That the father's rights to the custody of the children are absolute in the absence of an allegation and proof of unfitness to have custody.

Held further: (Menge, Permanent Member, dissentiente) that an allegation of desertion on the part of the husband is not sufficient to put the question of the husband's fitness to have custody of the children in issue.

Held further: That a wife by customary union is entitled to claim maintenance for her children under common law, and the fact that Native Law is applied to the main claim, does not debar her from so counter-claiming under Common Law.

Cases referred to:
Mokoena *v.* Mofokeng, 1945 N.A.C. (C. & O.), 89 followed.
Ex parte Minister of Native Affairs in *re* Yako *v.* Beyi, 1948 (1) S.A. 388.

Appeal from the Court of the Native Commissioner, Rustenburg.

Marsberg (President):—

In the Native Commissioner's Court, at Rustenburg, plaintiff, George Inganga sued Platjie Kabi and Anna Inganga, father and daughter respectively, as defendants for an order directing them to hand over two children to the plaintiff.

Plaintiff alleged that a customary union subsisted between him and Anna; that "there are two children born of the said union, boys of 4 years and 1½ years, and that he (plaintiff) is the lawful guardian of the said children and entitled to their custody"; that Anna deserted him during October 1953 and is now residing with her father, the first defendant; that she took the children with her and that both she and her father refuse to hand them over.

Both defendants admitted that a customary union subsisted and that the children are the children of the union, but denied that plaintiff is entitled to the custody *as alleged* or *at all.*

There were further allegations and counter allegations of desertion on the part of the spouses.

A counter claim was lodged by second defendant, Anna, for maintenance for herself and children at £10 a month.

At the outset of the trial the Native Commissioner indicated that Native Custom would apply. On the pleadings in so far as the main claim was concerned he was justified in taking that course. When the matter came before his Court for trial it was argued and held that the only point in dispute on the main claim was a question of law i.e. whether the father (plaintiff) has a legal right to the custody of the children.

Reading the pleadings fairly I, too, came to that conclusion, the main allegation being that plaintiff was the lawful guardian of the children and as such entitled to their custody. To this defendants admitted that plaintiff was the father but denied that for that reason or at all he was entitled to custody of the children. In this contention defendants obviously are wrong. Native Law in regard to guardianship of children born of customary unions is settled. (See Mokoena *v.* Mofokeng, 1945 N.A.C. C. & O., 89). The father is the lawful guardian and is entitled as of right to the custody of his children.

No evidence was led on the main claim. Mr. Michel who appeared for appellants submitted that the record should be returned for evidence to be taken in regard to plaintiff's fitness to have custody of the children. But on a fair reading of the pleadings there would be no justification for us to adopt that course. Plaintiff is *ipso jure* custodian of his children. To deprive him of that legal right an Order of Court is necessary. There is no allegation in the pleadings that plaintiff is not a

fit and proper person to retain custody and there is, therefore, no call for evidence on this point. An allegation of unfitness must be specially pleaded and proved. The Native Commissioner was justified in giving judgment on the pleadings without evidence and as the law is wholly on plaintiff's side judgment had to go in his favour.

Its form will however need correction.

This Court has previously indicated that it does not favour orders couched in a form which savours of the handing over of chattels. Orders in regard to children should be sought in the form of declarations of right. As the Courts also do not favour the removal of children of tender age from the natural care of their mother the children in the case before us must remain with defendant Anna until they reach six years of age.

The appeal on the main claim is dismissed with costs but the Native Commissioner's judgment is amended to read:—

> "Plaintiff is declared to be entitled to the custody of the two children born of his customary union with Anna Inganga but the Court orders that the children remain with their mother until each reaches the age of six years."

On the counter-claim I agree with the judgment which has been prepared by my brother Menge.

Oelschig (Member):—On the main claim (claim in convention) I agree with judgment of the President and on the counter-claim I concur in the judgment of Menge (Permanent Member).

Menge, Permanent Member (dissentiente as regards the claim in convention):—

Respondent (plaintiff in the Court below), sued his father-in-law and his wife (now appellants) for custody of his two male children aged 4 years and 1½ years at the time of the action in January, 1954.

He alleged that these children were born of a customary union between himself and the second defendant which still subsists; that she deserted him in October, 1953, taking the two children with her; that she is now residing with her father, the first defendant, and that she and her father refuse to let him have custody of the children.

The defendants' plea in effect admits these allegations save that the desertion is denied and in fact laid at the door of plaintiff.

The wife in turn counterclaims for maintenance at £15 (later reduced to £10) per month in respect of the two children and herself.

Evidence was heard only on the counterclaim. The wife testified to various assaults committed on her by plaintiff for which he was twice fined £1 and, on the last occasion, when she left him, sent to prison for 14 days without the option of a fine. Under cross-examination she stated that they had lived together for 9 years and that plaintiff assaults her "every time he is drunk". In the last assault, she states, her arm was fractured. She maintains that it was impossible for her to live with defendant any longer by reason of these assaults and that she therefore left him. After having left plaintiff she did return to him once. He had fetched her and she went with him because he threatened to stab her. She ran away again the next day. Such is her evidence; the evidence of her father is mainly on the question of what it costs him to maintain the children

No evidence was given by or on behalf of plaintiff. The Assistant Native Commissioner found for plaintiff with costs on the main claim and granted absolution on the counterclaim.

The Native Commissioner reasoned that the plaintiff's claim was purely a question of law which required no evidence, and that the plaintiff must succeed as "the rights of a father to the custody of his children are absolute". He held in effect that the plea disclosed no defence. He intimated at the outset that the case would be tried under Native Custom. On this basis he also disposed of the counterclaim, holding that in Native Law a "wife has no right of action whatever against her husband for the enforcement of his duties towards her". He cites in support of his contentions passages from Seymour's recent book on Native Law.

The defendants now appeal against the judgment on the main claim on the grounds that the father is not "*ipso facto*" entitled to the custody without consideration of the children's interests. The judgment on the counterclaim is attacked for two reasons: That in law the wife is entitled to retain the children, and that she had established her right to the maintenance on the evidence led.

The appeal on the main claim must in my opinion succeed. The proposition that in Native Law the right of a father to the custody of his children is absolute is subject to a number of qualifications. In at least one instance it is not operative at all, i.e. among some tribes when a wife is driven away with an imputation of witchcraft. But in every instance it is subject to the Court's overriding discretion in the interests of the children. The law on this subject has been set out very clearly (save for the questionable description of the father's right as absolute), by Sleigh, President in Mokoena *v.* Mofokeng, 1945 N.A.C. (C & O.), 89 as follows:—

> "Under Native Law and Custom the right of the male partner in a customary union to the custody of his minor children is absolute, and this whether or not the union has been dissolved. He can legally be deprived of the custody only if it can be shown that he is not a fit and proper person to have the custody, or, that owing to the tender age of the children, it would not be in their interest to live apart from their mother and the husband renders it dangerous or intolerable for her to live with him. In such cases the Court may place the children in the custody of the mother or some other person, and may make such order for their support as it may deem fit."

Now, the Native Commissioner states in his reasons for judgment, and counsel for the respondent also argued before us, that the defendants nowhere in their pleadings allege that the respondent is not a fit and proper person to have the custody of the children. That may be so, but plea alleges desertion by the plaintiff. Consequently the question of his character is squarely placed in issue; for a father who deserts his wife and breaks up the home is normally not a fit and proper person to have custody of his children. The Native Commissioner considered that the father's right to custody is absolute irrespective of the interests of the children. By thus misdirecting himself he was precluded from considering what bearing the evidence has on the suitability of the father to have the custody. In my opinion the evidence adduced on the counterclaim, and which the plaintiff did not contradict, strongly supports the defendant's plea to the main claim that the plaintiff is not entitled to the custody of the children.

As regards the counterclaim it is no doubt correct that in Native Law a wife has no action for maintenance against her spouse. The reason is that the dowry which her spouse has to provide will maintain her when she falls on evil days. Furthermore, a wife by customary union has no claim against her spouse for maintenance for herself under common law. But the Native Commissioner overlooked the fact that every Native woman has at common law the right to sue the father of her

children for their maintenance. To this extent the counterclaim is perfectly valid. The decision of the Native Commissioner to try the action under Native Law is sound so far as it goes; but it is only provisional and he cannot thereby deprive the woman of the right she has to sue under the ordinary law of the land [see Ex parte Minister of Native Affairs in *re* Yako *v.* Beyi, 1948 (1) S.A. 388].

The woman in this case could quite easily have brought her claim for maintenance of the children under the simplified procedure provided for in Ordinance No. 44 of 1903 read with section *ten bis* of Act No. 38 of 1927. But there is nothing to stop her from proceeding by way of summons or counterclaim if she so desires.

The Native Commissioner should have dealt with the counterclaim on the basis of the wife's rights under Common Law and should have heard evidence from both parties in regard to their resources and then decided what award to make in regard to the maintenance of the children.

In the result, then, I consider that the appeal should be upheld with costs. The Native Commissioner's judgment on the main claim should be altered to one of absolution from the instance with costs. The judgment on the counterclaim should be set aside and the matter referred back for further attention.

For Appellant: Mr. R. I. Michel.

For Respondent: Adv. H. Wolpe, instructed by Messrs De Villiers & Pohl.

CENTRAL NATIVE APPEAL COURT.

THEKISO *v.* MAHUMAPELO AND ANOTHER.

N.A.C. CASE No. 26/54.

JOHANNESBURG: 15th December, 1954. Before Marsberg, President, Menge and Oelschig, Members of the Court.

PRACTISE AND PROCEDURE.

Application for interdict—Conflicting versions as to the facts in the affidavits—Right of appeal against granting of interdict —When interdict is final and when temporary.

Summary: The respondents, partners in a funeral undertaker's business, applied for an interdict the effect of which was to oust the appellant from his connection with the business. They contended that the appellant was an employee; but the latter contended that he was a partner. Lengthy affidavits were filed by both the respondents and the appellant giving a conflicting version of facts. The Native Commissioner granted the interdict. On appeal a preliminary point was taken that the interdict, being *pendente lite* was not appealable.

Held: (dismissing the preliminary point) that the interdict was final and, therefore, appealable.

Held further: That in view of the dispute on the facts the matter should not have been decided on the affidavits but should have been sent for trial.

Held further: (Marsberg, President, and Oelschig, Member,— Menge, Permanent Member, dissenting) that the existence of a partnership consisting of the respondents and appellant had not been proved.

Cases referred to:

Frank *v.* Ohlsson's Cape Breweries, Ltd., 1924, A.D. 294.

Afrimeric Distributors (Pty.), Ltd. *v.* E. I. Rogoff (Pty.), Ltd., 1948 (1) S.A. 574.

Williams *v.* Tunstall, 1949 (3) S.A. 836.

Cox *v.* Hickman, (8 H.L.C. 268) 11. E.R. 431.

R. Bakers (Pty.), Ltd. *v.* Ruto Bakeries (Pty.), Ltd., 1948 (2) S.A. 631.

Appeal from the Court of Native Commissioner, Johannesburg.

Marsberg, President:—

In the Native Commissioner's Court at Johannesburg, applicants (1) Albert Mahumapelo and (2) Henry Phehla sought an interdict against respondent Jacob Thekiso—

(*a*) ordering him to deliver the keys of premises situate at 69 Edward Road, Sophiatown, Johannesburg, to applicants forthwith;

(*b*) restraining him from removing any assets or other property from the premises;

(*c*) restraining him from access to the premises;

(*d*) seeking other relief;

(*e*) claiming costs of the application.

In replying to the affidavit which accompanied the application, respondent himself sought a *mandament van spolie* against applicants—

(*a*) directing the first applicant to restore *ante omnia* to his brother and himself (respondent) in their respective capacities of partner and managing partner, certain hearse No. OA 2361 for the partnership operations;

(*b*) claiming costs of application against first applicant;

(*c*) seeking alternative relief.

The two applications are supported by a lengthy petition with annexures by the two applicants, lengthy replying affidavit and application with annexures by respondent and equally lengthy replying affidavit by first applicant, Albert Mahumapelo with further annexures. For the most part the allegations of the two contending parties are in conflict and the wisest course for the Native Commissioner to have adopted would have been to send the matter for trial by action. A great part of the papers consists of each party's own version of his affairs, allegation and counter-allegation, denial and counter denial. The main task in dealing with this appeal has been to draw attention to these differences by a process of contrasting points of conflict. To arrive at the truth from conflicting *ex parte* statements is virtually impossible. Judicial officers should not lightly allow litigants to substitute proof by affidavit in place of the well tried system of oral evidence whereby witnesses may be subjected to cross examination. Only where the *facts* in issue are not in dispute should relief by way of application be granted.

In the case before us the applicants claim relief against respondent on the main ground that they are partners in the firm carrying on business as The New Edward Funeral Undertakers and respondent is an employee. Respondent denies this allegation and claims that the partnership consists of four persons, viz., the two applicants, respondent and respondent's brother. Here are conflicting claims. A great portion of the proceedings has been devoted to deciding whether respondent was a partner or an employee in the firm. At the appeal stage

argument by counsel has been directed also to this question: whether the relationship was that of partners or employee. The fact that it is arguable would suggest that the solution would far better have been ascertained by *viva voce* evidence. It appears that about March, 1952 the two applicants and one Michael Melk entered into partnership in a firm styled the Baithusi Funeral Parlour, to carry on business as undertakers in Johannesburg. On 3rd February, 1953, Melk, representing the firm, entered into a deed of agreement with respondent whereby it was mutually agreed as follows:—

(1) That the employer (i.e.) Melk representing Baithusi (Funeral Parlour) shall employ the Manager (i.e. Jacob Thekiso) and the manager shall serve the firm as manager of the firm's business of funeral undertakers, upon, and subject to the terms and conditions following, namely:—

The engagement shall extend for an indefinite period from the date of this agreement subject to termination as hereinafter provided.

(2) During the continuance of this agreement the manager shall devote his full time and attention to his duties as such manager and shall do all in his power to promote, develop and extend the business of the employer. His duties shall *inter alia* consist of managing the entire business, supervising the office, interviewing agents, organising the business generally and improving the business of the employer.

(3) The manager shall not directly or indirectly engage or be concerned or interested in any other business of any kind whatsoever during the period of his employment with the employer.

(4) (The remuneration of the manager shall be about £21 a month).

(5) (The manager shall keep the books etc.).

(6) (The manager not to draw cheques etc. except as authorised).

(7) This contract of employment may be terminated upon either the said employer or the said manager giving to the other one calendar months notice in writing of his intention so to terminate this contract.

(8) (Manager to perform his duties faithfully).

(9) (Settlement of disputes by arbitration).

Melk resigned from the partnership on 31st August, 1953. Up to this stage the facts are common cause. But now conflict enters into the allegations. The applicants allege that when Melk left they carried on the business in co-partnership as The New Edward Funeral Undertakers. They say that respondent was appointed as manager to the previous Baithusi Funeral Undertakes about July, 1953 and that when Melk left (i.e. on 31st August, 1953, they owed respondent £63 (obviously wages) but owing to lack of funds retained him as bookkeeper and manager of their new partnership business. This is not very convincing and is obviously not a recitation of facts but an attempt to offer an explanation. On the other hand respondent while admitting that Melk left the partnership on 31st August, 1953, claims that the partnership was dissolved in June 1953 and that it was reconstituted as the New Edward Funeral Undertakers with the two applicants and himself as partners. He alleges further that he was managing director and that he was to be manager at the same salary as before. Then, says he also, his brother Mishack Thekiso was admitted as a partner on 25 August, 1953. This also does not make sense. Partnerships do not change their form and identity with such easy facility. Nor can I accept without further explanation the averment that a "Managing Director" is a constituant of a partnership. (I observe that the term used in some of the documents is "Directing Manager").

Now, it should be obvious it would be unwise to draw conclusions on statements as unconvincing and unreliable as the aforegoing. Neither version is so free from obvious defect that it can be accepted for the purpose of judgment. This issue is essentially one which should have been tested by oral evidence.

In claiming that he was a partner in the New Edward firm respondent in his affidavit avers:—

> 5 (*a*) (iv) It was agreed inter alia that I would be the manager of the new firm and would control and conduct the said business and that I would continue to receive a salary from the partnership in the sum of £21 per month for my services as manager.
>
> 5 (*c*) (iii) In further proof that my brother and I are partners of the New Edward Funeral Undertakers I annex hereto marked "G" copy of the minutes of a meeting of the New Edward Funeral Undertakers held on 28th April, 1954, the original minutes whereof are in the handwriting of second applicant (i.e. Henry Phehla) from which it will be seen that both my brother and I were present. I say in fact that my brother and I have attended all the meetings of the said firm in our capacity as partners thereof".

This document, Exhibit G, having been introduced into the proceedings by respondent, he is bound by any statements therein which fall under the category "Declarations against interest". The document bristles with references to "The Manager". There are references to "The Directors" and "The Company", clearly a misuse of terms. I shall quote paragraphs 5 and 6.

> 5. "Question of wages of the Manager. The meeting decided with the manager that we remain on the old agreement that he must take whatever he can take as usual until we are Financial Straight.
>
> 6. The Manager asked a question about the Rent and asked Mr. Mahumapelo to give his views regarding the Rent. Mr. Mahumapelo replied it is not my intention to claim rent at this juncture it is for the company to see as the manager is not getting wages those two items are just alike.".

Though this document was introduced in proof of another point it is illuminating in other respects. Second applicant admits it to be in his handwriting. It differentiates between the manager and the directors (i.e. the partners, obviously). Elsewhere respondent has claimed that he was to continue to be paid on the old basis of £21 a month. Here they refer to an "old agreement" whereby he was to take whatever he could as usual until they were financially straight. In first applicant's replying affidavit paragraph 3 he states:—

> "I state further that respondent was employed as manager on a 'commission basis', that is for every £10 of profit made by the business, the respondent was to receive £6 and I and the second applicant £2 each".

We have references here to new agreements, firstly, on the formation of the New Edward, then to another arrangement for payment of salary on a commission basis. The reference to the partnership formed for the New Edward Funeral Undertakers rests, as the Native Commissioner points out, only on the bare statement of respondent in his affidavit. There is no document before the Court evidencing this alleged agreement. Yet, on the face of it, document Exhibit G, which compromises both parties, suggests as late as 28th April, 1954, that there is some working arrangement between the parties. What this is clearly cannot be established on the papers before the Court

But this fact it does establish. From February, 1953, to 28th April, 1954, this business was being carried on, clearly in an unsatisfactory financial state to the knowledge of all concerned. Then about the end of May, 1954, first applicant asked for a statement of account (which respondent denies) and shortly after applied for this interdict. Why this sudden haste?

I have been endeavouring to stress the inadvisability of drawing conclusions from conflicting statements which have not been tested. I will give one further illustration. Paragraph 24 of applicant's petition reads:—

> "That since the commencement of the said business no rental whatever has been paid to your first petitioner in respect of the said business premises".

As a statement of fact this is correct but it was not inserted in the petition merely to record that fact. It was intended to mislead the court. The statement is of no significance whatever unless it conveys the suggestion that, rental was not paid through respondent's default and mismanagement. That was the inference which the Court was expected to draw. But the reason why rental was not paid is clear from paragraph 6 of the minutes of the meeting held on 28th April, 1954. (See extract from Exhibit G quoted above). Rental was not claimed by first applicant because respondent was not being paid his salary.

On the papers before him and after hearing argument for both sides the Native Commissioner granted an interdict on claims (*a*), (*b*) and (*c*) and ordered applicants to issue summons within two weeks calling upon respondent to account for his management of the business. Claim (*c*) in effect amounts to ejectment. At the same time he refused the application for *mandament van spolie* with costs.

Respondent has appealed against the judgment on the grounds:—

(*a*) That the Native Commissioner erred in holding that the respondent was not a partner in the partnership.

(*b*) That the Native Commissioner erred in holding that petitioners would suffer irreparable harm if their prayers were not granted.

(*c*) That the Native Commissioner erred in holding that petitioners had no other remedy available.

(*d*) That the Native Commissioner erred in holding that the petitioners had made out a prima facie case.

(*e*) That the balance of convenience lay on the side of the petitioners.

Apart from what I have said above, I consider the Native Commissioner could have rejected the application for the reason stated in paragraph 1 (*c*). A very simple remedy was available to applicants. They themselves claimed and the Native Commissioner found that respondent was an employee. One month's notice to respondent of the termination of his services was all that was required. The Native Commissioner has, in his reasons for judgment, commented on this point. It would have been better, however, had the applicants explained the matter rather than leave it to conjecture.

In dealing with applications of this nature Courts of Native Commissioner could usefully follow Supreme Court practice. To what extent the procedure by notice of motion can be resorted to has quite recently been dealt with in some detail in the Supreme Court: but one of the earlier cases quoted with approval is Frank *v.* Ohlsson's Cape Breweries, Ltd., 1924 A.D. 294, where Innes C. J. said: "It is a general rule of South African practice that when the facts relied upon are disputed an order of ejectment will not be made on motion; the parties

will be ordered to go to trial. The reason is clear; it is undesirable in such cases to endeavour to settle the dispute of fact upon affidavit. It is more satisfactory that evidence should be led and that the Court should have an opportunity of seeing and hearing the witnesses before coming to a conclusion. But where the facts are really not in dispute, where the rights of the parties depend upon a question of law, there can be no objection, but on the contrary a manifest advantage in dealing with the matter by the speedier and less expensive method of motion."

In Afrimeric Distributors (Pty.), Ltd., *v.* E. I. Rogoff (Pty.), Ltd., 1948 (1) S.A.L.R. 574, Ettlinger, A. J. said: "I think it is clear that whatever the practice may have been many years ago, the present practice of this Court is to grant final orders whether for the payment of money, or for any other relief where the facts are clear and are not really disputed. It does not seem to me that there is any reason why, if a final order can be made in the case of undisputed facts where the claim is one, for example, for delivery of goods; it should not be equally competent to make a final order where the facts are not disputed and where the claim is a claim for an account or an interdict or ejectment or anything else."

In Williams *v.* Tunstall, 1949 (3) S.A.L.R. 836, Maritz, J. P. said: "The only satisfactory method of deciding disputed questions of fact is by oral evidence, and the usual procedure is to issue a summons, except in matters such as insolvency, where the legislature has decreed a different form of procedure. Now there is nothing sacrosanct about a summons, and so, if the facts are not in dispute, there seems to me to be no logical reason for insisting on procedure by way of summons, if there is a more expeditious method of bringing the dispute to finality . . . . the tendency (to decide matters on affidavit even when there is a conflict on the material facts) should be checked, but the practice of launching motion proceedings in matters ordinarily begun by summons, where the facts are not in dispute, is too well established now to disapprove of it. But I think it should be resorted to with caution."

It is clear from the foregoing that in cases of dispute the matter should be sent for trial. In the case before him the Native Commissioner should have refused the application for interdict. He correctly refused the application for *mandament van spolie,* in regard to which there is no appeal.

In my opinion the appeal must be allowed with costs and the judgment of the Native Commissioner altered to read:—

"Application for interdict dismissed with costs".

I agree with the judgment of my brother Menge in regard to the preliminary point or exception taken by Mr. Lubinsky.

Menge (Permanent Member):

This is an appeal against an interdict granted by the Native Commissioner, Johannesburg, in terms of which the respondent was—

(1) (*a*) ordered forthwith to deliver to petitioners the keys of certain trading premises situate at 69 Edward Road, Sophiatown;

(*b*) interdicted from removing any assets or other property from the premises; and

(*c*) interdicted from access to the premises.

It was ordered that:—

(2) The applicants to issue summons within two weeks from to-day against respondent to account for his management of the business in question during the time he was in control.

(3) The question of costs of this application to stand over until final judgment has been given in the main action.

The two petitioners in an application dated the 19th July, 1954 allege, in essence, as follows: They and one Michael Melk were partners in an undertakers business conducted at 69 Edward Road in premises belonging to first petitioner. The respondent was employed as business manager in July, 1953. On the 31st August, 1953, Melk withdrew from the partnership, and first and second petitioners continued the business on their own. On that date the partnership was indebted to respondent in the sum of £63. The petitioners could not pay this and therefore kept respondent on as manager. The petitioners left the management of the business to respondent. It appears that they themselves were in employment and only attended to the partnership affairs occasionally on weekdays after 4.30 p.m. or on holidays. After about nine months first petitioner became dissatisfied with the way in which things were going and requested respondent to hand the books of the business over to a bookkeeper for audit. Respondent refused to do this. First petitioner had acquired a hearse which was one of the assets of the partnership and which was garaged at the business premises. First petitioner removed this hearse when he and respondent fell out. Thereafter petitioners found that a new lock had been affixed to the premises and they could not obtain access to the business. Petitioners are apprehensive that respondent will remove certain coffins and other assets alleged to be on the premises. They intend bringing an action against respondent to account for his managership; but in the meanwhile they cannot trade as they are denied access to the premises.

Their prayer reads as follows:—

"Wherefore your first and second petitioners humbly pray that it may please this Honourable Court to grant an order—

(*a*) ordering the respondent to deliver the keys of the premises situate at 69 Edward Road, Sophiatown, Johannesburg, to your first and second petitioners forthwith;

(*b*) interdicting and restraining the respondent from removing any assets or other property from the said premises;

(*c*) interdicting and restraining the respondent from access to the premises;

(*d*) other or alternative relief;

(*e*) that respondent pay the costs of this application."

The respondent in a lengthy replying affidavit dated the 26th July, 1954, gives a somewhat different version. According to a memorandum of agreement annexed to his affidavit he entered the original partnership's employ on the 3rd February, 1953, as manager at a salary of £4 per week plus £5 per month cost of living allowance. His unpaid wages for the first three months came to £63 for which he eventually sued the partnership. That case records that the defendant company was in default but no judgment was taken. Thereafter a new partnership was formed consisting of the petitioners and the respondent. Apparently no formal agreement was drawn up; but respondent claims that it was agreed *inter alia* that he was to be the manager at a monthly salary of £21. Enrolment books were printed in which the list of directors is headed by respondent as "Managing Director". Below him comes first petitioner as "Secretary" and lastly second petitioner as "Treasurer". On the 25th August, 1953, the respondent's brother, Mishack Thesiko, was admitted as a fourth partner and contributed £50 towards the business. Respondent and his brother attended director's meetings in the capacity of partners and respondent also convened such meetings.

In regard to the audit of the books respondent was not prepared to let the books go out of his hands, but he was prepared to let the bookkeeper examine them at the business premises. As regards the hearse, respondent is still in possession of the keys of this vehicle. Respondent secured the premises with a new lock because of the removal of the hearse; but there is no impediment to petitioners having access to the business during office hours. There are no coffins or other partnership assets on the premises. Such furniture as is there belongs to respondent, having been lent to the partnership. Respondent did not receive any salary by an arrangement in terms of which first respondent was in turn not to receive rent for the use of his building. Finally respondent asks for a *mandament van spolie* ordering first petitioner to restore the hearse.

The petitioners on the 31st July, 1954, filed a reply to respondent's affidavit in which they allege that respondent was employed "as a manager on a 'commission basis' that is for every £10 of profit made by the business, the respondent was to receive £6 and I and the second petitioner £2 each".

In regard to the enrolment books first petitioner complained "very strongly" about the designation of respondent as a director. Petitioners have no knowledge of respondent's brother having been admitted as a partner and having contributed any capital. Finally petitioners say they are using the hearse in an effort to carry out the obligations of the partnership.

The matter was argued by the Native Commissioner on the 28th July, 1954, and judgment was given, after various postponements, on the 11th August, 1954. On that day, too, the respondent's application for a *mandament van spolie* was dismissed with costs.

The respondent now appeals against the granting of the interdict. There is no cross appeal; consequently the refusal to grant the *mandament van spolie* need not be considered.

The Native Commissioner held that the respondent was an employee of the firm and not a partner; that on this basis the petitioners have a *prima facie* case and reasonable grounds for apprehending irreparable harm. On this basis he held, also, that the petitioners were without any other remedy and that the balance of convenience was generally in their favour.

On appeal before us Mr. Lubinsky, on behalf of the respondent took the preliminary point that the interdict being one *pendente lite* was an interlocutory order and therefore not appealable. Mr. Mandel, on behalf of the appellant conceded that this Court cannot hear the appeal if the order is not a final order. But he argued that the Native Commissioner's order is final and therefore appealable. He contended that the contemplated action has no relationship to the prayers (*a*), (*b*) and (*c*).

The point to be considered is, therefore, whether the interdict was final or merely *pendente lite*. The respondents did not ask for a temporary interdict. They asked for an order which in terms of their prayer would be final. The order too is not specifically stated to be of a temporary nature, although it is clear from the Native Commissioner's recorded remarks when he gave judgment that he intended giving an interdict *pendente lite*. He merely granted the prayers (*a*), (*b*) and (*c*), and then he added an order that the respondents issue summons within two weeks against the appellant "to account for his management of the business during the time he was in control".

Now a temporary interdict has been defined as "an order, or decree of the Court restraining a party from the execution of any act, or work, till the respective rights of that party and of the complainant can be decided by action"—see van Zyl's Judicial Practice of S.A.", Vol. 1, page 403. Applying this definition we feel that the argument of Mr. Mandel is sound. It does not seem that an action against the respondent merely to account for his management (whatever that may decide), will decide the respective rights of the parties to the partnership and the business premises. The action is confined to a limited sphere in contrast to the interdict.

The latter is vindicatory. It virtually orders the ejectment of the appellant. The former concerns purely a side-issue and does not embrace the issues involved in the interdict. No matter how satisfactory the appellant may account for his management, there is nothing to indicate, *ex facie* the order, that on the termination of this action, whether in his favour or otherwise, he will be, re-invested with the keys of, and access to, the premises. What is more, this part of the order is inconsistent with that portion which was asked for in the prayer; for how can the applicant be expected to defend an action wherein he is asked to account for his management of the business, when the order debars him from access to the records which he would require for his defence? In paragraph 12 of their petition the respondents stated that the appellant "as manager was obliged to keep a proper Banking Account and Books of all transactions relating to the partnership". It is also stated in paragraph 2 that the business is carried on at 69 Edward Road, Sophiatown. If then the appellant is interdicted from access to these premises, how is he to account for his management of the business there?

For these reasons we would hold that, whatever the intention of the Native Commissioner may have been, the order is final and appealable. The objection is dismissed.

Postea, (after hearing argument on the merits of the appeal):

I cannot see how the Native Commissioner, on the papers before him, could come to the conclusion that the respondent is an employee and not a partner. He points out that the respondent does not set out the terms of the alleged partnership agreement. Nor, for that matter, do the petitioners set out the terms of employment. They cannot be those contained in the agreement dated the 3rd February, 1953, between respondents and Melk, which was signed on behalf of the former partnership, because they aver that respondent's employment only commenced in July, 1953. Nor do the petitioners set out that respondent receives any salary. So far from denying that he receives no salary, they actually allege that his remuneration is a 60 per cent share of the profits. In the English case of Cox *v.* Hickman (8.H.L.C. 268) 11 E.R. 431 quoted by De Wet and Yeats at page 467 of "Kontrakreg en Handelsreg" Lord Campbell is reported as saying: "a right to participate in profits affords cogent, often conclusive evidence, that the trade in which the profits have been made, was carried on in part for or on behalf of the person setting up such a claim", i.e. to being a partner. Then there is the matter of the enrolment books. One of these produced as exhibit relates to a client named Paul J. Kula and was in use as long ago as July, 1953. This names the respondent at the head of the directors list as "Managing Director". First petitioner knew about this all along but all he did was to complain "very strongly" to respondent. This client, Kula, paid up his monthly subscriptions of 5s. during the period June, 1953, to May, 1954, according to this book. As against him the petitioners are clearly estopped from denying that respondent is a partner, and the senior partner at that. As between the partners themselves this piece of evidence is at least strong prima facie proof of the existence

of a partnership. The Native Commissioner says that this enrolment book does not allege that respondent is a partner. But why not? Surely only a partner can direct the affairs of a partnership. In any case, as Mr. Mandel has pointed out, the enrolment book does not allege that the petitioners are partners either.

Here is a business run for profit. The respondent runs it openly and to the knowledge of customers and his associates alike, as managing director. He receives no salary. Besides his labour he has brought at least £63 into the business; and what he gets out of it is a two-thirds share of the profits. This is all admitted. Here are all the essentials of a contract of partnership and yet we are asked to hold that the respondent is merely an employee. Clearly he is not. Consequently the petitioners' first and third claim must fail. There is no reason why the respondent, as managing director, should not have access to the business premises and to retain the keys. If the partners are at a dead lock they can sue for dissolution of the partnership.

As regards the second prayer, there is nothing to show that respondent is removing or about to remove any of the partnership assets; nor is any foundation for such a belief averred. In fact, so far the only one who has interfered with the assets is the first respondent, for he removed the hearse. There is a conflict of evidence as to what the asstes consist of. Petitioners, it would seem, are apprehensive because they find fault with the statement of account reccived from respondent and annexed to their petition. But the respondent denies having furnished this statement. Here too is a dispute on facts which requires clearing up by further evidence.

Thc appeal must succeed because, in my opinion the Native Commissioner's judgmcnt is against the weight of such evidence as the affidavits afford; and because, unless it is a matter of great urgency and there is a strong likelihood of irreparable harm, a claim should not be decided on motion of proceedings if it is shown that there is a real dispute on important facts. As Dowling, J. put it in R. Bakers (Pty.), Ltd. *v.* Ruto Bakeries (Pty.), Ltd., 1948 (2) S.A. at page 631:

> "The question of balance of probabilities ought not to arise in any motion proceedings where the form of procedur ordinarily appropriate is *rauw actie*. The existence o non-existence of a bona fide dispute on a material fact is the only test to be applied and a litigant seeking to force a decision on motion proceedings in such cases does so at his peril".

For these reasons I agree that thc appeal be allowed with costs and the Native Commissioner's judgment be altered to read "Application for interdict dismissed with costs".

Oclschig (Member):

I agree that the appeal be allowed with costs and thc Native Commissioner's judgment be altered to read "application for interdict dismissed with costs" for the reason that the facts in this case are in dispute on material issucs and claims should not bc decidcd on motion proccedings if it is shown that there is a real disputc on important facts. In any evcnt pctitioners have not shown that there arc any grounds for apprehending any likclihood of irreparable harm.

I agree with the judgment of my brothcr Menge in regard to thc preliminary point or exception taken by Mr. Lubinsky.

For Appellant: Adv. M. Mandcl, instructed by Mr. M. L. Goodman.

For Rcspondents: Adv. J. E. Lubinsky, instructed by Messrs. Bernard Melman & Co.

CENTRAL NATIVE APPEAL COURT.

MALAKA *v.* MALAKA.

N.A.C. CASE No. 24/54.

JOHANNESBURG: 17th December, 1954. Before Marsberg, President, Menge and Oelschig, Members of the Court.

ADMINISTRATION OF NATIVE ESTATES.

Enquiries under section 3 (3) *of Government Notice No.* 1664 *of* 1929 *as amended—Judicial proceedings*—Res judicata.

Summary: Applicant had unsuccessfully opposed the declaration of respondent as heir to an estate at an enquiry held under the regulations governing the administration of Native estates. He had also appealed unsuccessfully against that declaration to the Native Appeal Court. He then sued *de novo* in the Native Commissioner's Court. The Native Commissioner, having ruled that the matter is not *res judicata*—

Held: That the proceedings under section 3 (3) of Government Notice No. 1664 of 1929, as amended, are judicial and not administrative: and that consequently a determination under that sub-section is *res judicata* between the parties.

Cases referred to:

Sigcau *v.* Sigcau, 1941 C.P.D. 71.

Moshesh *v.* Moshesh, 1936 N.A.C. (C. & O.) 69 and Mohulatsi *v.* Mohulatsi, 1932 N.A.C. (T. & N.) 56 distinguished.

Case No. 49 of 1949 N.A.C. (S) 105 not followed.

Statutes, etc., referred to:

Section 3 (3) Government Notice No. 1664 of 1929.

Appeal from the Court of the Native Commissioner, Germiston.

Menge (Permanent Member) delivering the judgment of the court:—

The facts in this matter are briefly as follows: A native named Kleinbooi Dinko died on the 23rd October, 1952 and left an estate consisting of a house on stand No. 1269, Germiston Location. Two persons claimed each to be the sole heir: Harry Malaka and Abram Malaka. The Native Commissiner, Germiston, instituted an enquiry into the dispute under the provisions of Government Notice No. 1664 of 1929, as amended, and, after hearing evidence from both sides, on 27th July, 1953, declared Harry Malaka to be the heir.

The matter thereupon came before this Court on appeal in the following circumstances (to quote from the judgment which this Court delivered on 15th December, 1953):—

> "In this matter Abram Malaka on the 26th September, 1953, filed a notice of appeal against the finding of the Native Commissioner in an inquiry held by him into the distribution of the estate of the late Kleinbooi Dinko Malaka who died at Germiston Location in 1952 and who left a house on stand No. 1269 there."

The grounds of appeal are given as follows:—

> "That the Commissioner did not have all the facts available before him in order to arrive at a just and proper decision in regard to the heir in the estate of the late Kleinbooi Dinko Malaka."

This notice contains no prayer for condonation of the late noting (judgment having been given on the 27th July, 1953). But the appellant on the same day also filed an application to review the proceedings before the Native Commissioner and to appeal against his decision. No reasons are set out but application is made for condonation of the late noting of the "said appeal".

Although the last mentioned application purports to be, as per its heading, an application for review, it cannot be accepted as such in that it does not comply with the provisions of rule 22 of the rules of this Court, in that no irregularity is alleged or implied in the affidavits supporting it.

Both notices taken together can, however, be accepted as a notice of appeal with a prayer for the condonation of late noting, and as such we propose to regard them".

The judgment, after reviewing the evidence and affidavits placed before it, concludes as follows:—

> "We consider that on the facts before him the Native Commissioner arrived at a just and proper decision, and that the appellant has no reasonable prospects of success.
>
> The application for the condonation of the late noting of the appeal and for review is accordingly dismissed with costs".

Thereafter, on 9th February, 1954, Abram Malaka issued summons against Harry Malaka in the Native Commissioner's Court, Germiston, claiming the house as rightful heir and alleging that the Native Commissioner's award at the enquiry on 27th July, 1953 was incorrect. Nothing is said about the appeal proceedings. The defence excepts to the summons as not disclosing a cause of action or alternatively that the Court had no jurisdiction to hear the action. Alternatively defendant pleads *res judicata*.

Argument was heard on the 27th July, 1954, when the previous enquiry record was handed in by consent. The Assistant Native Commissioner held "that the jurisdiction of this court is not excluded by reason of an enquiry having been held and a finding given by the Native Commissioner in terms of Government Notice No. 1664, dated 20.9.29 (Note N.A.C. C and O 33/36)". The question of costs was reserved pending a decision on appeal.

Against this order the defendant now appeals, mainly on the ground that the matter is *res judicata*.

Mr. Hertzberg before us also argued the matter mainly on the question of *res judicata*.

Mr.Christodolides argued on the basis of the case of Sigcau *v.* Sigcau, 1941 C.P.D. 71, that the Native Commissioner's decision under the regulations was purely administrative. He pointed out that, as stressed in that case, there exists no machinery for the enforcement of the order made; but he conceded in argument that a party who had obtained such an order could sue in a Native Commissioner's Court for any rights which may flow from the order. The position is somewhat analagous to that which arises when, in a matter of divorce, an order is made of forfeiture of the marriage benefits. In that connection Broome, J. expressed himself as follows in Bhengu *v.* Bhengu 1949 (4) S.A. 22 (at page 25): "It may

be said that a general order of this sort does not help the plaintiff's spouse much, for he may not be able to recover any specific property without taking further proceedings. But it does help him to the extent that it lays the foundation of his claim in such further proceedings. . . . . ."

The first question which arises is whether the ruling is appealable. The order is in form interlocutory, but in substance it clearly puts an end to the defence pleaded, and consequently disposes of an issue in the main action. Applying the principles set out in the cases of Nepgen *v.* Brown, 1918, E.D.L. 169, and, more especially, Pretoria Garrison Institutes *v.* Danish Variety Products (Pty.), Ltd., 1948 (1) at page 870, we hold that the order is appealable.

The Assistant Native Commissioner seeks support for his ruling from the case of Moshesh *v.* Moshesh, 1936 N.A.C. (C. & O.) page 69, but he has misread this case. It merely lays down that a claimant to an estate is not tied down to the procedure laid down in the regulations for the administration of Native estates but may pursue his claim by means of an ordinary action. The case does not deal with the question whether, when such an action is brought, a prior determination of the issue under the regulations can be pleaded as *res judicata.*

It is this question which is now in issue for it seems to us that the Native Commissioner's decision is in effect a rejection of the plea of *res judicata.*

The parties are the same and so is the cause of action. The only question, then, is whether the determination under the regulations constitute a bar to fresh proceedings. This determination was not made by a court of law; but that is not an essential for the validity of a plea of *res judicata.* For even an arbitrator's award can be pleaded as *res judicata* (Schoeman *v.* van Rensburg, 1942 T.P.D. 175). Beck (Theory and Principles of pleading) states that the plea presupposes that the decision pleaded as such was a judicial, as opposed to an administrative, order. Spencer Bower (Estoppel by Representation) considers that *res judicata* operates when there has been "a final judicial decision of a tribunal of competent jurisdiction". Is then the Native Commissioner's award a judicial decision or a purely administrative order?

Counsel for respondent conceded that the question as to what would be an administrative act and what a judicial act has not been fully gone into in relation to Native estate matters.

In Pretoria North Town Council *v.* A.I. Electric Ice Cream Factory (Pty.), Ltd., 1953 (3) S.A. at page 11, Schreiner, J. A., after pointing out that there is some difference of opinion in juristic literature as to the proper basis of classifications of discretions and functions under the heading of "administrative" "quasi-judicial" and "judicial", said: "What primarily has to be considered in all these cases is the statutory provision in question, read in its proper context". Now, the regulations for the administration of Native estates published under Government Notice No. 1664 of the 20th September, 1929, are designed to afford Natives a simple procedure at minimum cost for the liquidation of the estates of Natives who die intestate. Provision is made in section 3 (3) for the settlement of conflicting claims. The Native Commissioner takes evidence and determines the issue. He may award costs. An appeal from his decision lies in the Native Appeal Court. By an amendment of 9th May, 1947, these regulations were amplified so as to compel the attendance of parties and witnesses. The elements covered by this procedure are, therefore, a disputed claim to a legal right, an investigation or trial, an adjudication and a right of appeal. Is this an administrative or judicial proceeding?

In the unnamed case No. 49 at page 105 of 1949 N.A.C. (S) and also in Zulu *v.* Tyobeka, 1943, N.A.C. (C. & O.) 41, to which latter case Counsel for respondent referred us, it was held merely following Sigcau *v.* Sigcau, that the Native Commissioner acts in an administrative capacity. In Sigcau's case, however, it was not sought to differentiate between judicial and administrative functions. Although the Court described the Native Commissioner's function as administrative, it was in reality indicating that the Native Commissioner, acting under section 3 (3) of the regulations was not functioning as a "Court of Native Commissioner". The two Native Appeal Court cases which were referred to in Sigcau's case, and in which it was held that the Native Commissioner acts in an administrative capacity [viz.: Moshesh's case referred above and Mohulatsi *v.* Mohulatsi, 1932, A.N.C. (T and N) 56], also do not deal with the distinction between judicial and administrative functions. As in Sigcau's case the material point was that the Native Commissioner acting under the regulations is not the Native Commissioner's Court. In fact, it seems that the decision in *Mohulatsi's, Moshesh's* and *Sigcau's* cases would still have been the same even if the Native Commissioner, acting under the regulations, is exercising a judicial function. None of these cases is, therefore, of any assistance in determining whether the Native Commissioner does so act, at least for the purposes of the doctrine of *res judicata.*

Now, "administration" has been defined as "the exercise of political powers within the limits of the constitution", (Holland,-Jurisprudence). On the other hand judicial proceedings have been described as follows:—

> "A proceeding . . . . which legally ascertains any right or liability" (Stephen,—Digest of Criminal Law).
>
> "A proceeding designed for the enforcement of a right vested in the plaintiff", (Salmond on Jurisprudence).
>
> "A judicial determination of some question of law or issue of fact", (Herbstein and van Winsen—Civil Practice p. 202).
>
> "An act done by competent authority, upon consideration of facts and circumstances, and imposing liability or affecting the rights of others", (Slade *v.* Pretoria Rent Board, 1943 T.P.D. 254).

In the English case of R *v.* Metropolitan Police Commissioner; *ex parte* Parker, 1953 (2) A.E.R. 717, Lord Goddard, C. J. considered that "to hear evidence and come to a conclusion on facts" is quasi-judicial, not administrative; and Donovan, J., described as judicial the hearing of evidence, weighing it and making a finding. So also in Transvaal Indian Congress *v.* Land Tenure Advisory Board, 1954 (2) S.A. at page 509, Hill, A. J. considers a quasi-judicial body to be one to which questions of law and fact are submitted for decision.

Finally, the proceedings under the regulations are analogous to those under the laws relating to deserted wives, and these were held to be "civil proceedings" in Miller *v.* Miller, 1940, C.P.D. pages 470-1.

It seems clear, therefore, that proceedings under Regulation 3 (3) of Government Notice No. 1664 of 1929, though not court proceedings, are judicial, and not administrative and that we cannot follow the case at page 105 of 1949 N.A.C. (S), mentioned earlier herein. That being so the final decision given by the Native Commissioner in those proceedings is *res judicata* between the parties; for it is stated in the Digest (44.2.6) that "it is a reasonable rule that one right of action should only be tried once, so as to prevent interminable litigation and the embarrasment of contrary decisions".

The Native Commissioner's decision must be accepted by the appellant *pro veritate* and he cannot now issue a fresh summons and seek to establish the contrary.

The appeal is allowed with costs. The Native Commissioner's order is set aside and judgment entered for defendant with costs.

Marsberg, (President): I concur. In my opinion the matter is *res judicata.*

Oelschig (Member): I concur.

For Appellant: Mr. B. Hertzberg.

For Respondent: Adv. C. P. Christodolides, instructed by Mr. S. Wade.

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OFFICERS OF THE NATIVE APPEAL COURTS.
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NOORDOOSTELIKE NATURELLE-APPÈLHOF.
NORTH-EASTERN NATIVE APPEAL COURT.

PRESIDENT: ED./HON. J. H. STEENKAMP.

PERMANENTE LID: T. D. RAMSAY: 1/1/54–31/8/54.
PERMANENT MEMBER: R. ASHTON: 1/9/54–31/12/54.

GRIFFIER/REGISTRAR: R. WELMAN.

SENTRALE NATURELLE-APPÈLHOF.
CENTRAL NATIVE APPEAL COURT.

PRESIDENT: ED./HON. H. F. MARSBERG.

PERMANENTE LID/PERMANENT MEMBER: W. O. H. MENGE.

GRIFFIER: H. P. KLÖPPERS: 1/1/54–30/11/54.
REGISTRAR: W. H. KING: 1/12/54–31/12/54.

SUIDELIKE NATURELLE-APPÈLHOF.
SOUTHERN NATIVE APPEAL COURT.

PRESIDENT: ED./HON. M. ISRAEL.

PERMANENTE LID/PERMANENT MEMBER: H. W. WARNER.

GRIFFIER/REGISTRAR: E. J. BRIGG.

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