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REPORTS

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NATIVE APPEAL COURTS

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SOUTHERN NATIVE APPEAL COURT.

MDUDU *v.* MDUDU.

N.A.C. CASE No. 21 OF 1956.

KING WILLIAM'S TOWN: 12th July, 1956. Before Balk, President, Warner and Welman, Members of the Court.

PRACTICE AND PROCEDURE.

Late noting of appeal—Condonation—Considerations.

ADMINISTRATION OF ESTATES.

Inquiry under section three (3) *of Government Notice No.* 1664 *of* 1929, *as amended—Competent only if estates devolves according to Native law.*

Summary: On 28th February, 1956, the Native Commissioner gave a decision in an inquiry in terms of section 3 (3) of the Regulations published under Government Notice No. 1664 of 1929, as amended, to determine the person entitled to succeed to property in the estate of late James Mdudu. The time for noting an appeal, as laid down in the regulations, therefore, expired on 28th March, 1956, but the appeal was not noted until 23rd April, 1956, and application was made for condonation of the late noting.

Applicant consulted his attorney on 29th February, 1956, and instructed him to note an appeal, if he considered it advisable. The attorney had sufficient data by 8th March, 1956, to note the appeal.

The explanations of the causes of delay, one of which was that the attorney, owing to his being pre-occupied with circuit court matters, was not able to study the record of the inquiry until eleven days after he had received it, did not take the matter any further. The Native Commissioner had inadvertently applied common law in the inquiry, and in his reasons for judgment admitted that he had misdirected himself. He had held that the deceased's widow was entitled to succeed.

Held: That an attorney's convenience forms no good reason for disregarding rules of Court.

Held further: That, as it is clear that the applicant, a woman, has no prospect of success on appeal, the application falls to be refused.

Held further: It is incompetent to hold an inquiry in terms of section 3 (3) of the Regulations published under Government Notice No. 1664 of 1929, as amended, unless the estate devolves according to Native law.

Held further: That common law having been applied by the Native Commissioner in arriving at his decision it should be set aside and the matter remitted to him for such further action as he may deem fit.

Cases referred to:

Shabango *v.* Ngabi, 1953, N.A.C. 111 (N.E.).
Schoeman *v.* Smit, and Smit, 66 P.H., F. 106 (A.D.).
Modolo *v.* Nomawu, 1 N.A.C. 12.
Ngcwayi *v.* Ngcwayi, 1 N.A.C. (S.D.) 231.
De Villiers *v.* De Villiers, 1947 (1) S.A. 635 (A.D.).
Madikane *v.* Masoka, 1 N.A.C. (S.D.) 113.

Legislation referred to:

Government Notice No. 1664 of 1929, as amended.
Native Administration Act, 1927.
Government Notice No. 2887 of 1951, as amended.

Appeal from the Court of the Native Commissioner, Queenstown.

Balk (President):—

This is an application for condonation of the late noting of an appeal from a Native Commissioner's decision in an inquiry held, in terms of section 3 (3) of the Regulations for the Administration and Distribution of Native Estates, published under Government Notice No. 1664 of 1929, as amended, to determine the person entitled to succeed to the property in the estate of the late James Mdudu (hereinafter referred to as "the deceased"), such property not falling within the purview of sub-sections (1) and (2) of section *twenty-three* of the Native Administration Act, 1927.

The Native Commissioner's decision was given on the 28th February, 1956, so that, in terms of Rule 4 read with Rule 31 (2) of the Rules of this Court, published under Government Notice No. 2887 of 1951, as amended, the time within which the appeal therefrom could be noted expired on the 23rd March, 1956, but the noting was not effected until a month later, viz., on the 23rd April, 1956.

It emerges from the supporting affidavit made by the attorney who noted the appeal, that the applicant instructed him on the 29th February, 1956, to do so if, after he had gone into the matter, he considered it advisable, seeing that he had not represented the applicant at the inquiry; and from the copies of correspondence annexed to that affidavit, it is clear that this attorney had sufficient data by the 8th March, 1956, to note the appeal for he was by then acquainted with the essential facts and the basis of the Native Commissioner's decision which forms the ground of the proposed appeal, so that he had ample time to note it before the prescribed period expired. In other words the attorney was aware by the 8th March, 1956, that the facts were that the deceased, a Native, had died intestate survived by his wife, Nodolli (present respondent), to whom he had been married by civil rites with community of property excluded in terms of section *twenty-two* (6) of the Native Administration Act, 1927, and that there had been no Ministerial direction in terms of section 2 (*d*) of the regulations referred to above. The attorney was also then aware of the Native Commissioner's decision that Nodolli was entitled to succeed to the property in the deceased's estate; and it was manifest that, that decision was wrong in that it was contrary to Native law in accordance with which the estate fell to be distributed, see Shabango *v.* Ngabi, 1953, N.A.C. 111 (N.E.), at page 113, and this factor forms the basis of the proposed appeal.

The explanation in the supporting affidavit of the causes of delay after the 8th March, 1956, takes the matter no further since, as pointed out above, the attorney entrusted with the noting of the appeal was by that date in a position to do so.

One cause mentioned, however, calls for comment and that is the attorney's statement that, owing to his being preoccupied with Circuit Court matters, he was not able to study the record of the inquiry until eleven days after he had received it. In this connection it must be emphasised that an attorney's convenience forms no good reason for disregarding Rules of Court, see Schoeman *v.* Smit and Smit, 66 P.H., F. 106 (A.D.).

Turning to the merits of the proposed appeal, it is manifest that the applicant, who is the deceased's sister, being a woman, cannot succeed to the property in the deceased's estate under Native law in accordance with which, as stated above, that

estate falls to be distributed so that it is clear that she has no prospect of success on appeal and the application, therefore, falls to be refused, see Madolo *v.* Nomawu, 1 N.A.C. 12, Ngcwayi *v.* Ngcwayi, 1 N.A.C. (S.D.) 231, and De Villiers *v.* De Villiers, 1947 (1) S.A. 635 (A.D.).

The Native Commissioner's decision that the deceased's wife, Nodolli, was entitled to succeed to the estate cannot, however, be allowed to stand for, as pointed out above, it is wrong. Here it should be mentioned that the Native Commissioner very properly admitted in his reasons for judgment that he had misdirected himself and inadvertently applied common law instead of Native law in coming to his decision.

It is also perhaps as well to invite attention here to the fact that it is incompetent to hold an inquiry in terms of section 3 (3) of the above-mentioned Regulations unless the estate devolves according to Native law, in view of the language of that section, based, as it is, on sub-sections (4) and (10) of section *twenty-three* of the Native Administration Act, 1927, see Madikane *v.* Masoka, 1 N.A.C. (S.D.) 113, at page 115.

In the result I am of opinion that the application for condonation of the late noting of the appeal should be refused, with costs, but that the Native Commissioner's decision in the inquiry should be set aside and the matter remitted to him for such further action as he may deem fit.

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

R. Welman (Member): I concur.

For Appellant: Mr. Barnes, King William's Town, instructed by Mr. Tsotsi of Lady Frere.

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

SOUTHERN NATIVE APPEAL COURT.

VETI *v.* **HLATI.**

N.A.C. CASE No. 3 OF 1956.

KING WILLIAM'S TOWN: 12th July, 1956. Before Balk, President, Warner and Welman, Members of the Court.

EVIDENCE.

Finding in criminal case—Inadmissible in proof of finding in subsequent civil action—Onus of proof in interpleader action. Evidence of dipping records not probative of ownership of animal.

CUSTOM.

Ubulunga *beast—Original animal becoming permanent* ubulunga.

Summary: Certain cattle were attached by the deputy messenger at a judgment debtor's kraal in 1954 and again in 1955 in view of a finding by another Court in a criminal case against the judgment debtor that the previous attachment was invalid. Thereupon interpleader proceedings were instituted in the Native Commissioner's Court which declared some of the stock non-executable and one executable.

An appeal was noted on the ground that the judgment declaring the one beast executable was against the weight of evidence, and secondly that on a balance of probabilities the Court should have found that it did not belong to either of the judgment debtors.

A cross-appeal against the declaration of two cattle to be non-executable was based on the grounds that the judgment was against the weight of evidence and that the onus was on claimant to prove on a balance of probability that the two cattle in question were his bona fide property.

Held: That the finding in the criminal case that the earlier attachment was invalid is inadmissible in proof of such invalidity, as, in a civil trial, the Court should come to a decision on the facts before it without regard to the proceedings before another tribunal, not between the same parties.

Held further: That, as the cattle were in the possession of the judgment debtor, the onus of proof rested on the claimant.

Held further: That evidence that a beast was registered in claimant's name in the Dipping Records is not probative of claimant's ownership thereof.

Held further: That, when an original *ubulunga* beast was left by claimant with the person to whom it had been given for some eight to nine years without his having allotted a permanent *ubulunga* beast within a reasonable time after the first heifer calf to the original *ubulunga* beast had been weaned, the original beast became the permanent *ubulunga* beast and the ownership passed from the claimant.

Cases referred to:

Hollington *v.* Hewthorn & Co., Ltd. (1943), 2 A11 E.R., 35.
Gleneagles Farm Dairy *v.* Schoombee, 1949 (1) S.A. 830 (A.D.).
Simanga *v.* Nkampule, 1 N.A.C. (S.D.) 75.
Jakavula *v.* Melane, 2 N.A.C. 89.
Sigogo *v.* Nogaya, 1936, N.A.C. (C. & O.) 105.

Legislation referred to:

Government Notice No. 2886 of 1951, as amended.

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

Balk (President):—

This litigation had its inception in the judicial attachment of two heifers and a black and white ox in partial satisfaction of a civil judgment of a Native Commissioner's Court.

These cattle were first attached by the Deputy Messenger of that Court on the 20th September, 1954, at the kraal of Halalisa Zweni, one of the judgment debtors concerned, and were again attached by him on the 22nd June, 1955, in view of a finding on the 20th *idem* by another Court in a criminal case against Halalisa that the previous attachment was invalid.

Thereupon interpleader proceedings were instituted in the Native Commissioner's Court which declared that the black and white ox was, and that the two heifers were not, executable.

Against this judgment an appeal and a cross-appeal have been brought by the claimant and the judgment creditor, respectively, on the following grounds:—

GROUNDS OF APPEAL.

" 1. The judgment (declaring the black and white ox executable) is against the weight of evidence; and
2. that on a balance of probabilities the Assistant Native Commissioner should have found that the black and white ox did not belong to either of the judgment debtors but to claimant who discharged any onus cast upon him to prove his claim."

GROUNDS OF CROSS-APPEAL.

" 1. That the judgment (declaring the two heifers not executable) is against the weight of evidence and is not supported thereby.

2. That the Assistant Native Commissioner erred in declaring that the two heifers were not executable.

3. That the onus was upon the claimant to prove on a balance of probabilities that the two heifers in question are his bona fide property and claimant failed to discharge this onus."

The finding by the Court in the criminal case that the attachment of the 20th September, 1954, was invalid, is inadmissible in the instant case as proof of such invalidity because as laid down in Hollington *v.* Hewthorn & Co., Ltd. (1943), 2 A11 E.R., 35, in a civil trial the Court should come to a decision on the facts before it without regard to the proceedings before another tribunal, not between the same parties. That being so and as, according to the record of the proceedings in the instant case, the warrant of execution appears to be in order and the attachment of the 20th September, 1954, appears to have been properly made, i.e. in accordance with the provisions of Rule 67 of the Rules for Native Commissioners' Courts, published under Government Notice No. 2886 of 1951, as amended, it falls to be regarded as a valid attachment; and as the cattle were in the possession of the judgment debtor, Halalisa, when this attachment was effected, the onus of proof in the interpleader proceedings rested on the claimant, see Gleneagles Farm Dairy *v.* Schoombee, 1949 (1) S.A. 830 (A.D.), at page 836.

It is manifest from the claimant's testimony that he has no first-hand knowledge of the three attached cattle himself and that he relies on his witnesses, Nomthaliso Singama and Kekana Veti, to establish his case.

According to Nomthaliso, the two heifers concerned are the progeny of a red and white *ubulunga* cow given to her by her brother, the claimant, and the black and white ox concerned was obtained by her, together with another black and white ox, in exchange for a dun ox belonging to the claimant during the absence of both the claimant and his younger brother, Kekana, at work and without consulting them. She added that she had effected this exchange as the dun ox was old.

Kekana testified that he had purchased the dun ox for the claimant and that one, Jenetana (since deceased) with whom the two black and white oxen obtained in exchange for the dun ox had been left, had confirmed that this exchange had taken place.

It is apparent from the Assistant Native Commissioner's reasons for judgment that he did not accept Nomthaliso's version in so far as the attached black and white ox was concerned, finding that it was improbable that she had exchanged the dun ox without reference either to the claimant or his "eye", Kekana, and that this improbability was heightened by the fact that Nomthaliso had displayed so little interest in the other black and white ox, as is apparent from her testimony that she did not know what had become of it. Here it should be mentioned that, according to Kekana's evidence, Nomthaliso had told him that Jenetana had used this ox for dowry purposes.

Apart from these improbabilities there are, as pointed out by Counsel for respondent, other unsatisfactory features in the evidence for claimant. Nomthaliso stated that the attached cattle bore the claimant's earmark but admitted that she did not know the latter's earmark; and, as is manifest from the record, Kekana's testimony that these cattle bore the claimant's earmarks, was found to be false on their inspection by the Assistant Native Commissioner *a quo*. Kekana's evidence that the beast registered in the claimant's name in the Dipping Records was the attached black and white ox, therefore, also falls to be treated with reserve. In any event that evidence is not probative of the claimant's ownership of that ox, see Simanga *v.* Nkampule, 1 N.A.C. (S.D.) 75.

In these circumstances, the claimant cannot be said to have rebutted the presumption of ownership of the cattle in the judgment debtor, Halalisa, arising from their being in his possession on their attachment and he has, therefore, not discharged the onus of proof resting on him.

It should be added that, as submitted by Counsel for Respondent, the claimant cannot, in any event, succeed in so far as the two attached heifers are concerned as will be apparent from what follows.

It is manifest from the claimant's own evidence and that of his witness, Nomthaliso, that he left the original *ubulunga* beast with her until its death some eight to nine years after he had given it to her subsequent to her marriage without allocating a permanent *ubulunga* beast to her and that, when the original *ubulunga* beast died, it had a calf, born subsequent to the two heifers in question. It follows that the claimant cannot be said to have allocated a permanent *ubulunga* beast to Nomthaliso within a reasonable time after the first heifer calf of the original *ubulunga* beast had been weaned so that the original beast became the permanent *ubulunga* and the ownership therein and in its progeny passed from the claimant, see Jakavula *v.* Melane, 2 N.A.C. 89, at page 90 and Sigogo *v.* Nogaya, 1936, N.A.C. (C. & O.) 105, at page 106.

In the result I am of opinion that the appeal should be dismissed, with costs, that the cross-appeal should be allowed, with costs, and that the judgment of the Court *a quo* should be altered to read: "The three head of cattle are declared executable. The claimant is to pay the costs."

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

R. Welman (Member): I concur.

For Appellant: Mr. Kelly, Lady Frere.

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

NORTH EASTERN NATIVE APPEAL COURT.

ZULU *v.* ZULU.

N.A.C. CASE No. 85 OF 1956.

VRYHEID: 9th January, 1957. Before Steenkamp, President, Ashton and Chatterton, Members of the Court.

PRACTICE AND PROCEDURE.

Appeal from Chief's Court—Trial of Appeal by Native Commissioner.

Summary: A claim in a Chief's Court for the delivery of cattle was in reality an application for a declaration of rights in and to the property rights of the sister of the parties. The defendant had received from the intended bridegroom the *lobolo* which plaintiff claimed should have been paid to him. The marriage had not yet been celebrated.

Held (1): That on the prospective bridegroom, not on the Court falls the responsibility of seeing that he pays *lobolo* to the rightful person.

Held (2): That the Court can on the evidence say who the rightful person is by declaring who is entitled to the property rights in the girl.

Held (3): That it is advisable for Native Commissioners at the commencement of the hearing of an appeal to call upon the plaintiff for a statement of his claim and on defendant for his reply so that at the outset there may be no doubt as to the matter in dispute.

Appeal from the Court of the Native Commissioner, Vryheid.

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

Plaintiff claimed eleven head of cattle from his brother who had admittedly received them as *lobolo* for their sister. It was not disputed that plaintiff was the "house" heir but defendant contended that their late father had "given" the sister to him.

In a Chief's Court plaintiff succeeded in his claim and defendant appealed to the Native Commissioner who confirmed the Chief's decision.

Defendant has now brought the matter in appeal to this Court on the ground that the judgment is against the weight of evidence.

It being admitted that plaintiff is the "house" heir the onus was on defendant to prove his contention that his father "gave" the girl to him. The Native Commissioner was of the opinion that he had failed to prove it and this Court can find no fault with his view nor did Counsel for appellant (defendant) seriously challenge it. The appeal must therefore fail.

There is however an important fact which apparently was not given the consideration it should have had when the Native Commissioner and the Chief gave their judgments. The girl in respect of whom the cattle were paid as *lobolo* is not yet married and the cattle still belong to the prospective bridegroom although the defendant holds them on terms of *sisa*. It is for the prospective bridegroom to see that the cattle go to the rightful person, not the Court. But the Court can on the evidence say who the rightful person is by declaring that plaintiff is entitled to the property rights in his sister.

The Native Commissioner's judgment should therefore be amended accordingly.

It is ordered that the appeal be and it is hereby dismissed with costs but the Native Commissioner's judgment is altered to read:—

> "The appeal is dismissed with costs and the Chief's judgment (from which the words 'Chief's costs £5' are deleted) is altered to read 'plaintiff is awarded the property rights in his sister Ntombazana. Defendant to pay costs amounting to £1. 7s. 6d."

It frequently happens that the issues in cases taken on appeal from a Chief's to a Native Commissioner's Court are not clear from the record of the proceedings furnished in terms of the Rules for Chiefs' Courts. This Court is of opinion that it is advisable for a Native Commissioner at the commencement of the hearing of an appeal to call upon the plaintiff for a statement of his claim and on defendant for his reply so that at the outset there may be no doubt as to the matters in dispute.

For Appellant: Mr. H. C. Myburgh.

For Respondent: In person.

NORTH EASTERN NATIVE APPEAL COURT.

ZONDI *v.* MAKAYE & OTHERS.

N.A.C. CASE No. 86 OF 1956.

PIETERMARITZBURG: 23rd January, 1957, before Steenkamp, President, Ashton and Durr, Members of the Court.

PRACTICE AND PROCEDURE.

Appeal from a Native Commissioner's Court—Condonation of late noting.

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

Where it appeared from the affidavit implementing an application for the late noting of an appeal against a judgment

of a Native Commissioner's Court that the delay was to some extent due to the illness of the Clerk of the Court and the shortage of staff in the Native Commissioner's office:—

Held: For this reason and for this reason only the application for condonation is granted.

(The appeal was dismissed with costs.)

Appeal from the Court of the Native Commissioner, Pietermaritzburg.

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

Application was made in this case for the condonation of the late noting of the appeal lodged by plaintiff. It appeared from the affidavit that the delay was to some extent due to the illness of the Clerk of Court and the shortage of staff in the Native Commissioner's office. For this reason, and for this reason only, the application for condonation is granted.

For Appellant: Adv. J. A. van Heerden instructed by C. C. C. Raulstone & Co.

For Respondent: Mr. L. Simon of Leslie Simon & Co.

SOUTHERN NATIVE APPEAL COURT.

MGWETYANA *v.* MGWETYANA.

N.A.C. CASE No. 39 OF 1956.

BUTTERWORTH: 29th January, 1957. Before Balk, President, Warner and Johnson, Members of the Court.

PRACTICE AND PROCEDURE.

Unstamped application for condonation of late noting of appeal invalid—Validation not timeous—Effect.

Summary: Appellant lodged a written application for condonation of the late noting of an appeal, with the Clerk of the Native Commissioner's Court more than twenty-four hours before the commencement of the session, but failed to stamp the document as required by Rule 25 of the Rules for Native Appeal Courts, until the day on which the session commenced.

Held: That, this being so, the document could not be regarded as an application within the meaning of Rule 14 of the said Rules published under Government Notice No. 2887 of 1951, as amended, until the day on which the session commenced, in that it was not valid until stamped on that day.

Held further: That its stamping did not serve to validate it with retroactive effect.

Held further: That, in the circumstances, it was not filed with the Clerk of the Court at least twenty-four hours prior to the commencement of the session as required by the said Rule 14, which is imperative in its terms.

Cases referred to:

Mpanza *v.* Mpanza d.a., 1953, N.A.C. 66 (N.E.).
Mantshi & Another *v.* Ngqaqu, 1956 N.A.C. 61 (S.).

Legislation referred to:

Government Notice No. 2887 of 1951, as amended.

Appeal from the Court of the Native Commissioner, Butterworth.

Balk (President):—

In this case written application for the condonation of the late noting of the appeal to this Court was lodged with the Clerk of the Native Commissioner's Court at this centre more than 24 hours before the commencement of this session but the document was not stamped, as required by Rule 25 of the Rules of this Court, published under Government Notice No. 2887 of 1951, as amended, until the day on which this session commenced. That being so, the document could not be regarded as an application within the meaning of Rule 14 of the said Rules until the day on which this session commenced in that it was not valid until it was stamped on that day and its stamping did not serve to validate it with retroactive effect, see Mpanza *v.* Mpanza d.a., 1953 N.A.C. 66 (N.E.).

It follows that the application was not filed with the Clerk of the Court at least 24 hours prior to the commencement of this session as required by the lastmentioned Rule which is imperative in its terms, see Mantshi & Another *v.* Ngqaqu, 1956 N.A.C. 61 (S.), and the appeal was accordingly struck off the roll. There was no order as to costs as the respondents, who appeared in person, intimated that they had incurred none.

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

G. M. Johnson (Member): I concur.

For Appellant: Mr. W. M. Tsotsi, Lady Frere.

For Respondents: In person.

SOUTHERN NATIVE APPEAL COURT.

SITWAYI *v.* **TSHETSHE.**

N.A.C. CASE No. 43 OF 1956.

BUTTERWORTH: 29th January, 1957. Before Balk, President, Warner and Johnson, Members of the Court.

FINGO CUSTOM.

Payment of lobola *by illegitimate son to mother's guardian to establish "house" for late natural father not in accordance with custom.*

Acquisition by natural father of rights in spinster's children.

Summary: Respondent unsuccessfully sued appellant in a Chief's Court, and successfully appealed to the Native Commissioner's Court having jurisdiction, where he claimed to be the heir to one Tshetsha Maqubela and through him to the latter's father, Maqubela, who had an unmarried daughter, Dwayi, who had six children, of whom Sitwayi, the eldest, was appellant's father. He averred that he was heir to Dwayi and entitled to cattle that might be acquired for or through her, and that he was also guardian to all of her children and specifically heir to her youngest son, Nkumbini. The property in Nkumbini's estate, being in appellant's possession, he claimed it from the latter, who resisted the claim on the ground that he, himself was the rightful heir.

Appellant purports to have acquired his rights by virtue of an alleged custom, which allowed his father, Dwayi's eldest son, to pay dowry to his late mother's guardian, after his natural father's death, so that he might establish a "house" for his late father and acquire full rights himself in and to his younger brothers and sisters.

Held: After the views of the Native Assessors had been obtained, that there is no custom under Fingo law sanctioning an arrangement whereby an illegitimate son may, after the death of his natural father and his mother, pay

lobola for her to her guardian; and, by so doing, establish a "house" for his late natural father to which such son and the other illegitimate children of his mother by his late natural father would then belong, and thus acquire for himself rights in his younger brothers and sisters.

Held further: That the proposition that all the illegitimate children of an unmarried woman can be put under the son who is establishing a "house", although the children have different fathers, and even though one of the fathers has paid a fine, is obviously untenable as, apart from the fact that it involves traffic in children which the Court will not countenance, it runs counter to the well-established custom that the illegitimate child of a spinster or *dikazi* becomes a member of the family of its natural father on payment by the latter of the full customary damages, plus the *isondlo* for the child, to that woman's father, or, if he be dead, to his heir.

Cases referred to:

Matole *v.* Xakekile, 1940 N.A.C. (C. & O.) 104.
Ngxawum *v.* Sibaca, 1 N.A.C. (S.D.) 144.
Colis v. Matshawana, 1 N.A.C. 47.
Takayi *v.* Mzambalala, 1 N.A.C. 121.
Xoliwe *v.* Dabula, 4 N.A.C. 148.
Mpumlo *v.* Maqulo, 4 N.A.C. 325.
Matinise *v.* Malote, 1936 N.A.C. (C. & O.) 121.
Gatyelwa *v.* Ntsebezu, 1940 N.A.C. (C. & O.) 89.

Legislation referred to:

Government Notice No. 2885 of 1951, as amended.
Native Administration Act, 1927, Act No. 38 of 1927, as amended.

Appeal from the Court of the Native Commissioner, Willowvale.

Balk (President):—

This is an appeal from the judgment of a Native Commissioner's Court allowing an appeal brought by the plaintiff against the judgment of a Chief's Court and altering that judgment from one for defendant (present appellant), with costs, to one for plaintiff (now respondent) as prayed, with costs.

In the Native Commissioner's Court both the plaintiff and the defendant restated their pleadings, a procedure sanctioned by section twelve of the Regulations for Chief's and Headmen's Civil Courts, published under Government Notice No. 2885 of 1951, as amended. These restated pleadings read as follows:—

"CLAIM.

Appellant (plaintiff in the Chief's Court) claims to be:—

1. The heir of the late Nkumbini Tshetshe.
2. And to be entitled to delivery up and possession of the said late Nkumbini Tshetshe's estate property comprising—
   (*a*) one beast or value £10;
   (*b*) £77. 7s. in cash;
   as delivered up to or paid to respondent.

And in support of his said claims appellant says:—

1. The late Tshetshe Maqubela was the eldest son and heir of his late father.
2. The said late Tshetshe Maqubela had a full sister called Dwayi, to whose cattle the said late Tshetshe Maqubela was entitled as heir.
3. Appellant is the eldest son and heir of the said late Tshetshe Maqubela in the latter's "Great House", and is therefore also heir of the said Dwayi and any cattle that may be acquired for or through her.
4. The said Dwayi, aunt of appellant, never married during her lifetime but bore six children at her maiden home.

5. The six children born by the said Dwayi in order of birth were as follows:—
   (i) Sitwayi, male, deceased. Natural father Nyongoba.
   (ii) Mvelapi, male, deceased. Natural father Mangqongwana.
   (iii) Nomcondo, female, deceased. Natural father Nyongoba.
   (iv) Sikulumo, male twin of No. v., deceased. Natural father Kalakata.
   (v) Kololo, male, twin of (iv), still living. Natural father Kalakata.
   (vi) Nkumbini, male, deceased. Natural father Kalakata.
6. Appellant is the heir and guardian of all six of the said children.
7. The last-named child, the said late Nkumbini Tshetshe, grew up and married twice, the first wife being known as Madlamini for whom the said late Tshetshe Maqubela paid the dowry, and the second wife being known as Novoti and for whom appellant provided the dowry.
8. The said late Nkumbini Tshetshe died approximately ten years ago having been predeceased by Madlamini but leaving his widow Novoti still living, together with certain children being—
   (*a*) Two daughters by Madlamini called Monhlokwana and Mtitisa respectively.
   (*b*) Three illegitimate boys born to the said Monhlokwana.
   (*c*) Three daughters by Novoti, being Nomanani, Nodurwazana and a baby.
9. The said Novoti continued to live with her children and those of her co-wife at her late husband's, the said late Nkumbini Tshetshe's kraal until approximately 5 years ago when she wrongly deserted and returned to her maiden home together with her own children.
10. After the desertion of the said Novoti appellant instructed Kololo Tshetshe to take custody of the remaining children and to take possession and care of all the estate property belonging to the said late Nkumbini Tshetshe, and the said Kololo did take the said children into his care and likewise took possession of the estate property.
11. During or about 1954 the said Novoti sued the said Kololo in the Headman's Court at Nqabara for possession of the said Nkumbini's estate property and the said Novoti thereby recovered one beast or value £10 and the sum of £77. 7s. in cash which beast and cash the said Novoti handed over to respondent.
12. Appellant is the heir of the said late Nkumbini Tshetshe and as such is entitled to the said beast and the said cash but respondent's wrongly claims to be heir himself and refuses to hand over the said property and cash.
13. Respondent is the eldest son and heir of the aforementioned Sitwayi (see paragraph 5 above) who was the first born and illegitimate son of appellant's aunt Dwayi.

Wherefore appellant prays that judgment may be in his favour declaring him to be the heir according to custom of Nkumbini Tshetshe and ordering respondent to deliver up the said estate beast or pay its value £10 and to pay the sum of £77. 7s. to appellant, with costs."

"RESPONDENT'S REPLY TO APPELLANT'S CLAIM.

1. The Respondent (defendant in the Chief's Court) admits paragraphs 1, 2, 4, 8, 11 and 13.

2. Respondent admits the first two lines of paragraph 3 but denies the last two lines for reasons hereafter set forth.

3. Ad paragraph 5 respondent admits the names and order of birth of the six children described but denies that they had different natural fathers, stating that Nyongoba was the natural father of all these children.

4. Paragraph 6 is denied.

5. Ad paragraph 7 respondent admits the two marriages of Nkumbini described but denies that the dowries were provided as alleged, and says that both dowries were provided by Nkumbini's eldest brother Sitwayi, respondent's father.

6. Paragraph 9 is denied. Novoti went from her married kraal to Sitwayi's kraal last year.

7. Ad paragraph 10 respondent only admits that Kololo had possession of the estate property as his kraal was close to Mkumbini's but denies the remaining allegations.

8. Except that he admits refusal to hand over the property and cash and that he lawfully (now wrongly) claims to be heir himself the respondent denies paragraph 12.

9. Respondent states further:—

(*a*) When the late Nyongoba first caused the pregnancy of Dwayi as a result of which Sitwayi was born he paid to her brother Tshetshe one beast on account of fine.

(*b*) After the said Nyongoba's death after Dwayi had had the aforesaid five further children by Nyongoba the eldest son Sitwayi, of whom respondent is the heir, acquired full rights in and to his five brothers and sisters at a family meeting, in accordance with Native custom by paying to the late Tshetshe, appellant's father, six head of cattle, the full number asked for by Tshetshe.

(*c*) Respondent in his capacity as heir of Sitwayi is therefore entitled to the property claimed."

In response to a request by the plaintiff's attorney, the following further particulars were furnished in the Native Commissioner's Court by the defendant:—

"FURTHER PARTICULARS OF RESPONDENT'S REPLY.

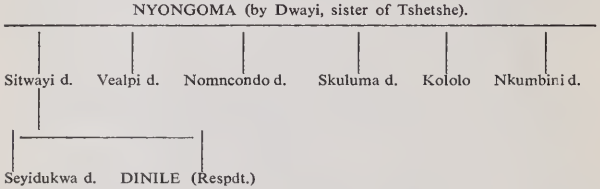
1. The men present at the family meeting described in paragraph 9 (*b*) of the reply were:—

The late Tshetshe Maqubela, Qwelane Tshetshe (appellant), Kangela Maqubela, Mhlam Maqubela, Ngxekeshe Tshetshe, Sigoqi Tshetshe, Peter Mhlam, Vuzi Ngubetole, Sitwayi Nyongoma.

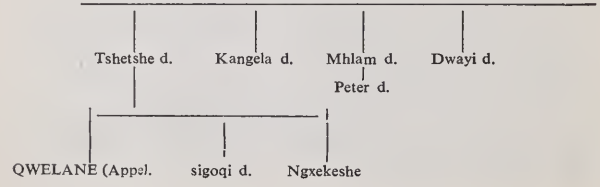
2. The time of the meeting was approximately shortly before the influenza epidemic of 1918/19.

3. The family trees, according to respondent, of the parties are as follows:—

Tree No. 1.



Tree No. 2.



The appeal to this Court is brought on the following grounds:—

"1. The Native Commissioner erred in declining to entertain the Native custom (vouched for by appellant's expert witnesses and accepted by the Chief's Court) whereby an illegitimate son is permitted to pay *lobola,* after the deaths of his natural father and mother, to the latter's guardian, thereby establishing a "house" and acquiring full rights in and to his younger brothers and sisters; as such custom is not repugnant to public policy or good morals.

2. The judgment is against the weight of evidence."

Counsel for appellant intimated at the outset that the second ground of appeal relates to the facts only in so far as they are probative of the existence of the alleged custom. It follows that the appeal resolves itself to two questions, viz. whether the alleged custom in fact obtains and, if so, whether it is opposed to the principles of public policy or natural justice which, in terms of the first proviso of sub-section (1) of section *eleven* of the Native Administration Act, 1927, form the ultimate criteria in determining whether any particular Native custom other than that of *lobola* or other similar custom may be applied in suits between Natives, the recognition of the *lobola* or other similar custom being imperative in terms of the second proviso to that sub-section.

Proceeding to a consideration of these questions, the plaintiff stated in his evidence that he had no knowledge of a custom such as that relied upon in this case by the defendant.

The first of the defendant's witnesses to depose to the alleged custom, viz. the plaintiff's younger brother, Ngxegxeshe, stated that both Fingo and Gcaleka custom sanction an arrangement whereby an illegitimate son may, after the death of his natural father and his mother, pay *lobola* for her to her guardian and so establish a "house" for his late natural father to which such son and the other illegitimate children of his mother by his late natural father would then belong and in which such son would be the heir. Here it should be mentioned that Fingo custom falls to be applied in the instant case as both parties appear to be Fingoes and they reside in a Fingo location. Ngxegxeshe, who gave his age as about 70 years, admitted in cross-examination that to his knowledge the present was the only instance of the alleged custom having been practised. Moreover, the inconsistencies in his evidence indicate that he cannot be regarded as a reliable witness.

Vuzi, in his evidence for the defendant, not only admitted in cross-examination that he had not heard of any other instance of the alleged custom having been practised, but also indicated that it was a novel custom to him. The evidence to which I refer, reads "I never heard of any other meeting for the marriage of a man and a woman both of whom are already dead. . . . I think it is possible to establish a "house" in another family without consulting it, because of what I saw at this meeting."

The testimony of the defendant's next witness, Hlukaniso, and that of the defendant himself, is not relevant to the existence of the alleged custom and need not, therefore, be considered.

James Jako who was specially called by the defendant to testify to the existence of the alleged custom, stated under cross-examination "The illegitimate son will become the heir of his father only in his own hut and not to anything else. He does not become a legitimate son but establishes a "house" which is independent of his natural father's "house". The natural father's "Great House" heir will be the heir of the illegitimate son if the latter has no son, but the illegitimate son can never become heir to the "Great House". Later Jako contradicted himself by stating "Such a "house" will not inherit from other "houses" of the natural father unless all the others have died out. Such a 'house' is no different from an ordinary "house" if the others have died out." Jako also contradicted himself as regards whether the illegitimate son was legitimated by the establishment of the "house"

and as to whether the consent of the natural father's family to the establishment of the "house" was required. Jako further stated "all the illegitimate children of an unmarried woman can be put under the son who is establishing a "house", although the children have different fathers, even though one of the fathers had paid a fine. He can thus remove a half brother from his guardian. Although a fine has been paid for a pregnancy producing a daughter, her dowry will belong to the new "house". I know that in certain circumstances an illegitimate son can succeed to his natural father but he may lose that right if his elder illegitimate brother establishes a "house" of his father." This proposition is obviously untenable as, apart from the fact that it involves traffic in children which the Courts will not countenance, see Matole *v.* Xakekile, 1940 N.A.C. (C. & O.) 104 and Ngxawum *v.* Sibaca, 1 N.A.C. (S.D.) 144, it runs counter to the well-established custom that the illegitimate child of a spinster or *dikazi* becomes a member of the family of its natural father on payment by the latter of the full fine, i.e. the full customary damages, plus the *isondlo* for the child, to the spinster's or *dikazi's* father or, if he is dead, to his heir, see Colis *v.* Matshawana, 1 N.A.C. 47, Takayi *v.* Mzambalala, 1 N.A.C. 121, Xoliwe *v.* Dabula, 4 N.A.C. 148, Mpumlo *v.* Maqulo, 4 N.A.C. 325, Matinise *v.* Malote, 1936 N.A.C. (C. & O.) 121, at page 124, Gatyelwa *v.* Ntsebezu, 1940 N.A.C. (C. & O) 89 and Matole's case (*supra*). It may perhaps be as well to mention here that this custom is peculiar to the Cape *Nguni* tribes. The illegitimate child also of course becomes a member of the family of its natural father if the latter contracts a customary union with its mother during their lifetime.

The testimony of the defendant's remaining witness, viz. Headman Soshankana, does not, to my mind, serve to prove the existence of the alleged custom as not only is it at variance with Jako's evidence as will be apparent from a comparison of the excerpt therefrom quoted above with the following passage from the Headman's evidence but, as is manifest from the latter, it is also contrary to the well-established custom mentioned above:—

> "The eldest son can do this even though the children were born to various fathers. If a woman has two daughters by different men both of whom pay the full fine, and thereafter a son is born to a third man, he cannot pay dowry for his father as the fines for his halfsisters have been paid. Jako was wrong on this point. The natural father of an illegitimate daughter can pay the fine at any stage and claim the dowry. This right would be cancelled if the eldest illegitimate son has paid dowry for his father."

The question of the existence of the alleged custom was put to the Native Assessors whose replies appear at the end of this judgment. I am in full agreement with their statement which, in all respects, accords with the basic principles underlying Fingo custom. Here it should be mentioned that Counsel for appellant conceded that he was not aware of any previous case in which reference was made to the existence of such a custom as is here alleged by the defendant; nor, to my knowledge, is there such a custom.

In the result the appeal fails and falls to be dismissed, with costs.

STATEMENT BY NATIVE ASSESSORS.

Assessors in Attendance:

Simon Ngculu, Fingo Assessor from Willowvale District.
Sitena Njeza, Fingo Assessor from Kentani District.
Theophilus Ntintili, Fingo Assessor from Tsomo District.
Charles Sakwe, Fingo Assessor from Idutywa District.
Masumpa Sokapase, Fingo Assessor from Nqamakwe District.
Cecil Monakali, Fingo Assessor from Butterworth District.

Question by President:

If the natural father of a son by a spinster or *dikazi* dies without having paid the "fine" and the *isondlo* for such son, to which family group does the son belong?

Reply by Theophilus Ntintili:

That child belongs to his mother's family group.

All the other assessors agree.

Question by President:

Can an illegitimate son in these circumstances be transferred to his natural father's family group and, if so, in what manner?

Reply by Cecil Monakali:

An illegitimate son could in these circumstances be transferred to his late natural father's family group. The members of the late natural father's family would go to the mother's family and pay the "fine" and the *insondlo* for the son and the son would then become a child of his late natural father's family group as he had been "fetched" in accordance with our custom. The members of the late natural father's family who would approach the mother's family would include the late natural father's heir.

All the other assessors agree.

Question by President:

Is there any other way, according to custom, in which an illegitimate son could be transferred to his late natural father's family group?

Reply by Theophilus Ntintili:

No. The only way according to custom is the one which we have stated.

All the other assessors agree.

Question by President:

Once the illegitimate son has been transferred to his late natural father's family group in the manner you have stated, does he become the heir of his late natural father if the latter left no legitimate male issue?

Reply by Simon Ngculu:

The son would not automatically become heir by being "fetched". He would become heir if in addition to being "fetched", he is instituted as heir at a meeting of his late natural father's family in accordance with custom.

All the other assessors agree.

Question by President:

Have you a custom sanctioning an arrangement whereby an illegitimate son may, after the death of his natural father and his mother, pay *lobola* for her to her guardian and by so doing establish a "house" for his late natural father to which such son and the other illegitimate children of his mother by his late natural father would then belong?

Reply by Charles Sakwe:

There is no such custom. The "house" could be established only by a customary union being contracted by the son's natural father with his mother and, if the father is dead, then there can be no such union. The only way in which the son could be transferred to his late natural father's family group is as we have stated.

All the other assessors agree.

Question by President:

Would it make any difference if the son wanted to establish a "house" to which he and the other illegitimate children of his mother by his late natural father would belong, without such "house" being that of his late father?

Reply by Theophilus Ntintile:

The son could not do such a thing as he is the " property " of his mother's family group.

All the other assessors agree.

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

G. M. Johnson (Member): I concur.

For Appellant: Mr. Dold, Willowvale.

For Respondent: Mr. Wigley, Willowvale.

SOUTHERN NATIVE APPEAL COURT.

SONGQENGQE *v.* DENGE.

N.A.C. CASE No. 60 OF 1956.

BUTTERWORTH: 29th January, 1957. Before Balk, President, Warner and Johnson, Members of the Court.

CUSTOMARY UNIONS.

Dowry—Presumption of marriage from long cohabitation—Rebuttal—Woman registered as wife for tax purposes.

Summary: Plaintiff (now appellant) claimed from defendant (now respondent) the dowry paid for daughters of defendant's sister by one Matyaleni Fumba, to whom he is heir, and with whom he alleges defendant's sister had entered into a customary union.

Although it is not disputed that the defendant's sister and Matyaleni had cohabited for a number of years, defendant denied that there was any customary union and claimed that he was entitled to retain the dowries paid for the girls.

Matyeleni had registered the woman as his wife for local tax purposes; but when dowry was being paid for her daughters after the former's death, she openly arranged for defendant to fetch the cattle.

Held: That, as the woman's conduct belied her statement that Matyaleni had paid dowry for her, and as it was difficult to escape the conclusion that the evidence for plaintiff in this regard was a fabrication, the Court *a quo* could not be said to have erred in rejecting that evidence.

Held further: That in the circumstances, the fact that Matyaleni paid local tax for defendant's sister did not advance plaintiff's case.

Held further: That, although the cohabitation over a lengthy period of a man and a woman, from which children are born, gives rise to a presumption that there was a customary union, the presumption is rebutted in the instant case by the direct evidence of defendant, which was accepted, that no dowry was in fact paid by Matyaleni.

Cases referred to:

Memani *v.* Makaba, 1 N.A.C. (S.D.) 178.
Bolofo *v.* Maneli, 1942, N.A.C. (C. & O.) 8.

Appeal from the Court of the Native Commissioner, Willowvale.

Balk (President):—

The plaintiff sued the defendant in a Native Commissioner's Court for thirteen head of dowry cattle or their value, £260, and for an account and delivery of their increase, with costs, averring in the particulars of his claim that—

" 1. The plaintiff is a grand-nephew and heir according to Native custom of the late Matyaleni Fumbana, who died leaving no male issue.

2. The said late Matyaleni Fumbana married defendant's sister Neonjini according to Native custom, and two daughters were born of this union, named Tozana and Nomvana.
3. After the death of her husband the said Noenjini left his kraal and returned to her people's kraal (defendant's) together with her said two daughters.
4. In about 1950 the defendant received 7 dowry cattle in respect of Tozana, namely red heifer, red heifer, yellow heifer, *wasakazi* heifer, *ntusi* cow, *ntusi* young bull, young black ox, each valued at £20.
5. At the beginning of 1956 defendant received as engagement cattle in respect of Nomvana, to wit: red heifer, *nala* ox, *nala* young cow, black young cow, black heifer and a black heifer, each valued at £20.
6. The plaintiff in his capacity as heir aforesaid is entitled to the said cattle paid in respect of the two girls but in spite of legal demand the defendant wrongfully neglects to deliver same."

The defendant pleaded—

" 1. That defendant admits the allegations of fact in paragraphs 1, 4 and 5 of plaintiff's summons contained, save the values therein mentioned, legal demand and refusal to deliver up.
2. That dowry cattle are valued at £10 each in this district and defendant is only in possession one *ntusikazi* cow, one black ox and one yellow heifer of Tozana's dowry but is still in possession of the whole of Nomvana's engagement cattle.
3. That defendant's sister Nontombi (*alias* Noenjini) never married and the said late Matyaleni Fumbana was only one of three men by whom the said Nontombi had children at divers times and the said Matyaleni never paid any fine or cattle in respect of such pregnancies.
4. That defendant denies the remaining allegations of fact in plaintiff's summons contained and puts plaintiff to the proof thereof.

Wherefore defendant prays that judgment may be for defendant with costs."

The Court *a quo* entered judgment for the defendant, with costs, and the appeal therefrom is brought by the plaintiff on the following grounds:—

" 1. The Assistant Native Commissioner erred in law in holding that the admitted facts that the woman Noenjini and the late Matyaleni Fumba (*sic*) lived together as man and wife for many years and had a number of children did not create a presumption of marriage.
2. The judgment was against the weight of evidence."

It is not disputed that Noenjini cohabited with the late Matyaleni Fumbana at his kraal for a number of years. Noenjini stated in her evidence for the plaintiff that the period was 13 years and the defendant in his testimony said it was 15 years. It is also not disputed in the evidence that Noenjini had five children by Matyaleni, viz. the two girls Tozana and Nomvana, the right to whose dowries is hereby in issue, and three others who died. Noenjini further testified that Matyaleni had paid four head of cattle as dowry for her to her late eldest brother, Mankiwana, who was then her guardian and that the defendant who is Mankiwana's heir, was present when these dowry cattle were paid. Zwelibanzi Mbanbo, the plaintiff's remaining witness, confirmed that four head of cattle were paid by Matyaleni to Mankiwana as dowry for Noenjini. It follows that, if their evidence be accepted, it establishes the plaintiff's case that Matyaleni entered into a customary union with Noenjini, see Memami *v.* Makaba, 1 N.A.C. (S.D.) 178, at page 180, and the plaintiff would in that event be entitled to the dowries received by the defendant for Tozana and Nomwana. It seems to me, however, that Noen-

jini's conduct belies her statement that dowry was paid for her by Matyaleni; for she admitted in cross- examination that when her daughter, Tozana, was about to enter into a customary union, she (Noenjini) sent for the defendant and saw to it that Tozana's dowry was delivered to him; further that when her youngest daughter, Nomvana, was about to contract a customary union, she (Noenjini) had the defendant come and fetch Nomvana's dowry. It is true that Noenjini explained that she had asked the defendant to look after the dowries as she did not trust Bizana with whom she was then living. But she admitted later in cross-examination that she knew the plaintiff's kraal, that his kraal was nearer to Bizana's kraal than the defendant's was, and when asked why she had sent for the defendant instead of the plaintiff to fetch her daughters' dowries, she replied "It was because I had left from Mankiwane's kraal and wanted all the property to be collected at Fumbana's kraal," which is a singularly unconvincing explanation, bearing in mind Noenjini's admission that the customary ceremonies in respect of Tozana and Nomvana when they were children were performed at the plaintiff's kraal. It is significant that this admission was made by Noenjini in cross-examination after she had stated that she had never sent to Matyaleni's people to perform the customary rites, that she had sent messages to the defendant who was the only person who had done anything for her children and that Matyaleni's people had made no claim to her children prior to instituting the instant proceedings. She went on to explain that when she had sent messages to the defendant she had asked him to transmit them to the person entitled to her children but this explanation is equally unconvincing in the light of what has been said above. It is also significant that before admitting that she knew the plaintiff's kraal and used to go there when her children were still young, she denied that she had ever been to that kraal. Apart from these unsatisfactory features, it is apparant from the Assistant Native Commissioner's reasons for judgment that Noenjini's demeanour whilst testifying was also unsatisfactory.

Turning to Zwelibanzi's testimony, he professed to have an intimate first-hand knowledge of the affairs of the families concerned gained from his own observation as their neighbour and from participation in family discussions and affairs. He gave details regarding the alleged customary union between Matyaleni and Noenjini, including the payment of the dowry. But he could not answer correctly questions put to him in cross-examination regarding Matyaleni's family, unconnected with such union. That this is so is apparent from his explicit statement that one of Noenjini's five children by Matyaleni was a boy whereas it is manifest from her evidence and that of the defendant that all five of the children were girls. Again Zwelibanzi stated that these children had all been born at Matyaleni's kraal whereas it is clear from Noenjini's and the defendant's evidence that this was not the case. Moreover, it is common cause that when the dowry for Tozana was paid to the defendant, it was done openly so much so that Zwelibanzi admitted that it had come to his knowledge at the time. It is also common cause that the plaintiff's father, Mkwedi, was alive for some time after this payment and did not live far from Bizana's kraal where it was effected nor far from the defendant's kraal to which the dowry cattle were removed and that he did not take any action for their recovery; and no reason for his failure to do so was advanced. In the circumstances the fact that Matyaleni paid local tax for Noenjini does not advance the plaintiff's case. On the contrary, it is difficult to escape the conclusion that the evidence for the plaintiff that dowry was paid by Matyaleni for Noenjini is a fabrication. The Assistant Native Commissioner cannot, therefore, be said to be wrong in rejecting that evidence; nor in accepting the defendant's version for the reasons given by him, viz. the defendant's satisfactory demeanour and testimony. Accordingly, the second ground of appeal fails.

Turning to the remaining ground of appeal i.e. the first ground, it is true that where a man and woman have lived together as man and wife for a lengthy period and have had children, it gives rise to a presumption that there was a customary union, see Bolofo *v.* Maneli, 1942 N.A.C. (C. & O.) 8, at page 10. But in the instant case the presumption that there was a customary union between Matyaleni and Noenjini arising from their long cohabitation together and their having had five children, is rebutted by the direct evidence of the defendant that no dowry was in fact paid for her by Matyaleni, that none could be obtained from him as he was a man of straw and that for the same reason he took a *nkazana* viz. Noenjini. Moreover, the defendant's evidence gains support from Noenjini's admissions that before she was *twalaed* by Matyaleni, she had cohabited illicitly with one Honono for about three years and had had an illegitimate child by him and that after Matyaleni's death she entered into another illicit union wth one Bizana at whose kraal she was still living at the time of the trial of this case.

It follows that the appeal fails and falls to be dismissed, with costs.

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

G. M. Johnson (Member): I concur.

For Appellant: Mr. Dold, Willowvale.

For Respondent: Mr. Wigley, Willowvale.

SOUTHERN NATIVE APPEAL COURT.

NQETO *v.* **MKATAZO.**

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

PORT ST. JOHN'S: 5th February, 1957. Before Balk, President, Warner and Midgley, Members of the Court.

PRACTICE AND PROCEDURE.

Native Commissioners' Courts Rules—Attachment— Validity of transfer of attached stock—Termination—Protection of purchaser—Effect of resale and death of stock after litis contestatio.

Summary: Certain four horses in the possession of the judgment debtor in a civil case were attached by the Messenger of the Court who handed them over to defendant, who was the judgment creditor, in part settlement of the latter's claim, without selling them by public auction.

Plaintiff, who was the true owner, successfully sued defendant for the return of his property.

Defendant thereupon appealed on the grounds, *inter alia,* that, as the Messenger of the Court had lawfully attached the horses in possession of the judgment debtor, no liability attached to the defendant for the attachment; that the Messenger of the Court had the right to dispose of them in satisfaction of the judgment and that the liability in regard to the manner of their disposal was that of the Messenger; that upon delivery by the Messenger of the Court the horses became the lawful property of defendant and, if this delivery was illegal, the plaintiff should have sued the Messenger; and further that as two of the horses had died of natural causes while in defendant's possession, and the other two were sold by him while no action was pending, the judgment for delivery of these horses was bad in law, it being impossible of performance.

Held: That as the horses were attached in the judgment debtor's possession the attachment was valid.

Held further: That the attachment terminated when the horses were handed to the judgment creditor in part settlement of his claim and, apart from the fact that the handing over was not sanctioned by the Warrant of Execution, nor by the Native Commissioners' Courts Rules, it was not covered by Rule 62 of those Rules, which protects purchasers at sales in execution only.

Held further: That, in the circumstances, the delivery of the horses to defendant could not pass ownership to him from plaintiff.

Held further: That, as plaintiff is entitled to succeed in a vindicatory action against defendant for the return of the horses or their value, the position is not affected by the sale of two of the horses by defendant as he did so after *litis contestatio;* nor is it affected by the deaths of the other two horses, which died after *litis contestatio,* when defendant had to be regarded as a *mala fide* possessor, as he had not shown that they would also have died had they been in plaintiff's possession.

Cases referred to:

Weeks and Another *v.* Amalgamated Agencies, Ltd., 1920 A.D. 218.
Mashiya *v.* Kana, 5 N.A.C. 111.
Aspeling, N.O. *v.* Joubert, 1919 A.D. 167.
Tsotswana *v.* Totonci, 1 N.A.C. (S.D.) 218.

Legislation referred to:

Government Notice No. 2886 of 1951, as amended.

Works of reference referred to:

Voet, 6.1.33.

Appeal from the Court of the Native Commissioner, Libode.

Balk (President):—

The plaintiff sued the defendant in a Native Commissioner's Court for the delivery of certain four horses or payment of their value, £70, averring in the particulars of his claim, as amended with the leave of that Court, that—

"The parties are Natives.

Plaintiff is the owner of certain four horses—2 mares and 2 foals which animals plaintiff had running at the kraal of Mtshiki Mnqanqeni.

Defendant obtained a judgment against Mtshiki Mnqanqeni and through the Messenger of the Court, Libode, attached the said animals on the 17th of December, 1953, the Messenger handed them to defendant who now has possession of them.

Defendant has no right to retain the said horses as they are plaintiff's property and in no way liable to be attached to pay the debts of Mtshiki Mnqanqeni and that the Messenger of the Court had no right to hand the said horses to the defendant."

The defendant pleaded as follows:—

"1. Paragraphs 1 and 3 are admitted, save and except that as regards paragraph 3 defendant pleads that the attachment of the horses took place on the 2nd December, 1953, and not on the 17th as alleged and further save and except that defendant denies that he has no right to the horses claimed by the plaintiff.

2. Paragraphs 2 and 4 are denied and plaintiff is put to the proof of his allegations therein contained.

3. Defendant further states that the summons in the above case was served upon him on a Sunday which is not a day for legal service and that therefore the service was illegal. Further defendant states that prior to the conclusion of the previous case between the same parties over the same subject matter he had already contracted to

go to the mines, and his performance of the contract was long overdue and that he has had to leave for the mines in fulfilment of his contract and that if the above case is set down for trial during the currence of his contract which is 9 months he will be obliged to ask for postponement to allow him to return home at the normal termination of his contract.

Wherefore defendant prays that plaintiff's summons be dismissed with costs."

Judgment was entered for the plaintiff for the four horses or their value at £15 each, with costs, and the appeal against that judgment is brought by the defendant on the following grounds:—

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

2. The judgment is bad in law in that as the horses were lawfully attached in the possession of the judgment debtor who pointed them out to the Messenger of the Court as his property and handed them to him in execution of the judgment no liability attached to the defendant for their attachment.

3. The judgment is bad in law in that as the horses were under attachment for a period of more than 14 days and there was no written claim to them by the plaintiff, the Messenger of the Court had a right to dispose of them in satisfaction of the judgment debt, and the defendant had no authority and was not obliged or called upon to instruct or direct the Messenger of the Court as to how he should dispose of them in satisfaction of the judgment, and the liability in regard to the manner of disposing of the horses was the Messenger of the Court's.

4. The judgment is bad in law in that the horses were lawfully handed over and delivered to defendant by the Messenger of the Court, at the instance and initiative of the Messenger of the Court and the defendant accepted them in settlement or part settlement of the judgment debt when no claim was made by plaintiff and the horses became the lawful property of the defendant, and the proper course for plaintiff should have been to sue the Messenger of the Court if the delivery of the horses to defendant was illegal.

5. That as 2 of the horses died of natural causes while in the possession of the defendant as his property, and as defendant disposed of the two other horses after the dismissal of plaintiff's summons in Case 181 of 1953 between the same parties over the same cause of action, and while no claim was then pending for the horses, the judgment for the delivery of the four horses in question is bad as it is impossible of performance, and the alternative for the payment of their value is also bad in law as defendant was not liable for the death of the two horses and had sold the other two when no action was pending and did so in good faith, the horses at the time being his property."

The dismissal by the Court *a quo* of the exception to the service of the summons, i.e. the exception embodied in paragraph 3 of the defendant's plea, does not call for consideration as this aspect is not covered by the notice of appeal.

It is common cause that the four horses were attached by the Messenger of the Court on a warrant of execution (Exhibit "A") issued in pursuance of a judgment obtained by the defendant against one Mtshiki Mnqanqeni in the Native Commissioner's Court referred to above and that these horses were in Mtshiki's possession at the time of their attachment. It is also common cause that subsequent to their attachment the four horses were received by the defendant from the Messenger of the Court in

partial satisfaction of his judgment against Mtshiki without their having been sold in execution as required by the warrant (Exhibit "A"), which sounds in money, read with Rule 67 (9) of the Rules for Native Commissioners' Courts, published under Government Notice No. 2886 of 1951, as amended. According to the plaintiff's testimony, the four horses in dispute consist of a grey mare which was *ngomaed* by him whilst a filly to Mtshiki, and its three progeny, and all four are his (plaintiff's) property. This testimony is borne out by that of the plaintiff's witnesses and has not been controverted by the defence evidence so that the Native Commissioner cannot be said to be wrong in his finding that the horses were the plaintiff's property. Here it should be mentioned that it also emerges from the plaintiff's evidence, which in this respect has also not been controverted, that a few days after the four horses had been attached, he made a verbal claim to the Messenger of the Court that they were his property and was told by the Messenger that they could not be released and that he (plaintiff) would have to take the matter to Court which, thereupon, he did. The defendant admitted in his plea that the four horses were then i.e., when he made the plea, still in his possession. It is true that he stated in his evidence that he had sold two of the horses and one of the others had died before the issue of the summons in the instant case and that the remaining horse had died after the summons had been served on him. But, apart from the fact that the defendant is bound by the admission in his plea, in respect of which no amendment was applied for, the Native Commissioner's finding that the defendant's evidence in this respect was a fabrication, cannot be said to be wrong, supported, as it is, by Headman Tyekane's testimony for the plaintiff that he (the Headman) last saw all four of the horses in the defendant's possession during the green mealie season following their attachment, i.e. in April 1954, whereas the defendant stated that the first of the horses to die had died in 1953 immediately after it had been handed to him by the Messenger of the Court; and it is significant that the summons in the instant case was issued and served on the defendant in April, 1954.

As the horses were attached in Mtshiki's i.e. the judgment debtor's, possession, the attachment was valid even though the plaintiff was their owner, see Weeks and Another *v.* Amalgamated Agencies, Ltd., 1920 A.D. 218, at pages 226 and 238. That attachment was, however, terminated when the Messenger of the Court handed the four horses over to the judgment creditor, i.e. to the defendant, in partial satisfaction of the latter's judgment against Mtshiki; and, apart from the fact that such handing over was not sanctioned by the warrant of execution (Exhibit "A") nor by the Rules referred to above, it was not covered by Rule 62 of those Rules which protects purchasers at sales in execution only, so that the handing over could not pass the ownership in the horses from the plaintiff to the defendant, see Mashiva *v.* Kana, 5 N.A.C. 111, cited by the Native Commissioner in his reasons for judgment; and this position obviously still obtains even assuming that the handing over of the horses to the defendant was at the instance of the Messenger of the Court, as alleged by the defendant in his evidence. It follows that the dominium in the four horses remained in the plaintiff and that he is entitled to succeed in a vindicatory action against the defendant for their return or payment of their value; and this position is not affected by the fact that the defendant sold two of the horses for, as is manifest from what has been said above he did so after notice of the plaintiff's claim, i.e. after *litis contestatio,* see Aspeling, N.O. *v.* Joubert, 1919 A.D. 167, at page 171; nor is the position affected by the fact that the other two horses died, since, as is also manifest from what has been said above, the deaths occurred after *litis contestatio* and the defendant, who after *litis contestatio* fell to be regarded as a *mala fide* possessor, see *Voet* 6.1.33, has not shown that these two horses would also have died had they been in the plaintiff's possession, see Tsotswana v. Totonci, 1 N.A.C. (S.D.) 218.

In the result the appeal fails on all the grounds advanced by the appellant and it should accordingly be dismissed, with costs.

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

R. A. Midgley (Member): I concur.

For Appellant: Mr. Vabaza, Libode.

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

SOUTHERN NATIVE APPEAL COURT.

MJALI *v.* MKABAYI.

N.A.C. CASE No. 57 OF 1956.

PORT ST. JOHN'S: 5th February, 1957. Before Balk, President, Warner and Midgley, Members of the Court.

PRACTICE AND PROCEDURE.

When Court should allow postponement for calling of witness.

Summary: Plaintiff sued defendant for damages for alleged seduction and mentioned in evidence that one Christina Ndamase had seen defendant when the latter had visited her one night in May, 1955, whereas defendant's case was that he had not visited plaintiff after December, 1954.

As plaintiff had not called Christina, ostensibly as her parents refused to allow her to give evidence, defendant at the conclusion of his case asked for an adjournment to enable him to subpoena her for the defence, on the apparent assumption that she would deny having seen him on the occasion in May, 1955, referred to by plaintiff. His application was refused and in due course judgment was entered for plaintiff.

Defendant appealed on the ground, *inter alia,* that the Court erred in refusing him an opportunity to subpoena Christina, whose importance as a witness came to his notice only when plaintiff gave her evidence.

The Court *a quo* had applied the test laid down in Estate Norton *v.* Smerling, 1936 O.P.D. 44, but had found that the defendant's application did not conform to the three conditions precedent as it rested on a vague assumption that Christina would support him.

Held: That, as the question whether a person will support any particular party to an action cannot be determined until such person has given evidence, this question cannot form a consideration in the disposal of an application for an adjournment to call him.

Cases referred to:

Estate Norton *v.* Smerling, 1936, O.P.D. 44.
Rex *v.* Kosana, 1915 E.D.L.D. 263.

Appeal from the Court of the Native Commissioner, Libode.

Balk (President):—

This is an appeal from the judgment of a Native Commissioner's Court for plaintiff (now respondent) for £45 and costs in an action in which she sued the defendant (present appellant) for £150 as damages for her seduction by him followed by pregnancy.

In his plea the defendant denied the alleged seduction.

The appeal is brought on the following grounds:—

"1. That the Court erred in refusing to give defendant an opportunity to subpoena the witness Christina. That defendant could not know of the existence of Christina as an important witness in this case until plaintiff gave

her evidence to that effect, and the Court should not have accepted plaintiff's statement that Christina did not attend merely because she did not want to, it being more probable that she did not attend the Court because she would not support the plaintiff and defendant's application to be allowed to subpoena Christina should have been allowed.

2. That the damages awarded to plaintiff were to high."

The plaintiff stated, *inter alia,* in her testimony that one Christina Ndamase had seen the defendant when the latter had visited her one night in May, 1955, whereas the defendant's case, according to his evidence, is that he had not visited the plaintiff after December, 1954. The plaintiff further stated that Christina had not come to testify in response to her request as her parents would not allow her to do so. At the conclusion of the defendant's evidence, his attorney applied for a postponement to enable him to subpoena Christina as a defence witness. This application was opposed by the plaintiff's attorney and refused by the Court *a quo.* Thereupon the defendant's case was closed and judgment was given against him.

It was laid down in Estate Norton *v.* Smerling, 1936, O.P.D. 44, at page 54, that the Court should exercise its discretion in favour of a defendant applying for an adjournment to obtain further evidence if he establishes—

" (1) that the evidence he desires to make available is relevant and material to an issue in the case;

(2) that there is such further evidence to be had; and

(3) that it is through no fault of his own that the evidence is not available at the moment."

The Court *a quo* applied this test but found that the defendant's application did not conform to the three conditions precedent in that it rested on a vague assumption that Christina may support him. But the question whether Christina will support the defendant is immaterial as it is not possible to determine this question until Christina has in fact given evidence so that it cannot form a consideration in the disposal of the defendant's application for an adjournment to call her, see Rex *v.* Kosana, 1915 E.D.L.D. 263, at page 267. That being so and as it seems to me that the three conditions precedent obtain in the instant case, the Court *a quo* should have granted the defendant's application for the adjournment. That these conditions do in fact obtain seems clear, firstly, from the conflict in the evidence between the plaintiff and the defendant as regards whether he visited her after December, 1954, bearing in mind that the seduction is alleged by her to have taken place in April, 1955; secondly from the fact that Christina's evidence is available; and, thirdly, as it is implicit in the defendant's evidence that Christina did not in fact witness the incident related by the plaintiff in her testimony, it was through no fault of his own that Christina's evidence was not available at the hearing.

It follows that the appeal succeeds on the first ground and it is unnecessary to consider the remaining one.

In the result I am of opinion that the appeal should be allowed, with costs, that the judgment of the Court *a quo* should be set aside and the case remitted to it for the hearing of Christina Ndamase's evidence and thereupon for a fresh judgment.

H. W. Warner (Permanent Member): I concur in the President's judgment.

R. A. Midgley (Member): I concur. I feel that it is perhaps as well to add that the *quantum* of damages does not appear to me to be excessive.

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

For Respondent: Mr. Vabaza, Libode.

SOUTHERN NATIVE APPEAL COURT.

MBESE *v.* **LUMANYO.**

N.A.C. CASE No. 75 OF 1956.

PORT ST. JOHN'S: 5th February, 1957. Before Balk, President, Warner and Midgley, Members of the Court.

PONDO CUSTOM.

Institution of illegitimate son as natural father's heir—Preliminary formalities.

Summary: Plaintiff sought a declaration in the Native Commissioner's Court that he was the heir to his late brother Manci, who died without legitimate male issue, on the ground that he was the brother of deceased, next senior in the family after him. He also asked, *inter alia,* for the ejectment of defendant, Lumanyo, from the kraal of the late Manci and his removal from the control of the deceased Manci's property. He alleged unsuccessfully that Lumanyo was Manci's illegitimate son born in adultery to the wife of one Mtwalo, and that being an adulterine child of the woman he had no lawful claim to be heir to Manci.

The issue turned upon Lumanyo's claim to having been born of a liaison between Manci and his mother, *after* her marriage to Mtwalo had been dissolved, and to having been "fetched" to his father's kraal by the latter, who paid the full "fine" and *isondlo* for him and publicly acknowledged him as his son, at a family meeting.

Plaintiff, having failed in the Court *a quo,* appealed.

Held: After the Native assessors had been consulted, that Manci had "acquired" Lumanyo as his son by payment of the full "fine" and *isondlo* to the mother's family, even though this was paid after the holding of a family meeting at which Lumanyo was acknowledged by Manci as his son.

Held further: That, although the holding of a family meeting is essential, the object of the meeting is not to institute the heir, but for the announcement thereat by the father that he has a particular natural son and to permit of discussion. In other words, it is informative and consultive only, in character.

Held further: It is not competent, according to custom, to appoint an illegitimate son as heir of his natural father during the latter's lifetime since he may still beget a legitimate son.

Cases referred to:
Mkanzela *v.* Rona, 1 N.A.C. (S.D.) 219.

Legislation referred to:
Government Notice No. 2886 of 1951, as amended.

Works of reference referred to:
May on Evidence (Third Edition).
Phipson on Evidence (Ninth Edition).

Appeal from the Court of the Native Commissioner, Tabankulu.

Balk (President):—

The plaintiff (present appellant) instituted an action in a Native Commissioner's Court against the defendant (now respondent) for the following relief:—

"1. An order of court declaring him heir to the entire estate left by the late Manci.

2. An account of such estate stock and property by defendant and delivery of such estate assets by handing over of it and acknowledgment of plaintiff's ownership in it to all in possession of it.
3. An order of ejectment on defendant from the kraals of the late Manci and the cessation of the exercise of control by him.
4. Costs of suit."

In the particulars of his claim the plaintiff averred that—

" 1. The parties hereto are Natives.
2. Plaintiff is the full younger brother of the late Manci Mbese who had three wives and "houses" but died without male issue in any of such "houses".
3. Defendant is the illegitimate son of the late Manci born to him by the wife of one Mtwalo in adultery.
4. When defendant was grown up and married he was ejected from his mother's kraal and came to live with the late Manci who accepted him as a son despite the objections of plaintiff and the elders of family.
5. The late Manci died in January, 1955, leaving considerable estate stock and property at his three kraals and with some 16 other persons under the custom of *ngoma*
6. On the late Manci's death defendant declared himself heir to the entire estate and proceeded to exercise control thereover.
7. Plaintiff knows of 58 head of cattle, one horse, 100 sheep, 34 goats, 13 yokes, 5 ploughs, 1 planter, 1 harrow, 1 cultivator and a gun being property left by the late Manci but there is probably more estate property than this. Plaintiff values the cattle at £10 per head, the horse at £15, the sheep at £2 per head and the goats at £1 per head, and the agricultural implements and gun at £50.
8. Despite demand defendant refuses to acknowledge plaintiff as heir to the estate of the late Manci, to give an account of the estate stock and property, to vacate the kraals of the late Manci or to cease exercising full control over such kraals and the entire estate."

The defendant pleaded as follows:—

" 1. Paragraphs 1, 2, 5 and 8 of plaintiff's claim are admitted.
2. Defendant puts plaintiff to the proof of the allegations contained in paragraph 7 of his claim.
3. *Ad paragraphs* 3, 4 *and* 6: Defendant denies that he is not the heir to the late Manci Mbese and puts plaintiff to the proof thereof.

   Defendant pleads further that he is the illegitimate son of the late Manci Mbese born to him by one Mantshangase at her people's kraal after her union with her husband Mtwalo had been dissolved; that he grew up at the kraal of his mother's people from where he was "fetched" shortly after his marriage by the late Manci Mbese to his own kraal and there publicly instituted by him, the said late Manci Mbese, as his heir.
4. Defendant says that he is known as and registered for taxes under the name of Lumanyo Manci and does not know the name Lumanyo Mtwalo by which plaintiff has styled him in his summons.

   Wherefore defendant prays that plaintiff's claim may be dismissed with costs of suit."

By reason of the death of the defendant, Lumanyo, after the issue of the summons, an application for the substitution of his eldest son and heir, Tembile, as defendant, duly assisted as he is a minor, was granted by the Court *a quo* at the commencement of the trial. This procedure is sanctioned by Rule 28 of the Rules for Native Commissioner's Courts, published under Government Notice No. 2886 of 1951, as amended.

Judgment was entered for the defendant, with costs, and the appeal from that judgment is brought on the ground that it is against the weight of the evidence.

By arrangement between the parties, the evidence for the defendant was adduced first at the trial. According to that evidence, the defendant's case is that after the dissolution of Mtwalo's customary union with his wife, Mantshangase, by the *keta* of her dowry and whilst she was residing at her father's kraal, Manci rendered her pregnant as a result of which she gave birth to Lumanyo. Mantshangase's full brother, Mpolozana, demanded the "fine" for this pregnancy from Manci before the child was born. Manco promises to pay it after the birth of the child. Mpolozana's father was dead at the time and Mpolozana was his only son. After Mtwalo's death, Mantshangase went to his kraal with the permission of her people to visit her children by him viz. Joni and Sumani. Lumanyo remained at Mpolozana's kraal. Mantshangase refused to return to that kraal and when Lumanyo was a grown herd boy he stole away and joined her. Mpolozana went to fetch him. He promised to return but did not do so. Lumanyo married and thereafter went to Manci's kraal. On hearing thereof, Mpolozana demanded from Manci payment of the "fine" and *isondlo* for Lumanyo. Manci then paid the full "fine" and *isondlo*. The six head of cattle forming this payment were delivered to Joni at Mpolozana's request. Two of these cattle died. Their skins were sold by Joni who retained the proceeds. At Mpolozana's request Joni sold the remaining four head of cattle and handed the proceeds to him. Before paying the "fine" and *isondlo* for Lumanyo, Manci held a family meeting of his male relatives and announced thereat that his son—referring to Lumanyo—had come home. This announcement was accepted by those attending the meeting, including the plaintiff, and the matter was reported by the latter at Manci's instance to Headman Sinda. It was also reported to the Magistrate.

That the late Manci had no legitimate male issue is manifest from the pleadings and the evidence.

It follows that if the evidence for the defendant is accepted, as was done by the Court *a quo,* its finding that the defendant is the late Manci's heir is correct; for, according to that evidence, the late Lumanyo whose eldest son and heir the defendant is, was Manci's natural son by a *dikazi* and the Pondo law requirements enabling such a son to succeed to his late father's estate are present, viz. (1) Lumanyo belonged to Manci as the latter had "acquired" him by the payment of the full "fine" and *isondlo* to the guardian of Lumanyo's mother i.e. to Mpolozana; (2) Manci had no legitimate male issue; and (3) Manci held a family meeting at which he announced that this son (Lumanyo) had come home.

Counsel for appellant contended that Lumanyo's institution as heir at the family meeting was invalid in that, as is manifest from the evidence, the payment of the "fine" and *isondlo* for him was not effected until some time after that meeting was held whereas Pondo custom demands that such payment must be made before the family meeting is held as the father cannot appoint the son as his heir at such a meeting if he has not yet "acquired" him by such payment. In support of this contention Counsel relied on Mkanzela *v.* Rona, 1 N.A.C. (S.D.) 219. Whilst this contention does not call for consideration as it is not covered by the notice of appeal, an aspect flowing therefrom does, viz. the question whether Pondo custom requires that the full "fine" and *isondlo* must be paid before the family meeting is held, as this aspect is material in arriving at a finding on the facts which is the basis of the instant appeal. This question was put to the Pondo assessors whose replies appear below. It will be seen therefrom that it is immaterial whether the payment of the "fine" and *isondlo* is made before or after the family meeting. Here it should be mentioned that the question of the son's release dealt with in Mkanzela's case (*supra*) does not arise in the instant case.

Counsel for appellant contended that the present statement by the assessors is wrong as it is in conflict with the assessors' statement in Mkanzela's case which set out the custom correctly and was accepted by this Court. But, to my mind, this contention is unsound. In the first place the question whether the payment of the "fine" and *isondlo* must precede the family meeting does not appear to have been put specifically to the assessors in Mkanzela's case as was done in this case. Then, according to custom, the object of the family meeting is not to institute the heir but to announce thereat that the father has the natural son or in the words of the assessors in the instant case "to inform the family that he has a son elsewhere and to permit of discussion. In other words, the family meeting is informative and consultive in character. That this is so is manifest from the fact that the announcement at the family meeting is not in the form of a statement that the son is or has been appointed as the father's heir but that he has such a son or that such a son has come home. And here it must be borne in mind that there are reasons why the statement takes this form. In the first place it would be contrary to custom specifically to appoint a person's heir during such person's lifetime, such custom having its origin in this, that such an action was considered to be unwise in that it might well bring about such person's untimely demise at the hands or instance of the heir. Again, according to custom, it is not competent to appoint an illegitimate son as the heir of his natural father during the latter's lifetime since he (the father) may still beget a legitimate son in which case the latter and not the natural son would inherit. The fact that the holding of the family meeting is an essential requirement does not affect the position that it is informative and consultive in character as the basis of the requirement in this as in other respects in the arrangement of family and kraal affairs is, in keeping with custom, evidential. In my view, therefore, the assessors' statement in the instant case correctly sets out the custom.

Turning to the plaintiff's version, he testified that he was the late Manci's full brother, next senior to him, and, as such, his heir. Lumanyo was not instituted by Manci as his heir. There had been a family meeting called by Manci but he had only informed them thereat that Mtwalo's child, Lumanyo, had come and said to him that he had returned as Joni (Mtwalo's son by Mantshangase referred to above) had chased him away saying he (Lumanyo) belonged to Manci and not to the Mtwalos. Manci denied that Lumanyo was his child. Joni arrived towards the end of the meeting and said that he was looking for Lumanyo and his wife, the children of his father, and on being told what Lumanyo had said, denied it. Some days later Manci admitted to the plaintiff that Lumanyo was his child and added that he wanted to pay the "fine" for him. The plaintiff was opposed to the payment of a "fine" for the illegitimate child of Mtwalo's wife seeing that under Pondo custom a natural father cannot obtain any rights to his illegitimate child by another's wife. Shortly thereafter the plaintiff was called by the head of his family, Sub-Headman Mampondweni, to answer a complaint by Manci that the plaintiff objected to the payment of the "fine" for Lumanyo. At the ensuing inquiry Manci admitted that Lumanyo was his child by Mantshangase begotten whilst she was Mtwalo's wife. As Lumanyo remained at Manci's kraal, the plaintiff complained to Sub-Headman Situkutezi who was then head of his family. At the inquiry into this complaint, Manci's second wife, Majono, stated that Lumanyo had been born to Mtwalo's wife.

The plaintiff also called a number of witnesses, including Masilika, Koweni and Sakana. These three testified that Lumanyo had been born and had grown up at Mtwalo's kraal, that Mantshangase had not left that kraal as alleged in the defence evidence and that the customary union between Mtwalo and Mantshangase had not been dissolved.

That the plaintiff is the late Manci's full brother, next senior to him, and, as such, his heir on failure of a natural son of Manci entitled to succeed to his estate, is not disputed.

The Native Commissioner's finding that the defence version, and not that of the plaintiff, of what transpired at the family meeting is the correct one cannot be gainsaid; for, as pointed out by him in his reasons for judgment, that finding is inescapable in the light of the testimony of the plaintiff's own witness, Marelesi, that the plaintiff had, in his presence, reported to Headman Sinda at the instance of Manci that the latter's son by a *dikazi* who used to be Mtwalo's wife, had come home. That this is so is apparent from the fact that Marelesi's testimony serves not only to confirm the evidence for the defendant that at the family meeting it was accepted by those present, including the plaintiff, that Lumanyo was Manci's son by a *dikazi* and that this was reported by the plaintiff at Manci's instance to Headman Sinda, but also to show that the plaintiff's denial in the course of his evidence that he had been sent to Headman Sinda to make this report, is false.

Moreover, as is apparent from the following passage from the plaintiff's evidence, there are blatant inconsistencies therein which, taken alone, warrant its rejection:—

> "When Lumanyo arrived Manci called a meeting. Manci did not say at that meeting that he wanted to chase him away. Manci called the meeting to ask for advice. I say he did not ask for advice. The only object was to tell the meeting about the child. He wanted to chase the child away. I cannot explain why he called the meeting.
>
> I say Manci did deny that he knew the child and was chasing him away. The child was chased away.
>
> I did say Joni arrived at the end of the meeting and said he was looking for children of Mtwalo. He did not say the child belonged to Manci. Manci said "Here is your child. Take him away" Thus Mtwalo's family was claiming Lumanyo. It was apparent that Lumanyo had not been chased away by Joni.
>
> I admit that all we Manci's at that time did not know Lumanyo and saw that his 'father' had come to fetch him. I don't know why Lumanyo did not go. I say he refused to go. Manci had told him to leave."

Then, there are improbabilities in the evidence for the plaintiff. There was no need for Manci to have convened the family meeting merely for the purpose related by the plaintiff so much so that, as is apparent from the aforegoing passage from the latter's evidence, he cannot explain why Manci should have convened the meeting at all. Again, it is most unlikely that Manci would have complained to Sub-Headman Mampondweni that the plaintiff objected to the payment of the "fine" for Lumanyo if, as the plaintiff and some of his witnesses would have the Court believe, Manci was prepared to disclose that Lumanyo was his child, begotten during the subsistence of its mother's customary union; for, according to the plaintiff's version, it is clear that Manci knew that in that case he could not consonant with custom, obtain any right to Lumanyo by the payment of a "fine" for him. In any event any declaration made by Manci regarding Lumanyo's parentage in the circumstances related by the plaintiff and his witnesses would be inadmissible since it cannot be regarded as one against Manci's pecuniary or proprietary interests, see May on Evidence (Third Edition), paragraph 425, at pages 248 and 249, nor as an admissible declaration as to pedigree as it was made *post litem motam*, see Phipson on Evidence (Ninth Edition), Chapter XXVII, commencing at page 320. For the last mentioned reason Majono's alleged declaration regarding Lumanyo's parentage is also inadmissible; a further reason making it inadmissible s that Majono is alive; and, as she was not cross-examined in regard to the alleged declaration when she gave evidence for the defendant, it does not serve to controvert her testimony in any way.. Then the plaintiff's only

explanation for not approaching the Headman in regard to his complaint that Lumanyo remained at Manci's kraal, viz., that he did not want to do so, makes it unlikely that he actually approached the Sub-Headmen who are his relatives.

Turning to the remaining evidence for the plaintiff, the testimony of Dipping Foreman Pinyane does not appear to advance the plaintiff's case. Medji's evidence is to the effect that Joni had complained to Headman Sinda that Manci had taken a child from his home, i.e. Lumanyo, and that before this complaint was enquired into Joni and Manci, at the latter's request, had a private conference and thereafter the Headman was informed that it had been agreed between them that Manci was to pay a "fine" of six head of cattle to Joni. This evidence, which was confirmed by Marelesi whose testimony appears to be straightforward and impartial, viewed in the light of Joni's denial that he had demanded Lumanyo's return and that he had brought the complaint in question before Headman Sinda, lends colour to the plaintiff's version that Lumanyo was begotten during the subsistence of the customary union between Mtwalo and Mantshangase particularly if the testimony of the defendant's witness, Majola, that Joni did go to Manci to get Lumanyo back, is borne in mind. But, this evidence by Medji and Marelesi also advances the defendant's case in an important respect in that it indicates that Manci did "fetch" Lumanyo, Medji also stated that Headman Sinda approved of Manci's having it recorded that Lumanyo was his son. Medji made it clear that at that time it was accepted that when Lumanyo was begotten his mother was not associated in a customary union. Mampondweni, the Sub-Headman referred to above, supported the plaintiff's evidence that Manci had brought a complaint against him (plaintiff) because the latter had objected to the payment of the "fine" for Lumanyo because his (Lumanyo's) mother was Mtwalo's wife when he was begotten. But, as pointed out above, this evidence not only gives rise to an improbability but is inadmissible in so far as the alleged disclosure of Lumanyo's parentage is concerned. The gist of the evidence given by Masilika, Koweni and Sakana is set out above. The Native Commissioner states in his reasons for judgment that these witnesses faltered in cross-examination and that their ages were such as to indicate that they were too young to have first hand knowledge of the events to which they testified. Whilst it seems to me that the evidence relied upon by the Native Commissioner does not serve to fix the ages of the witnesses concerned with sufficient certainty to warrant the inference that they were too young to have first hand knowledge of the events to which they testified,, there are inconsistencies in their evidence which, to my mind, should not have been there if they were truthful. Masilika stated in his examination-in-chief that he was not related to the parties but in cross-examination he admitted that his son was married to the plaintiff's daughter which, in the Native eye, constitutes close relationship. Koweni stated in his evidence-in-chief that he had first seen Lumanyo when there was a younger child. In cross-examination he again said that there was a younger child, then said there could have been a younger child and finally admitted that there was not one. Again, he admitted in cross-examination that his knowledge of the Mtwalo family was what he had been told and that he knew nothing of its affairs whereas in re-examination he stated that what he had testified to about Mtwalo's affairs was what he had seen with his own eyes but did not explain how he came to make the statements to the contrary in cross-examination. Sakana stated in his examination-in-chief that Mantshangase did not leave Mtwalo's kraal for any length of time. In cross-examination he first stated that Mantshangase had not left that kraal. Later he admitted that she had done so to train as a herbalist, adding that he did not know for how long she was away. Finally in re-examination he stated that he had not seen Mantshangase away from Mtwalo's kraal for a long time. In these circumstances the Native Commissioner cannot, to my mind

be said to be wrong in rejecting the evidence of these witnesses, Makitshini and Magiza bear out the plaintiff's version as to what took place at the family meeting but their evdence in this respect not only does not assist the plaintiff but is most detrimental to his case as it indicates a conspiracy in that it is clear from what has been said above that the plaintiff's version in this respect is a fabrication; nor, for the reasons given above, is the remainder of Makitshini's and Magiza's testimony of any assistance to the plaintiff, dealing, as it does, with what transpired at the inquiries before Sub-Headman Mampondweni and Situkutezi. In any event, Makitshini cannot be regarded as a reliable witness as he admitted in cross-examination that when the report was made at the Magistrate's Office regarding Lumanyo, he (Makitshini) had confirmed that Lumanyo was Manci's son by a *dikazi* whereas in re-examination he said that he had not done so and that this question had never been put to him at the Magistrate's Office. Sub-Headman Situkutezi's evidence concerns the inquiry held by him and does not, therefore, advance the plaintiff's case for the reasons given above. Folo testified to the payment of six head of cattle by Manci to Joni, five as a "fine" for Lumanyo and one as *isondlo* for him. This testimony also does not assist the plaintiff as it is consistent with the defendant's case; however, Folo's statement that he had never heard of Mpolozana lends colour to the plaintiff's case for it is common cause that Folo was one of the messengers entrusted with taking the cattle from Manci to Joni and Folo should, consonant with custom, have been apprised of all the details connected with the transaction, including that the cattle were being paid to Mpolozana if that, in fact, was the case.

Reverting to the evidence for the defendant, there are undoubtedly features therein which evoke suspicion as will be apparent from what follows. Mpolozana stated that he had arranged for the six head of cattle paid by Manci as a "fine" and *isondlo* for Lumanyo to be delivered to Joni as he (Mpolozana) lived far off. But in the Native eye, this is a lame excuse, particularly as Mpolozana admitted in cross-examination that there would have been no difficulty in having the cattle transferred to himself. Mpolozana also admitted that he had not gone to see these cattle at Joni's kraal and that Joni had retained the skins of the two of these cattle which had died, without demur from him, both unusual features. Joni confirmed that he had sold these skins and retained the proceeds. Then according to Mpolozana, Mantshangase returned to Mtwalo's kraal after the dissolution of her customary union with him (Mtwalo) by the *keta* of her dowry. It is true that Mtwalo was then dead and that she went to live with Joni, her son by Mtwalo, who was then already married, but her doing so was nevertheless not in keeping with custom. Again, Mpolozana admitted that he had taken no steps to recover the "fine" for Lumanyo from Manci from the time of the latter's birth until he (Lumanyo) went to Manci's kraal which was after Lumanyo had been married and Mpolozana gave no reason for this long delay. Then there are discrepancies in the evidence for the defendant. Mpolozana's description of the six head of cattle referred to above differs from that given by Joni. The former stated that these cattle consisted of two oxen, three cows and a bull calf whereas the latter said that they comprised two cows, two heifers and two oxen. Mpolozana also stated that he did not inspect these cattle whereas Joni and Majola said that he did inspect them. Majola also stated that Mpolozana instructed Joni to sell the four surviving cattle as stock movements were restricted, whereas Mpolozana said that there would have been no difficulty in having these cattle transferred to him. Joni stated that he attended the family meeting at which it was announced that Lumanyo had come home, whereas the other of the defendant's witnesses did not mention him as being one of those present thereat and Majono specifically stated that Joni had not attended this meeting.

There are also other aspects unfavourable to the defendant's case. Firstly, there is the denial by the defendant's witness, Joni, that he had brought a complaint against Manci before Headman Sinda regarding Lumanyo's being at Manci's kraal. This denial is refuted by the testimony of Medji and Marelesi for the plaintiff which, to my mind, falls to be accepted, as Marelesi in particular appears to be an impartial witness for, as pointed out above, his evidence is straightforward and he testified not only in favour of the plaintiff, whose witness he was, but also in favour of the defendant as regards the report made by the plaintiff to Headman Sinda, regarding Lumanyo's being Manci's son by a *dikazi*. Secondly, there is the testimony, referred to above, of the plaintiff's witness, Folo, who was Manci's messenger, showing that Folo had not been apprised that the six head of cattle paid by Manci as the "fine" and *isondlo* for Lumanyo were destined for Mpolozana.

Whilst the unsatisfactory features in the defendant's case dealt with above undoubtedly tend to lend colour to the plaintiff's case, it seems to me that the Native Commissioner cannot be said to have erred in his findings that Lumanyo was Manci's child by Mantshangase begotten whilst the latter was a *dikazi*, i.e. after the dissolution of her customary union with Mtwalo, and that Manci paid the full "fine" and *isondlo* for Lumanyo to the latter's mother's guardian; for these findings are supported by the direct evidence of the defence witnesses Mpolozana and Majola who were best qualified to testify to the facts concerned seeing that Mpolozana was Mantshangase's guardian after the dissolution of her customary union with Mtwalo and Majola was Mtwalo's great wife; and her evidence strikes me as being straightforward and impartial for she did not hesitate to admit that Joni did go to bring Lumanyo back which, as pointed out above, refutes Joni's evidence in this respect and lends colour to the plaintiff's case. Here it should be mentioned that her evidence regarding the declaration by Mantshangase, since deceased, of Lumanyo's pedigree is admissible as this declaration was made *ante litem motam*, see Phipson on Evidence (Ninth Edition) at the pages referred to above. Moreover, the fabrication by the plaintiff and his witnesses Makitshini and Magiza as to what transpired at the family meeting indicating, as it does, a conspiracy between them, goes a long way towards showing that the truth lies with the defendant. In addition there are the other unsatisfactory features in the evidence for the plaintiff which are mentioned above. And, as stated above, the Native Commissioner was also justified in finding that Manci held a family meeting at which he announced that his son, Lumanyo, had come home.

In these circumstances there can, to my mind, be no doubt that the defendant discharged, on a preponderance of probability, the onus resting on him on the pleadings of proving that he is Manci's heir so that the Native Commissioner cannot be said to be wrong in finding for the defendant and the appeal accordingly falls to be dismissed, with costs.

Statement by Native Assessors.

Assessors in Attendance.

1. Tolikana Mangala, Pondo Assessor from Libode District.
2. Johnson Hlwatika, Pondo Assessor from Ngqeleni District.
3. Robert Godlimpi, Pondo Assessor from Bizana District.
4. Mdabuka Cetywayo, Pondo Assessor from Lusikisiki District.
5. Lumayi Langa, Pondo Assessor from Flagstaff District.

Question by President: The natural father of a son by a *dikazi* agrees before his birth to pay the "fine" for him after his birth. The son grows up and marries. He then goes to the kraal of his natural father who holds a family meeting at which he announces that his son has come home. Thereafter

the natural father pays the full " fine " and *isondlo* for the son. The natural father dies leaving no legitimate male issue. Is the son in these circumstances his natural father's heir according to Pondo law?

Reply by Lumayi Langa: According to Pondo law the son is his natural father's heir.

All other assessors agree.

Question by President: Am I to understand that it makes no difference that the family meeting was held before and not after the payment of the " fine " and *isondlo*?

Reply by Johnson Hlwatika: It makes no difference. The meeting is to inform the family that he has a son elsewhere.

All other assessors agree.

Question by Mr. Attorney Stanford: In the case of Mkanbela *v.* Rona [1 N.A.C. (S.D.) 219] heard by this Court in 1950 the Pondo assessors stated that it was necessary for the full " fine " to be paid for an illegitimate son before he could be instituted as his natural father's heir. Is that statement not in conflict with your present reply?

Reply by Tolikana Mangula: It makes no defference whether the family meeting is held before or after the " fine " and *isondlo* are paid. The " fine " and *isondlo* must, however, be paid before the son can be regarded as his natural father's heir.

All other assessors agree.

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

R. A. Midgley (Member): I concur.

For Appellant: Mr. Stanford, Flagstaff.

For Respondent: Mr. Hart, Tsolo.

SOUTHERN NATIVE APPEAL COURT.

MFAZWE *v.* **MFIKILI.**

N.A.C. CASE No. 41 OF 1956.

PORT ST. JOHN'S: 7th February, 1957. Before Balk, President, Warner and Midgley, Members of the Court.

PONDO CUSTOM.

Dissolution of customary union—What constitutes valid tender—Dissolution of wife's instance—Return of dowry validly tendered sufficient—Husband's right to damages for adultery—Lost upon dissolution.

Summary: Plaintiff, now respondent, successfully sued defendant, now appellant, for damages for adultery with his wife. The woman had requested her dowry-eater to dissolve the union by returning the dowry received for her. He tendered a beast to plaintiff's mother by word of mouth, while she was in charge of plaintiff's kraal in the latter's absence at work. Thereafter, at his instance, a letter to the same effect was written to plaintiff by a firm of attorneys. This letter was received by plaintiff in about October, 1954, but ignored.

Early in 1955 when plaintiff had returned from work, and before he took action for the recovery of damages, the dowry beast offered was driven to his kraal. Defendant admittedly had been living with the woman as man and wife from some time in 1954.

Held: That, before a customary union can be dissolved at the wife's instance, dowry stock or its equivalent in money must be tendered to the husband and it must be sent or taken to

him; and that a verbal or written tender, not accompanied by stock or money is not valid, and may be ignored in Pondo law.

Held further: That a valid tender of the return of the dowry to the husband dissolves the customary union irrespective of whether he accepts it or not.

Held further: That upon dissolution of the customary union the husband loses his right to claim damages from the guilty party for adultery with his wife, before such dissolution.

Cases referred to:

Maggirceni *v.* Benene, 1937 N.A.C. (C. & O.) 202.
Mayile *v.* Makawula, 1953 N.A.C. 262 (S.).
Somtitsi and Another *v.* Rabiya, 1939 N.A.C. (C. & O.) 14.

Appeal from the Court of the Native Commissioner, Tabankulu.

Balk (President):—

This is an appeal from the judgment of a Native Commissioner's Court for plaintiff (now Respondent) as prayed, with costs, in an action in which he sued the defendant (present appellant) for five head of cattle or their value, £40, as damages for adultery committed by the latter with the former's customary wife, Mamtabaza.

In the particulars of his claim the plaintiff averred—

" 1. That the parties to this action are Natives;
2. That plaintiff is married by Native law and custom to Mamtabaza and his marriage to her still subsists;
3. That since about September, 1954, defendant has been living in adultery with plaintiff's wife the said Mamtabaza and has thus rendered her pregnant.
4. That by reason of defendant's wrongful and unlawful actions as hereinbefore set forth in paragraph 3 hereof plaintiff has sustained customary damages to the extent of 5 head of cattle or the sum of £40, the value thereof.
5. That despite demand for the payment of 5 head of cattle or their value £40 defendant makes no payment whatsoever."

The defendant pleaded as follows:—

" 1. Admits paragraph 1 of the summons.
2. Denies paragraph 2 of the summons and puts the plaintiff to the proof thereof. States that during October and November, 1954, the customary union between plaintiff and Mamtabaza was dissolved by a return of the dowry due.
3. Denies paragraph 3 of the summons and states that only after the dissolution of plaintiff's customary union with Mamtabaza did he marry her and live with her as his wife.
4. Denies paragraph 4 of the summons.
5. Admits paragraph 5 of the summons.

Wherefore defendant prays that plaintiff's claim may be dismissed together with costs and that judgment be entered in his favour with costs of suit."

The appeal is brought on the grounds that the judgment is against the weight of the evidence and bad in law in that the Judicial Officer did not take into consideration the facts that the plaintiff had tacitly accepted the tender of one beast to dissolve his union with Mamtabaza and later accepted physical delivery of that beast in ratification of the dissolution of the union.

It is common cause that there was a customary union between the plaintiff and Mamtabaza; and the defendant admitted in his evidence that he has been living with her as his wife since the ploughing season of 1954. His main defence was that the customary union between the plaintiff and Mamtabaza had then already been dissolved, an issue disputed by the plaintiff. Proceeding to a consideration of this issue, it appears from Mvun-

yelwa's evidence for the defendant, that he (Mvunyelwa) is Mamtabaza's brother and the "eater" of her dowry and that he went to the plaintiff's mother and offered to return a dowry beast to her to mark the dissolution of the plaintiff's customary union with Mamtabaza before the latter was given by him to the defendant as his wife. Thereafter he went to his attorney and had him write the letter (Exhibit "A") to the plaintiff advising him that he (Mvunyelwa) and Mamtabaza intended dissolving her customary union with the plaintiff and offering the return of a dowry beast to mark such dissolution. Then he again went to the plaintiff's mother and offered to return a dowry beast to her, which she declined. Here it should be mentioned that it emerges from the plaintiff's evidence that he was away at work at the time and that his mother then had charge of his kraal. The plaintiff admitted that he had received the letter (Exhibit "A") in about October, 1954. According to Mvunyelwa, on both occasions when he offered to return a dowry beast to the plaintiff's mother, he did not take it with him so that these offers cannot in Pondo law, which applies here, be regarded as proper tenders dissolving the customary union between the plaintiff and Mamtabaza, see Magqireni *v.* Benene, 1937 N.A.C. (C. & O.) 202. For the same reason the offer to return a dowry beast, embodied in the letter (Exhibit "A"), does not constitute a proper tender dissolving the customary union. It follows that the plaintiff's inaction following these offers cannot be regarded as a tacit acceptance thereof nor the acceptance by him of a valid tender at a later date as ratification of his acceptance of the offers. In other words, the plaintiff was entitled to ignore the offers as they did not amount to valid tenders. That being so and as, according to the plaintiff's and Mvunyelwa's evidence, it was not until after the plaintiff's return home from work early in 1955 that the dowry beast offered by Mvunyelwa was driven to the plaintiff's kraal, the customary union between the latter and Mamtabaza still subsisted when the defendant cohabited with her in 1954 and such cohabitation, therefore, amounted to adultery.

Counsel for appellant stated that he did not rely on the offers to return the dowry beast, which were not proper tenders, but on the tender at a later date, i.e. in 1955 by Mvunyelwa, when he drove the beast to the plaintiff's kraal after the latter's return from work and produced the necessary permit to move it there. Counsel contended that on the evidence the Native Commissioner should have found that the plaintiff had accepted this tender and that this acceptance resulted in the dissolution of the customary union. He went on to submit that as it is clear that the plaintiff did not take any action for the recovery of damages for the adultery until after such dissolution, he could not succeed in his claim for these damages. This aspect is fully dealt with in the evidence and, as it also appears to be covered by the first ground of appeal in view of the averment in the particulars of claim that the customary union still then subsisted and the denial thereof in the defendant's plea, Counsel for appellant was permitted to argue the appeal on this basis.

As there appeared to be no decisions on the question whether the husband is debarred under Pondo custom from claiming damages for his wife's adultery where he has taken no action to recover such damages before the dissolution of his customary union with her at her instance by the return of dowry, the matter was put to the Native assessors. It will be observed from their replies, which appear below, that the position is substantially the same as in cases where the customary union is dissolved at the instance of the husband i.e. where the husband has claimed the return of his wife or, failing which, the return of the dowry, except that the husband may, if he suspects that his wife has committed adultery, refuse to accept the return of the dowry cattle until the question of damages for the adultery has been disposed of. It seems to me, however, that effect should not be given to the custom in this respect as it is contrary to public policy in that it lends itself to the dissolution of a customary

union being held in abeyance indefinitely after the wife has rejected her husband, with the attendant evils. Moreover, there appears to be no good reason for differentiating between such a dissolution at the instance of the husband and one at the instance of the wife as the ultimate criterion in both cases is the rejection of the husband by the wife. It follows that in both cases the custom should be the same, viz., that a valid tender of the return of the dowry to the husband dissolves the customary union irrespective of whether he accepts it and that, if the husband has not before then demanded damages for his wife's adultery, he cannot maintain a claim therefor. As pointed out above, for the tender to be valid the dowry stock or its equivalent in money must be sent to the husband. The valid tender of part of the dowry returnable is sufficient to dissolve the union, see Mayile *v.* Makawula, 1953 N.A.C. 262 (S.), at page 264. At first sight the fact that a husband loses his right to damages for his wife's adultery if he has not demanded such damages before the dissolution of the customary union, may appear to be inequitable. But, apart from the fact that this custom is sanctioned by decisions of this Court, see Somtitsi and Another *v.* Rabiya, 1939 N.A.C. (C. & O.) 14, at page 16, and Mayile's case (*supra*), it is, in practice, salutary rather than inequitable for it makes for immediate action against the adulterer and vigilance on the part of the husband or in his absence by the "eye" of his kraal.

In the instant case the Native Commissioner held that in any event there had been no dissolution of the customary union as Pondo custom required that Mamtabaza herself should have driven the dowry beast to the plaintiff's kraal if she was rejecting him, see Magqireni's case (*supra*), at page 203. But to my mind, her failure to do so does not affect the position that the valid tender dissolved the customary union as it is manifest from her evidence that she had then rejected the plaintiff and asked her brother, Mvunyelwa, to refund the dowry so that the requirement that Mamtabaza herself should have driven the dowry beast to the plaintiff's kraal becomes a non-essential formality.

That being so, and as it is clear from the plaintiff's evidence that he made no demand for damages for Mamtabaza's adultery with the defendant before the valid tender of the return of the dowry beast was made to him, he lost his right to such damages.

Accordingly the appeal should be allowed, with costs, and the judgment of the Court *a quo* altered to one for defendant, with costs.

STATEMENT BY NATIVE ASSESSORS.

Assessors in Attendance.

Johnson Hlwatika, Pondo Assessor from Ngqeleni.
Lumayi Langa, Pondo Assessor from Flagstaff.
Mdabuka Cetywayo, Pondo Assessor from Lusikisiki.
Robert Godlimpi, Pondo Assessor from Bizana.
Tolikana Mangala, Pondo Assessor from Libode.

Question by President: Where the customary union has been dissolved at the instance of the husband i.e. where the husband has claimed the return of his wife or, failing which, the dowry, he loses his right to damages for his wife's adultery if he has made no claim therefor prior to such dissolution. Is the position the same if the customary union is dissolved at the instance of the wife, i.e. if without her husband having taken action for her return or, failing which, the return of the dowry, she requests her dowry "eater" to refund the dowry?

Reply by Tolikana Mangala: There is no difference. Once the dowry cattle are returned and the husband has received them, he cannot thereafter claim damages for his wife's adultery.

All other assessors agree.

Question by President: Is the husband obliged to accept the return of the dowry?

Reply by Tolikana Mangala: Yes.

All the other assessors agree.

Question by President: What is the position if the husband on his return home from work is confronted with the return of the dowry?

Reply by Tolikana Mangala: If the husband suspects that his wife has committed adultery, he can refuse to accept the dowry until such time as the action for damages for the adultery is disposed of.

All the other assessors agree.

Question by President: What is the position if the husband only becomes aware of his wife's adultery after he has received the dowry?

Reply by Lumayi Langa: Once the husband has accepted the return of the dowry he cannot maintain an action for damages against the adulterer.

All the other assessors agree.

Question by President: If the husband has reported the adultery at the adulterer's kraal and demanded damages from him, may the husband accept the return of the dowry without losing his right to the damages for the adultery?

Reply by Lumayi Langa: Once the husband has reported the adultery to the adulterer and demanded the damages from him, he may accept the return of the dowry and still maintain his action against the adulterer.

All other assessors except Robert Godlimpi agree.

Robert Godlimpi: If the charge of adultery is denied by the alleged adulterer when the report and the demand are made, the husband must refuse to accept the return of the dowry until the action for damages has been disposed of.

Lumaya Langa: If the charge is admitted by the adulterer when the report and the demand are made, the husband may accept the return of the dowry without losing his right to damages for the adultery. If the alleged adulterer denies the charge, the husband may not accept the dowry before the case is disposed of.

All other assessors except Tolikana Mangala agree.

Tolikana Mangala: If the wife presses for the dissolution of the customary union, the husband may accept the return of the dowry after he has instituted legal proceedings for damages for the adultery.

Question by Mr. Attorney Birkett: Have you ever known of any case in which the husband was debarred from claiming damages for his wife's adultery committed before the dissolution of the customary union at her instance where no claim for such damages was made prior to such dissolution?

Reply by Lumayi Langa: There have been such cases in our Courts and the husband has been debarred.

All the other assessors agree.

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

R. A. Midgley (Member): I concur.

For Appellant: Mr. Stanford, Flagstaff.

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

SOUTHERN NATIVE APPEAL COURT.

ZITULELE *v.* NYEULA.

N.A.C. CASE No. 59 OF 1956.

PORT ST. JOHN'S: 7th February, 1957. Before Balk, President, Warner and Midgley, Members of the Court.

EVIDENCE.

Rebutting evidence—When refusal to hear is irregular—Prejudice by such irregularity.

Summary: In an action for the return of cattle which plaintiff alleged he had placed with defendant for safekeeping, judgment was given in favour of the defendant. Plaintiff thereupon appealed, one of the grounds of appeal being that the Native Commissioner erred in refusing an application by plaintiff to lead evidence in rebuttal of a denial by defendant and his witnesses of any relationship between defendant and the wife and mother-in-law of plaintiff, it being contended that plaintiff was taken by surprise by the denial of relationship and that the evidence in rebuttal could have had far-reaching effect upon the credibility of the evidence for defendant.

The relationship is directly in issue and plaintiff's witnesses were not cross-examined on the point. The remaining facts are immaterial.

Held: That as the relationship between defendant and the plaintiff's wife and her mother is directly in issue and as plaintiff was taken by surprise the Native Commissioner's failure to hear rebutting evidence is an irregularity.

Held further: That rebutting evidence would be admissible for the purpose of proving the relationship, only in so far as it is directly in issue, and not to attack the credibility of the defence witnesses.

Held further: That, as substantial prejudice to plaintiff did not result from the irregularity, this ground of appeal fails.

Cases referred to:

Du Plessis *v.* Ackermann, 1932 E.D.L.D. 139.
McLoughlin *v.* South African Medical & Dental Council, 1947 (2) S.A. 377 (W.L.D.)
Grant *v.* S.A. National Trust and Assurance Co., Ltd., and Others, 1948 (3) S.A. 59 (W.L.D.)

Statutes referred to:

Act No. 38 of 1927, section 15.

Appeal from the Court of the Native Commissioner, Flagstaff.

Balk (President):—

This is an appeal from the judgment of a Native Commissioner's Court for defendant (now respondent), why costs, in an action in which the plaintiff (present appellant) sought a declaration that he was the owner of certain cattle and an order for their delivery or payment of their value to him.

In the particulars of his claim, as amended, with the leave of the Court *a quo*, the plaintiff averred that—

"1. The parties hereto are Natives as defined in Act No. 38 of 1927.

2. In or about 1949 plaintiff delivered the following cattle belonging to him to the defendant who undertook to care for them on the plaintiff's behalf, namely:—

Two red-horned heifers: Value £12 each.
One red hornless heifer: Value £12.
One black *Ngqabe* heifer: Value £12.
One red ox: Value £13.

3. That whilst in the possession of the defendant, the said cattle have had the following increase:—
   One black hornless heifer (born of the black *Ngqabe* heifer).
   One red *Mpemvu* ox (born on the red hornless heifer).
   One red bull: £10.
   which are worth £11 and £10 respectively.
4. That despite demand defendant wrongfully and unlawfully refuses or neglects to return the said cattle to plaintiff and now claims ownership of the said cattle."

The defendant pleaded as follows:—

" 1. Paragraph 1 of the summons is admitted.
2. Paragraph 2 of the summons is denied in *toto*. Defendant denies that plaintiff ever placed any cattle with him for the purpose stated or for any other purpose. Defendant pleads that many years ago he *nqomaed* a certain black *ngqabe* cow to the plaintiff's wife Manatala, which cow increased and about 1949 four such *nqoma* cattle were handed back to him by plaintiff's said wife Manatala, which cattle are the property of the defendant.
3. Defendant denies paragraph 3, but while admitting there were two increase after the said cattle were handed to him denies there was a black hornless heifer, but admits there was an increase of a red *mpemvu* bull, now an ox. Defendant denies plaintiff has any right title or interest in these cattle.
4. Ad paragraph 4 defendant denies receipt of any demand but states that plaintiff did on or about the 29th August, 1955, wrongfully and unlawfully spoliate 5 cattle in respect of which defendant obtained judgment against plaintiff in Flagstaff Case No. 77 of 1955, to which defendant craves leave to refer at the trial and which 5 cattle are the property of the defendant. Defendant puts plaintiff to the proof of all his allegations which are denied by defendant. Defendant admits he claims ownership of the cattle and save for the foregoing paragraph 4 of the summons is denied.
   Wherefore defendant prays that judgment may be entered in his favour with costs of suit."

The grounds of appeal are—

" (*a*) the Native Commissioner erred in refusing plaintiff's application to lead evidence in rebuttal of the denial by defendant and his witnesses that defendant is related to plaintiff's wife and mother-in-law, in view of the fact that plaintiff was taken by surprise by such evidence and that the evidence in rebuttal is important and could have had a far reaching effect upon the credibility of the evidence for defendant; and
(*b*) the judgment is against the weight of the evidence."

Counsel for appellant submitted in regard to the first ground of appeal that the relationship referred to therein was directly in issue in that, if proved, it would lend colour to the plaintiff's version that he had hidden the cattle with the defendant; and, as there was no cross-examination of the witnesses for plaintiff in regard to the relationship, the plaintiff was taken by surprise by the denial by the defence that the relationship existed and the Native Commissioner should accordingly have granted the plaintiff's application for leave to adduce rebutting evidence. As the relationship is directly in issue and as the plaintiff was in the circumstances taken by surprise, there was a special reason for allowing the application and the Native Commissioner's failure to do so constitutes an irregularity, see Du Plessis *v.* Ackermann, 1932, E.D.L.D. 139 and McLoughlin *v.* South African Medical and Dental Council, 1947 (2) S.A. 377 (W.L.D.), at page 396. But this does not conclude the matter as the question whether the irregularity resulted in substantial prejudice to the plaintiff falls

to be considered in terms of the proviso to section *fifteen* of the Native Administration Act, 1927. It seems to me that the preponderance of probability would clearly remain in the defendant's favour even if it be assumed that the relationship exists so that proof thereof would not assist the plaintiff. That this is so will be apparent from what is said in dealing with the remaining ground of appeal. The rebutting evidence would, of course, be admissible, for the purpose of proving the relationship only in so far as it is directly in issue as indicated above and not to attack the credibility of the defence witnesses, see Grant *v.* S.A. National Trust and Assurance Co., Ltd., and Others, 1948 (3) S.A. 59 (W.L.D.). It follows that the irregularity has not resulted in substantial prejudice to the plaintiff and the first ground of appeal, therefore, fails.

Turning to the remaining ground of appeal, the Native Commissioner states in his reasons for judgment that the plaintiff did not create a favourable impression whereas the defence witnesses did, in particular Izia Godlwana, whom he regarded as an impartial witness and who gave his evidence convincingly. The Native Commissioner goes on to deal with the probabilities as disclosed by the evidence and finds that they favour the defendant. That this is the case, even assuming that the relationship alleged by the plaintiff exists, there can, to my mind, be no doubt. In the first place there is the unexplained delay of three years on the part of the plaintiff in instituting the instant action. Then, according to the plaintiff and his witness, Mdunyana, the defendant agreed to his (plaintiff's) taking the cattle in 1955 yet when the plaintiff shortly thereafter took them, the defendant for no apparent reason immediately instituted spoliatory proceedings against him and recovered them. Again, according to the evidence for the plaintiff, the red ox was placed with his wife's mother Mampenge, after the other four cattle had been placed with the defendant and it was only at a later date that the red ox was also placed with the defendant. There appears to be no good reason why the ox should first have been placed with Mampenge, bearing in mind that the plaintiff's case is that these five head of cattle were placed with the defendant to evade their attachment in an action for damages then pending against the plaintiff as a result of his having killed one Manquza. The plaintiff also stated that four of the cattle had been placed by him at Zikele's kraal and thereafter returned to the defendant. Apart from the fact that it is strange that the plaintiff's witnesses were unaware that the cattle had been placed at Zakele's kraal, it is significant that, as is manifest from the defendant's evidence and the document (Exhibit "C"), the defendant at that time demanded the return to him of these cattle from Zikele and recovered them. The defendant's version is that the plaintiff, who was facing a criminal charge for having moved four sheep to Tabankulu without a permit, sold the *ngqabe* heifer to him for £5 as he required funds in connection with this charge. At the request of the plaintiff's wife he (defendant) *nqomaed* the heifer to her after earmarking it. It had three progeny which he also earmarked. When the plaintiff was arrested for killing Mangquza, he (defendant) arranged to get his cattle back, giving the plaintiff's wife, Manatala, £6 in lieu of a beast under the *nqoma* transaction. When the plaintiff was released from gaol, apparently on bail pending trial, he took the cattle and placed them with Zikele. He (defendant) demanded the cattle from Zikele and recovered them. After the plaintiff had served his sentence he spoliated the cattle and he (defendant) took immediate steps for their recovery. Two of the cattle died and there were two further increase. The red ox he (defendant) bought from Mampenge. Not only is the defendant's version in the main supported by his witnesses but it is consistent with his conduct and in keeping with the probabilities.

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

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

R. A. Midgley (Member): I concur.

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

For Respondent: Mr. Stanford, Flagstaff.

SOUTHERN NATIVE APPEAL COURT.

MBONJIWA *v.* **SCELLAM.**

N.A.C. CASE No. 52 OF 1956.

KOKSTAD: 9th February, 1957. Before Balk, President, Warner and Bourquin, Members of the Court.

PRACTICE AND PROCEDURE.

Native Commissioner to record whether common or Native law applied—Principles to be applied in determining which legal system to invoke and whether Native Commissioner exercised proper discretion therein.

MARRIAGE.

Lobola *paid in consideration of customary union is a purely Native law transaction but not so if paid in connection with civil marriage—"Custodian" of girl not entitled to* lobola, *unless authorised by father or guardian—Native law requires agreement in respect of* lobola.

LAW OF CONTRACT.

Misrepresentation by non-disclosure of material fact in contract entitles other party to resile therefrom.

Summary: Plaintiff sued defendant for the balance of *lobola* due under a verbal agreement in respect of the marriage by civil rites of his granddaughter to defendant. Defendant, while admitting that he still owed the balance of the dowry, contended that it was payable to the girl's father who, he had discovered. was the husband of plaintiff's daughter, the girl's mother. Judgment was given for the defendant in the Native Commissioner's Court, and the plaintiff appealed on the grounds that common law and not Native law should have been applied to the issue by the Presiding Officer and that as defendant had made part payment to plaintiff in recognition of the latter's claim he was liable to pay him the balance. The Native Commissioner applied Native law, atlhough he did not note this on the record.

Held: That a Native Commissioner must record at the close of the case whether he has applied common law or Native law in that case.

Held further: In determining the legal system to be applied and whether the Native Commissioner exercised proper discretion therein, recourse must be had to the principles enunciated in *ex parte* Minister of Native Affairs: *In re* Yako *v.* Beyi, 1948 (1) S.A. 388 A.D.

Held further: That a *lobola* agreement or payment made in connection with a civil marriage must be regarded as ancillary to, and modified by, the legal principles underlying such marriage; but at the same time it remains essentially a Native law transaction, i.e. to the extent that it does not conflict with the principles underlying the civil marriage to which it is ancilllary.

Held further: That in Native law there must always be an agreement in respect of *lobola,* even though it may be tacit.

Held further: That the fact that plaintiff was the girl's "custodian" at the time he entered into the agreement does not, under Native law, entitle him to maintain an action against the defendant for the recovery of the *lobola* payable, if he is not authorised thereto by her father or guardian.

Held further: That, as this aspect of Native law does not run counter to the principles underlying a civil marriage, there can be no objection on that account to the application of Native law, under which plaintiff obviously has no case.

Held further: That, as defendant was labouring under a mistake in respect of a material fact which the plaintiff was under a legal obligation to disclose when the agreement was originally entered into, and as the former is scarcely likely to have entered into the agreement with the latter had he been aware of the true facts at the time, it was competent for him to resile from the contract as he did.

Held further: That in those circumstances plaintiff has no remedy under common law either.

Cases referred to:

Nombida *v.* Flaman, 1956 N.A.C. 108 (S.)
Nzimande *v.* Phungula, 1 N.A.C. (N.E.) 386.
Ex Parte Minister of Native Affairs: *In re* Yako *v.* Beyi, 1948 (1) S.A. 388 (A.D.)
Umvovo *v.* Umvovo, 1953 (1) S.A. 195 (A.D.).
Mpoko *v.* Vava, 3 N.A.C. 198.
Kanisa *v.* Ngodwane, 5 N.A.C. 49.
Cobokwana *v.* Mzilikazi, 1931 N.A.C. (C. & O.) 44.
Andries *v.* Mayekiso, 1932 N.A.C. (C. & O.) 7.
Thlophane *v.* Motsepe, 1932 N.A.C. (T. & N.) 35.
Fuzile *v.* Ntloko, 1944 N.A.C. (C. & O.) 2.
Sikonyella *v.* Lealia, 1951 N.A.C. (C.D.) 19.
Raphuti & Raphuti *v.* Mametsi, 1946 N.A.C. (T. & N.) 19.
Tobiea *v.* Mohatla, 1 N.A.C. (S.D.) 91.
Mzizi *v.* Pamla, 1953 N.A.C. 71 (S.)
Dlamini *v.* Kuboni and Another, 1953 N.A.C. 230 (S.)
Nobeqwa *v.* Sinekile, 1942 N.A.C. (C. & O.) 70.
Dibley *v.* Furter, 1951 (4) S.A. 73 (C.P.D.).

Works of Reference referred to:

Wessels' Law of Contract, Vol. 1, at pages 352 to 355.

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

Balk (President):—

This is an appeal from the judgment of a Native Commissioner's Court for defendant (now respondent), with costs, in an action in which he was sued by the plaintiff (present appellant), under a verbal agreement between them, for the balance of the *lobola* payable for one Simamanunu in respect of her marriage by civil rites to him (defendant).

In his plea the defendant admitted that he still owned the balance of the *lobola* but denied that the plaintiff had the right to claim it on the ground that one Sifo Rajuili, and not the plaintiff, was entitled thereto.

At the commencement of the hearing in the Court *a quo,* the particulars of the plaintiff's claim were amended, with the leave of the Court, by deleting the averment that Simamanunu was his daughter.

The appeal is brought on the following grounds:—

"1. Having regard to the allegations set out in the summons and plea, and having regard to the evidence adduced, material to the issue, it is respectfully submitted that only the common law should have been applied in the

case instead of which, Native law and custom was applied, and upon which the judgment in the Native Commissioner's Court was granted.

2. The agreement upon which plaintiff based his action was recognised by the defendant in above case because he had paid £20 representing 4 head of cattle valued at £5 each, to the plaintiff, and was thus liable to pay the remainder of the dowry to plaintiff."

The Native Commissioner has not recorded whether he applied common law or Native law in this case but it appears from his reasons for judgment that he decided it according to the last-mentioned legal system. In this connection his attention is directed to the necessity for recording this information specifically at the close of a case, see Nombida *v.* Flaman, 1956 N.A.C. 108 (S.) and the cases there cited, in particular Nzimande *v.* Phungula, 1 N.A.C. (N.E.) 386, at page 388.

Proceeding to a consideration of the circumstances of the instant case to determine, in the light of the principles enunciated in *ex parte* Minister of Native Affairs: *In re* Yako v. Beyi, 1948 (1) S.A. 388 (A.D.) read with Umvovo *v.* Umvovo, 1953 (1) S.A. 195 (A.D.), whether the Native Commissioner exercised a proper discretion in applying Native law, it is not disputed that the defendant agreed to pay the *lobola* for Simamanunu to the plaintiff at the time that a civil marriage was arranged between them whilst she was residing at the plaintiff's kraal and that the defendant paid £20 to the plaintiff on account of this *lobola* and thereafter contracted a civil marriage with Simamanunu, a minor, with her parents' consent. It is manifest from the evidence that when the *lobola* agreement was entered into and the £20 was paid on account thereof, the defendant was under the mistaken impression that Simamanunu was an illegitimate child of the plaintiff's daughter and that the plaintiff was, therefore, Simamanunu's guardian and as such entitled to the *lobola* for her. It is also manifest from the evidence that although the plaintiff was aware that the defendant laboured under this misapprehension, he did not disclose the true position to him i.e. that Simamanunu was in fact Sifo's daughter by his marriage with the plaintiff's daughter, and that this information only came to the defendant's knowledge as a result of admissions made by the plaintiff at an inquiry into the matter held by Headman Morai some time after the *lobola* contract had been entered into and the £20 paid on account thereof; further, that the defendant also learnt at this inquiry that Sifo required him to pay the *lobola* for Simamanunu to him otherwise he objected to the marriage taking place and the defendant thereupon agreed to do so. In the course of his testimony the plaintiff admitted that he had not been authorised by Sifo to recover the *lobola* payable by the defendant for Simamanunu and that his motive in bringing the instant action of his own accord was to recover the balance of the *lobola* due to him by Sifo for his (plaintiff's) daughter.

Whilst, as conceded by Counsel for appellant, there can be no doubt that *lobola* paid or agreed upon in respect of a customary union is purely a Native law transaction, the same cannot, as contended by him, be said of *lobola* agreed upon or paid in connection with a civil marriage, as is the case here; for, although the Native Appeal Court decisions have not been consistent in this respect, the preponderant weight of authority is to the effect that a *lobola* agreement or payment made in connection with a civil marriage must be regarded as ancillary to, and modified by, the legal principles underlying such a marriage, see Mpoko *v.* Vava, 3 N.A.C. 198, Kanisa *v.* Ngodwane, 5 N.A.C. 49, at page 50, Cobokwane *v.* Mzilikazi, 1931 N.A.C. (C. & O.) 44, at pages 46 and 47, Andries *v.* Mayekiso, 1932 N.A.C. (C. & O.) 7, at page 10, Thlophane *v.* Motsepe, 1932 N.A.C. (T. & N.) 35, at pages 39 and 40, Fuzile *v.* Ntloko, 1944 N.A.C. (C. & O.) 2, at page 4, and Sikonyella *v.* Lealia, 1951 N.A.C. (C.D.) 19, at page 20. But such *lobola* agreement or payment remains essentially a Native law transaction and the Native Appeal Courts have

regarded it as such and given effect to its incidents as are dictated by Native law in so far as they are not in conflict with the principles underlying the civil marriage, see the cases cited above and Raphuti & Raphuti *v.* Mametsi, 1946 N.A.C. (T. & N.) 19, Tobiea *v.* Mohatla, 1 N.A.C. (S.D.) 91, Mzizi *v.* Pamla, 1953 N.A.C. 71 (S.), at pages 78 and 79, and Dlamini *v.* Kuboni and Another, 1953 N.A.C. 230 (S.).

Counsel for appellant contended that the Native Commissioner had erred in exercising his discretion in applying Native law instead of common law as not only could a *lobola* transaction attaching to a civil marriage not be regarded as one falling under Native law in its entirety but such a transaction requires an agreement whereas one attaching to a customary union does not. Whilst it is true that a *lobola* transaction attaching to a civil marriage can only come into being by means of an express agreement as *lobola* is not an essential of such a marriage, it is not correct to say that Native law does not require an agreement in respect of *lobola;* for without an agreement there can in Native law be no *lobola* transaction and the fact that the agreemen is often implied and thus a tacit one does not alter the position that there is an agreement; nor is this position affected by the fact that the payment of *lobola* is an essential of a customary union.

If Native law be applied in the instant case, the plaintiff cannot succeed for, as pointed out above, it is clear that Sifo, who as Simamanunu's father is entitled to the *lobola* payable for her, did not authorise the plaintiff to institute legal proceedings against the defendant for its recovery and the fact that the plaintiff was Simamanunu's "custodian" at the time when he entered into the agreement with the defendant in respect of the *lobola* payable for her, does not entitle him to maintain an action against the defendant for its recovery, see Nobeqwa *v.* Sinekile, 1942 N.A.C. (C. & O.) 70. This aspect of Native law does not run counter to the principles underlying a civil marriage so that there can be no objection on that account to the application of this legal system here.

A further aspect remains to be considered and that is whether the plaintiff, not having a remedy under Native law, has one under common law, see Umvovo's case (*supra*) at page 201.

The evidence referred to above, to my mind, clearly supports the view that the plaintiff, deliberately and for his own benefit, took advantage of the mistake under which he knew the defendant was labouring, to induce the latter to enter into the *lobola* agreement with him and to make the part payment thereunder. That the mistake on the defendant's part was in respect of a material fact which the plaintiff was under a legal obligation to disclose, is clear in that it concerned the identity of the person entitled to Simamanunu's *lobola* and such person's consent to her marriage to the defendant according to civil rites was required as she was a minor and would hardly have been forthcoming without his being paid or promised her *lobola.* In my view also the defendant would not have entered into the *lobola* agreement with the plaintiff or made the part payment thereunder had he known the true facts at the time for it is only reasonable to assume that the defendant would in the circumstances have insisted on dealing with Sifo in the matter to ensure that he obtained his consent to the marriage as in fact the defendant did when the true facts came to his notice at the Headman's inquiry which preceded the marriage. Accordingly it was competent for the defendant to resile from the agreement as he did, see Wessels' Law of Contract, Vol. 1, at pages 352 to 355, paragraphs 1066, 1067, 1072 and 1073, and Dibley *v.* Furter, 1951 (4) S.A. 73 (C.P.D.), at page 84 to 89. The plaintiff, therefore, also has no remedy under common law.

In these circumstances it seems to me that the dominant consideration is the fact that, as pointed out above, a *lobola* agreement concluded in connection with a civil marriage remains essentially a Native law transaction, i.e. to the extent that it does

not conflict with the principles underlying the civil marriage to which it is ancillary, particularly where, as here, there is nothing to indicate that the parties had common law in mind when they entered into the agreement.

It follows that it cannot be said that the Native Commissioner did not exercise a proper discretion in applying Native law in deciding this case and the first ground of appeal, therefore, fails.

There is obviously no substance in the second ground of appeal, based, as it is, on common law for, as is manifest from what has been stated above, the part payment by the defendant under the *lobola* agreement did not preclude him from resiling therefrom seeing that the true facts only came to his notice after he had made such payment.

In the result, the appeal should be dismissed, with costs.

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

C. Bourquin (Member): I concur.

For Appellant: Mr. Zietsman, Kokstad.

For Respondent: Mr. Grant, Kokstad.

NORTH EASTERN NATIVE APPEAL COURT.

MTIYANE *alias* **SOKULU** *v.* **MATE.**

N.A.C. CASE No. 5 OF 1956.

ESHOWE: 12th February, 1957. Before Steenkamp, President, Ashton and Alfers, Members of the Court.

ZULU LAW AND CUSTOM.
(Zululand).

*Abandonment—Divorce—*Ihashi *custom—Interval between repeal of* 1878 *Code and Promulgation of* 1932 *Code—Disposing of wife by husband to another man.*

Summary: Plaintiff married a woman by Native custom prior to 1925 and she bore him three children. The woman thereafter formed a liaison with defendant's father (since deceased) to whom she bore five children now claimed by plaintiff. Defendant replied to the claim that the woman had been divorced by plaintiff and been married to defendant's father and he (defendant) consequently was entitled to the children.

Held (*a*): That the real Zulu custom of *ihashi* relates only to the marriage of a widow to a man outside the family of her deceased husband.

(*b*) That the "selling" of a wife by her husband to another man was never any part of and contrary to the basic principles of Zulu law.

(*c*) Mere abandonment of a wife by her husband cannot be regarded as dissolving a union. Abandonment must be done through the woman's guardian to be effective.

(*d*) That the practice of a husband disposing of his wife to another man is contrary to public policy and natural justice and does not make her free to marry the man to whom she is disposed of.

Appeal from the Court of the Native Commissioner, Eshowe.

Cases referred to:

Ugijima *v.* Mapumana, 1911 N.H.C. 3.
Mbonambi *v.* Sibiya, 1944 N.A.C. (T. & N.) 49.
Ndhlela *v.* Mtiyana, 1934 (N. & T.) 18.

Statutes etc., referred to:

Rule 11 Rules for Chief's Civil Courts (Government Notice No. 2885 of 1951).
Natal Code of Native Law, 1932 (Proclamation No. 168 of 1932).
Natal Code of Native law, 1878.

Ashton (Permanent Member):—

Plaintiff sued defendant in a Chief's Court for his wife Katazile and her five children declaring that defendant's father Mbengeza had fathered the children adulterously while he, plaintiff and Katazile were still married by Native custom.

Defendant admitted that "five children were sent back to their origin (*sic*) father to defray all costs and support" and the Chief entered judgment "The plaintiff to take five children (5) with costs to be defrayed."

Defendant appealed to the Native Commissioner, Eshowe, against this judgment but the Chief's reasons for judgment were not filed and this Court made the following order:—

> "The judgment is accordingly set aside and the case is returned to the Native Commissioner to comply with Rule 11 of the Regulations for Chief's Civil Courts. After he has obtained the Chief's reasons or for good reason exercises the discretion provided for in sub-rule (3) of the Rule quoted he shall consider the matter afresh, hear such further evidence as he or the parties may call, pronounce a fresh judgment, and if it is still against the present appellant he shall send the record to this Court in time for it to be argued and considered at its next session *at Eshowe*.
>
> When considering the matter afresh the Native Commissioner should bear in mind the rulings in the case of Ugijima *v.* Mapumana, 1911, N.H.C. 3, when deciding whether Katazile was free to marry a second time. Other cases on the point which may be of use to him are Mbonambi *v.* Sibiya, 1944. N.A.C. (T. & N.) 49 and Ndhlela v. Mtiyana, 1934 (N. & T.) 18. He should also consider whether it was at any time customary in Zululand for a man to receive *lobolo* for his wife from a man to whom she had run away from him and he should also call for the record of the case between Katazile and plaintiff if it is still available in the office of the Native Commissioner, Empangeni.
>
> Costs of the appeal thus far will be costs in the cause."

That was on the 2nd May, 1956, but at the Court's next session at Eshowe its directions had not been complied with and it ordered that the directions must be carried out in time for the appeal to be heard at this session. This has now been done.

The Chief in his reasons for judgment said that it was admitted in his Court that Mbengeza the father of defendant had committed adultery with plaintiff's wife and that the former paid six head of cattle to the plaintiff; that defendant contended, however, that this payment was in respect of *lobolo*—not damages—and that his father married the woman who had been plaintiff's wife and the children were his. The Chief, however, had found that there was no union between defendant's father and plaintiff's wife and gave judgment for plaintiff as prayed.

Defendant appealed to the Native Commissioner, Eshowe, against this judgment and that officer gave the following judgment:—

> "That the appeal be allowed and the Chief's judgment is hereby altered to read 'For defendant with costs in both Courts'."

This judgment was the judgment delivered by the Native Commissioner after the case had been sent back to him and now it comes up for consideration on appeal on the following grounds:—

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

2. That the Native Commissioner erred in not finding upon the whole of the evidence (and in particular also upon the evidence regarding payment of *lobolo* and the dates of the alleged divorce and re-marriage) that the defendant (respondent) had failed to discharge the onus of proving a valid divorce of Katazile from plaintiff (appellant) and a valid customary union between her and the late Mbengeza Mate.

3. That the Native Commissioner erred in not giving due effect to the provisions of Section 31 of the Natal Code of Native Law No. 168 of 1932."

It is clear from the evidence that plaintiff entered into a customary union with the woman Katazile prior to the year 1925, and bore him three children and that Katazile formed a liaison with the defendant's father, Mbengeza, whose heir he contends he is and lived with Mbengeza for about twenty five years during which time she bore him the five children now claimed by the plaintiff.

In 1931 Katazile went to a Chief's Court in the Empangeni district to seek a divorce from plaintiff and the Chief after having failed to effect a reconciliation sent the couple to the office of the Native Commissioner, where Katazile, assisted by her brother Manzendhlela, sued plaintiff for a divorce. But the Native Commissioner gave judgment for the husband (present plaintiff).

Katazile did not return to her husband after her unsuccessful action against him and then plaintiff sought out Mbengeza and arranged with him that Katazile would be abandoned by plaintiff if Mbengeza paid seven head of cattle. This was done and plaintiff did nothing further regarding Katazile until this case when he sued defendant by her son by Mbengeza (who had died in the interim) for her return and the return of the five children born of the union between her and Mbengeza.

The crux of the whole case hinges on the arrangement between plaintiff and Mbengeza. It is contended by defendant that the arrangement amounted to a divorce between plaintiff and Katazile by virtue of a custom termed *ihashi* whereby the male partner in a customary union is said to be able to "dispose" of his wife to another man on payment of her *lobolo* value.

The Court summoned Native assessors to ascertain whether there exists or existed a custom known as *ihashi* and the questions put to them and the replies they gave were recorded and form an annexure to this judgment.

It is clear from their replies that the "pure" Zulu custom of *ihashi* as practised in Zululand related only to the marriage of a widow to a man outside of the kraal of her deceased husband and it is equally clear from what the assessors told the Court that the husband of a woman could not dissolve their union by disposing of her to another man for *lobolo* paid by that other man to the husband.

It appears, however, from the evidence which the Native Commissioner accepted that there might have existed a custom whereby such a dissolution was effected and as it was on the existence of such a custom that the Native Commissioner based his judgment it becomes necessary to decide whether such a custom, if it existed, could be regarded as law.

Dealing with the question solely from the point of view of Zulu customary law it is clear that the "selling" of a wife by a husband to another man was contrary to basic principles of Zulu law. It is clear, too, from the judgment of the Native High Court in the case of Ugijima *v.* Mapumana, 1911, N.A.C. 3 that in the early days the dissolution of customary unions was possible and the manner of their dissolution is briefly described. It is also clear that in Zululand from the time the Native Code of 1878 was made applicable to that territory divorces were granted by Magistrate's and until 1898, by Chiefs. The judgment was to the effect that divorces in Zululand could only be legally granted by constituted authority and that "extra judicial" divorces were no longer of legal effect.

It was contended that as the so-called "*de facto*" divorce which was arranged by plaintiff and Mbengeza took place in 1931 it was not prohibited by the Code of 1878 which was specifically repealed by Act No. 38 of 1927 with effect from the 10th January, 1929, and was not replaced until 1st November, 1932, by Proclamation No. 168 of that year. Counsel for appellant argued that because of the fact that there was in that period no statutory Code of Native Law the Civil Law applicable to Natives

in Zululand was customary law and that in consequence the *ihashi* custom as followed by plaintiff and Mbengeza constituted a valid divorce between plaintiff and Katazile with whom Mbengeza was then free to contract a customary union and in fact did so.

But, as stated above, the *ihashi* custom as said to have been followed by the plaintiff and Mbengeza was not in accordance with Zulu customary law. Moreover, a custom which allowed a husband to dispose of his wife by what amounted to a "sale" to another man could never become accepted as law as it is clearly not in accordance with natural justice and public policy. The custom is not defined in any of the Codes of Native Law and it has always been the policy that Native women shall not be treated as chattels. Little could be more opposed to natural justice and public policy than the bartering by the husband of his wife to her lover for a number of cattle and any custom which allows this cannot be accepted as law.

It might here be mentioned that in view of the evidence this Court does not hold that such a custom was not followed in parts of Zululand but if it was, it was practised outside the law and had no legal effect and although the wife might be allowed by her husband to live with her lover in adultery without his interference the offspring of that adulterous union belonged in accordance with Zulu law to the husband of the woman.

There is one more point to bear in mind regarding the arrangement between the plaintiff and Mbengeza. It was agreed between them that the plaintiff was to abandon his wife and so make her available to enter into a customary union with Mbengeza. But mere abondonment cannot be regarded as dissolving a union. The assessors called in for this case were clear in their opinion when asked what was the position when a woman tired of her husband and left him for another man (Question No. 4). They made it clear that the woman's father must be approached and again in the next question (No. 5) they made it clear that if a man "chased" his wife away the union was not automatically dissolved but the woman would have to go back to her father. It is clear that the act of abandonment by the plaintiff did not follow the course which might have amounted to a divorce.

It follows that the children born of the alliance between Katazile and Mbengeza belong to Katazile's husband—the plaintiff—and the Native Commissioner was wrong when he set the Chief's judgment aside.

In my opinion the appeal should be allowed with costs; the Native Commissioner's judgment set aside and for it substituted "The appeal from the Chief's judgment in favour of the plaintiff is dismissed with costs."

Alfers (Member): I concur.

Steenkamp (President):

I have read my brother Ashton's judgment and while I agree that the appeal should be allowed I wish to approach the issue from a slightly different angle.

I agree that the *ihashi* custom is not applicable to the present case.

I find difficulty in accepting in toto the opinion expressed by the assessors called by this court concerning the old Zulu custom. There was no written Code in force in Zululand during the year 1930-31 when the events that led up to this case occurred—the one of 1878 which had been extended to Zululand having been repealed as from 1st September, 1929, and the one of 1932 only being promulgated after the plaintiff and the mother of the defendant had become estranged.

The crux of the case is whether the plaintiff had abandoned defendant's mother in such a manner that from his actions it may be deduced that he thereby intended to dissolve the union.

Plaintiff's evidence in this connection reads as follows:—

> "After Mbengeza had paid me these cattle I told him to come and I would remove this woman from my tax receipt and he could then *lobolo* her."

The next stage is to find out what procedure is followed when a husband intends to abandon his wife, and here I prefer to consult the custom of the other Nguni tribes as I am satisfied that prior to the promulgation of any codes in Natal and Zululand these tribes followed more or less the same customs.

Seymour in his book "Native Law in South Africa" deals with abandonment on page 109 and this is what the author states:—

> "The abandonment of a wife by her husband, and his rejecting her from his kraal, are not acts which effect dissolution even if so far as he is concerned, they are intended to result in permanent separation.
>
> To dissolve the union, the husband's repudiation of his wife must not only be unequivocal, it must also be conveyed to his wife's guardian."

In the present appeal there is no evidence that the plaintiff had had at any time dissolved the union in accordance with Native law. He might have intended doing so but this falls far short of actual abandonment and therefore I must conclude that defendant's father was never the lawful husband of Katazile nor could he become so until such time as the plaintiff had, in accordance with custom as outlined above, dissolved the union by abandonment.

Eshowe, 12th February, 1957.

ANNEXURE.

The following assessors were called by the Court:—

1. George Gilbert Mkiza, Nongoma, commoner.
2. Ndesheni Zulu, Nongoma, son of an Induna.
3. Chief Mpineseni Zungu, Mahlabatini.
4. Ex-Sergeant Mhlope Nxumalo, Nongoma, commoner.
5. Mahlungwana Zulu, Eshowe, commoner.
6. Nlsoyi Mpungose, Mtunzini, commoner.

A summary of the questions and the replies are appended hereunder.

Question 1:

Was it possible in Zulu customary law for a man to give up his wife to another man on payment of *lobolo* by that other man to him?

Answer:

All the assessors were of the same opinion that it was never Zulu custom for a husband to barter his wife to another man.

Question 2:

What was the *ihashi* custom?

Answer:

The assessors were unanimous that the *ihashi* custom applied only in the case of widows. They explained that when a husband died and his widow did not wish to enter into an *ukungena* union with one of his male relatives and she ran away to the man of her choice she was allowed to remain there until she had several children and then was called upon to return with her children to her late husband's kraal. This she usually did but where a poor man left a widow who attached herself to a rich man the rich man would repulse the efforts of the poor man's people to obtain the widow's return and would allow them as recompense to take the *ihashi* cattle—the widow's *lobolo* value at the time of her husband's death.

Question 3:

If a woman left her husband and lived with another man who paid her *lobolo* value to her husband what would be the position in Zulu custom?

Answer:

The *ihashi* custom cannot take place where the husband of the deserting woman was still alive. If the woman's *lobolo* value were paid by the man to the husband of the woman the payment

would be outside the law. No divorce as a result of such payment would result and any children born to the second man by the woman would belong to her lawful husband.

Question 4:

What was the position when a woman tired of her husband and left him for another man?

Answer:

The husband's only remedy was to go to his wife's father and demand the return of his cattle. If the father told the husband that his wife was at the other man's kraal the husband would never go there to demand his cattle direct as he would be afraid that he would be killed. If the husband chased the wife away saying he did not want her any more the husband could get no cattle back.

Question 5:

Could a man divorce his wife extra-judicially in Zulu custom? If a man chased his wife away was not that regarded as the dissolution of the union?

Answer:

In Zulu custom the wife would go back to her father and report to him. If the husband declared he did not want his wife any more he would forfeit his cattle and that would be the end of it but it would have to be done before the Induna.

Question 6: (By Mr. Attorney Schreibe).

If a wife left her husband for another man could the husband approach that man for his *lobolo* instead of first going to the wife's father? If the other man paid the husband what would be the position regarding the children born to the other man and the wife?

Answer:

The children of the second union belonged to the lawful husband, not to the man with whom the wife lived after leaving her husband.

Question 7: (By Mr. Attorney Schreiber).

How were divorces come by in the old Zulu custom? What happened if a wife left her husband and went to stay with another for any length of time?

Answer:

There were no divorces in old Zulu custom. There was no return of cattle from the woman's father. It happened later that *lobolo* came to be returned but it was not in accordance with ancient custom. But divorce could not be arranged privately, the parties had to go to their chiefs.

For Appellant: Mr. S. H. Brien, instructed by J. Gerson.
For Respondent: Mr. Schreiber of Davidson & Schreiber.

SOUTHERN NATIVE APPEAL COURT.

MDA *v.* GCANGA.

N.A.C. CASE No. 62 OF 1956.

UMTATA: 18th February, 1957. Before Balk, President, Warner and Bates, Members of the Court.

LAW OF DELICT.

Seduction—Presumption of virginity—Parentage denied—Onus when intercourse admitted—Quantum *of damages.*

EVIDENCE.

Letter written partly in English and partly in Xhosa not admissible without translation—Discrepancy between pleadings and evidence—Effect on credibility.

Summary: Plaintiff, a teacher, successfully sued defendant in a Native Commissioner's Court for damages for seduction and pregnancy, and defendant appealed on the grounds that

the judgment was against the weight of evidence, the proved facts and probabilities, and that the damages awarded were too high. Defendant alleged that plaintiff was not a virgin as she told him she had had intercourse previously with some other man. He did not cross-examine her when she gave evidence of her virginity at the time of her first intercourse with him.

Held: That in the absence of cross-examination of plaintiff on the question of her alleged prior relations with another man, defendant's evidence to this effect carried little weight, and he has not discharged the onus of rebutting the presumption of plaintiff's virginity arising from the undisputed fact that she was a spinster.

Held further: That the injunction that documents not written in either of the official languages should not be admitted as evidence, without a translation in one of those languages includes documents which are written partly in an official language and partly in another language.

Held further: That where a party to an action did not personally instruct her attorney no inference adverse to her credibility can be drawn from any discrepancy between her pleadings and evidence.

Held further: That, on a question of paternity, a man is bound by an admission of intercourse before confinement even if such admission relates to a period other than that at which conception could have taken place, if he cannot establish that it was physically impossible for him to be the father of the plaintiff's child.

Held further: That where plaintiff is out of work as a result of pregnancy she is entitled to a sum equivalent to three months' salary, to cover her maintenance as part of her lying-in expenses.

Held further: That the quantum of damages recoverable under Native law is no criterion in the assessment under common law of damages for seduction.

Cases referred to:

Nojantsholo *v.* Godo, 1941 N.A.C. (C. & O.) 81.
Dhlamini *v.* Mbele, 1953 N.A.C. 37 (N.E.).
Seedat *v.* Tucker's Shoe Co., 1952 (3) S.A. 513 (T.P.D.).
Bacela *v.* Mbontsi, 1956 N.A.C. 61 (S.).
Van der Westhuizen *v.* Maritz, 1927 C.P.D. 108.
MacDonald *v.* Stander, 1935 A.D. 325.
Bujela *v.* Mfeka, 1953 N.A.C. 119 (N.E.).
Ex parte Minister of Native Affairs: *In re* Yako *v.* Beyi, 1948 (1) S.A. 388 (A.D.).
Magwentshu *v.* Molete, 1930 N.A.C. (C. & O.) 40.

Appeal from the Court of the Native Commissioner, Umtata.

Balk (President):—

This is an appeal from the judgment of a Native Commissioner's Court for plaintiff (now respondent) as prayed, with costs, in an action in which she sued the defendant (present appellant) for £100 as damages for her seduction by him in January, 1955.

In his plea the defendant denied the alleged seduction.

The appeal is brought on the following grounds:—

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

2. That the damages awarded in this case are excessive and too high and not justified by the evidence and circumstances of the whole case."

Apart from certain letters which were put in at the trial, the only evidence adduced thereat was that of the plaintiff and the defendant.

In his evidence the defendant admitted that he had sexual intercourse with the plaintiff during August and September, 1954, but denied both that he had further relations with her and that he was the father of her child born in October, 1955, as alleged by her. The defendant also denied that the plaintiff was a virgin at the time he first had intercourse with her in August, 1954, as she had told him that she had had relations with another man prior thereto.

The plaintiff testified that she was a virgin when she first had sexual intercourse with the defendant and, as she was not cross-examined as to whether she had told the defendant that she had prior relations with another man, his evidence to that affect carries little weight and he cannot be said to have discharged the onus resting on him of rebutting the presumption that the plaintiff was a virgin arising from the undisputed fact that she was a spinster, see Nojantsholo *v.* Godo, 1941 N.A.C. (C. & O.) 81, at page 82. Moreover, the Additional Native Commissioner states in his reasons for judgment that the plaintiff's whole attitude and demeanour in the witness box indicated that she was speaking the truth. There was no hesitation whatever in her replies to questions and although she was subjected to a searching cross-examination she did not falter. She struck him as a singularly frank and straight-forward witness whom he had no hesitation in believing; whereas of the defendant he states that his whole attitude and demeanour in the witness box left him with the conviction that he was not speaking the truth. It is true that, as pointed out by Counsel for appellant, there are seeming discrepancies between certain statements in the plaintiff's letter (Exhibit " B " and her evidence. But these discrepancies are more apparent than real. That this is so becomes evident if the statements are read in their context i.e. on reading the whole of the letter (Exhibit " B ") and not only the passages in English containing the statements in question. Here it should be mentioned that the Additional Native Commissioner admitted documents, including the letter (Exhibit " B "), which are partly in English and partly in Xhosa, without a translation in one of the official languages of the passages in Xhosa. He states in his reasons for judgment that he regarded only the passages in English as admissible in evidence. But such a procedure cannot be countenanced in that it results in the passages in English being read out of their context which lends itself to faulty conclusions by the Court as regards what the writer intended to convey. The injunction in Dhlamini *v.* Mbele, 1953 N.A.C. 37 (N.E.), at page 38, that documents not written in either of the official languages should not be admitted without a translation in one of those languages, accordingly falls to be construed as including also those documents which are written partly in an official language and partly in another language as in the instant case.

Counsel for appellant contended further that the plaintiff's evidence was not worthy of credence as it was at variance with the particulars of her claim as regards when she was seduced by the defendant. But not only did the plaintiff's testimony in this respect accord with the particulars of her claim, as amended, with the leave of the Court *a quo* and the omission to amend paragraph 3 of those particulars obviously does not affect this position, but it is manifest from the plaintiff's evidence that she did not personally instruct her attorneys so that in any event no inference adverse to her credibility can be drawn from any discrepancy between her pleadings and evidence, see Seedat *v.* Tucker's Shoe Co., 1952 (3) S.A. 513 (T.P.D.), at page 516.

It follows that the Additional Native Commissioner cannot be said to be wrong in his finding that the plaintiff was a virgin when the defendant first had sexual intercourse with her and that this occurred in 1955. Here it should be mentioned that the question of the corroboration of the plaintiff's evidence does not arise in view of the defendant's admission that he had sexual intercourse with her.

Turning to the question of the paternity of the plaintiff's child, the principles to be applied in determining the incidence of the onus of proof in regard thereto are those under common law as the Court *a quo* decided the case according to that legal system. Consequently, in order to succeed in establishing his denial of parentage, it was incumbent on the defendant to prove that it was physically impossible for him to be the father of the child, see Bacela *v.* Mbontsi, 1956 N.A.C. 61 (S.).

Counsel for appellant submitted that this rule was not opposite here as it was limited to admissions which were in respect of intercourse that had taken place not more than twelve months before confinement, whereas in the instant case the defendant's admission related to intercourse with the plaintiff which had occurred thirteen to fourteen months prior to confinement. In support of his submission Counsel cited the following passage from Christinaeus quoted in Maasdorp's Translation of Grotius, at page 325, and referred to in Van der Westhuizen *v.* Maritz, 1927 C.P.D. 108, at page 109, and in Bacela's case (*supra*):—

> "If the man admits connection, the woman is to be believed in her identification of the father, and this holds even if he acknowledges that he had connection with her only a month or a year before the confinement, because, the connection being in any way admitted, he is not believed as to the time he may fix upon in order to free himself."

But, to my mind, this submission is not well founded; for, as is evident from the reason underlying the rule quoted above, the period of twelve months is not intended as a rigid time limitation but to serve as an indication that a man is bound by an admission of intercourse before confinement even if such admission relates to a period other than that at which conception could have taken place. That this is the position is confirmed by the authority cited in MacDonald *v.* Stander, 1935 A.D. 325 in the antepenultimate paragraph at page 329.

That being so and as it is manifest from the evidence that the defendant did not establish that it was physically impossible for him to be the father of the plaintiff's child, the first ground of appeal fails.

Turning to the remaining ground of appeal, it is not disputed that the plaintiff was a teacher in receipt of a salary of £12 per month and that as a result of her pregnancy she was out of employment so that she is entitled to a sum equivalent to three months' salary, i.e. £36, to cover her maintenance as part of her lying-in expenses, see Bujela *v.* Mfeka, 1953 N.A.C. 119 (N.E.), at page 122

Counsel for appellant contended that the balance of £64 as general damages was excessive as it exceeded the flat rate *quantum* recoverable under Native law by the plaintiff's guardian for her seduction. But, as pointed out by the Additional Native Commissioner, the *quantum* recoverable under Native law is no criterion in the assessment under common law of damages for seduction, see *Ex parte* Minister of Native Affairs: *In re* Yako *v.* Beyi, 1948 (1) S.A. 388 (A.D.), at page 401, cited by him.

In the case of Magwentshu *v.* Molete, 1930 N.A.C. (C. & O.) 40, the Court, on appeal, increased the general damages for seduction to £50 on the ground that the plaintiff was an educated girl, having held the post of teacher. Since then the purchasing power of money has depreciated to such an extent that £64 today cannot be said to be more than the equivalent in value of £50 in 1930 so that £64 cannot be said to be excessive as general damages in the instant case, having regard to the fact that the plaintiff is a teacher and taking into account all the other relevant factors.

The second ground of appeal, therefore, also fails and the appeal falls to be dismissed, with costs.

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

A. C. Bates (Member): I concur.

For Appellant: Mr. Vabaza, Libode.

For Respondent: Mr. White, Umtata.

SOUTHERN NATIVE APPEAL COURT.

NGOZI *v.* **TITI.**

N.A.C. CASE No. 63 OF 1956.

UMTATA: 19th February, 1957. Before Balk, President, Warner and Bates, Members of the Court.

ACTIONABLE WRONGS.

Seduction—Assessment of damages suffered by deflowered girl.

Summary: Plaintiff successfully sued defendant for damages for seduction and pregnancy. On appeal defendant (appellant) contended that damages were excessive and too high and on his behalf it was argued that damages—under common law—should bear some relation to the amount which would be recoverable if the claim had been made under Native custom.

Held: That, as there appears to be no reasonable ground for limiting the damages recoverable by a woman under common law to the flat rate amounts recoverable by her guardian under Native law, and the amount awarded as general damages did not appear excessive, the appeal should fail.

Cases referred to:

Mzozoyana *v.* Madinga, 1 N.A.C. 103 (S.D.).

Mafunda *v.* Xazwe, 1 N.A.C. 87 (S.D.).

Ex Parte Minister of Native Affairs: *In re* Yako *v.* Beyi, 1948 (1) S.A. 388 (A.D.).

Appeal from the Court of the Native Commissioner: Umtata.

Warner (Permanent Member):—

This is an appeal against a judgment of a Native Commissioner's Court for plaintiff (present respondent) as prayed, with costs, in an action in which she sued defendant (present appellant) for £60 as damages for seduction and pregnancy.

In his plea the defendant denied the allegations that he had seduced plaintiff and made her pregnant.

He also objected to the jurisdiction of the Native Commissioner's Court for the district of Umtata on the ground that he is a resident of the district of Libode. This objection was overruled and was raised as the first ground of appeal in the notice thereof but as this ground was abandoned in this Court it is not necessary to make any further mention of it.

The grounds of appeal which fall to be considered are as follows:—

"2. That the judgment of the case on the merits was against the weight of evidence, the facts proved and the probabilities of the case as a whole.

3. That the damages awarded were excessive and too high and against the weight of the evidence and the proved facts."

In her evidence plaintiff stated that she left her home in a rural location and took up employment as a domestic servant in the town of Umtata in February, 1954, that defendant seduced her and made her pregnant during the same month, as a result of which she gave birth on 24th November, 1954.

Plaintiff also stated that, when she discovered that she was pregnant, she informed defendant. They continued to have intercourse and, later, defendant sent her to East London, giving her £2 for her bus fare, to stay with his cousin Amos Mbanxa. She stayed with Amos for a few days and he then sent her to Matthews Mabango. A report was made to her father as a result of which she returned to Umtata on 11th October, 1954. Her father and William Mbulu Titi took her to defendant at his place of employment. Defendant admitted liability and promised to pay three head of cattle and £20 as damages.

Plaintiff produced a letter and envelope which, she stated, she found on her bed in April, 1954. The envelope is addressed to defendant. She also produced a registered envelope addressed to her in East London and a note. The note is unsigned but plaintiff testified that it was written by defendant and that a £1 note was also enclosed in the envelope. Another exhibit was a certificate of exemption from pass laws, affixed to which is a photograph of defendant, below which is his signature. According to plaintiff, defendant left this certificate in her room on the occasion of one of his visits to her.

Under cross-examination, plaintiff stated that, when defendant visited her on one occasion, a friend of hers named Ethel was visiting her so she placed a mattress on the floor on which Ethel slept while she (plaintiff) and defendant occupied the bed; and that on subsequent occasions Ethel saw the parties together in the same room.

It was stated that Ethel had been expected at Court but did not arrive, so she did not give evidence.

Plaintiff's evidence, however, received corroboration from that of William Bulu Titi who supported her statement that, in October, 1954, he accompanied plaintiff and her father on a visit to defendant at his place of employment for the purpose of demanding damages and that defendant admitted liability and said that he was going to pay three head of cattle and £20.

Counsel for appellant has pointed out a discrepancy between the evidence of plaintiff and that of William Titi. The former stated that defendant admitted liability and stated that he was going to pay three head of cattle and £20, implying that this promise was made in her presence, whereas the latter stated that, when plaintiff was present, defendant merely admitted responsibility and said that he would consult his relatives and that it was on a subsequent occasion, when plaintiff was not present, that defendant said that he would pay three head of cattle and £20. In his reasons for judgment, the Native Commissioner mentioned that there are discrepancies in the evidence but pointed out that regard must be given to the fact that the witnesses were giving evidence concerning events which had occurred about two years previously. He also stated that he found plaintiff to be a truthful and reliable witness.

Defendant admitted that he knew plaintiff but denied that he had been intimate with her. He denied that he was the cause of her seduction and pregnancy. He also denied that plaintiff and William Titi came to him in regard to plaintiff's pregnancy but admitted that plaintiff's father did so. He denied that the notes produced by plaintiff were in his handwriting. He stated that he did not know how he lost his exemption certificate bearing his photograph and offered no suggestions as to how it could have come into plaintiff's possession. The Native Commissioner stated, in his reasons for judgment, that defendant was not a very good witness and seemed to be most uncomfortable in the witness box and that his demeanour was not what one would expect to find if he were innocent.

In view of what has been stated above, it cannot be said that the Native Commissioner was wrong in finding that plaintiff had proved her allegation that defendant seduced her and made her pregnant and the first ground of appeal, therefore, fails.

In arguing the second ground of appeal, appellant's Counsel has invited attention to the cases of Mzozoyana *v.* Madinga, 1 N.A.C. 103 (S.D.) and Mafunda *v.* Xazwe, 1 N.A.C. 87 (S.D.) in which it was stated that the damages awarded in a case of this nature, when brought under common law, should bear some relation to the amount which would be recoverable if the claim had been made in terms of Native custom. It was stated, however, in the case of *Ex parte* Minister of Native Affairs: *In re* Yako *v.* Beyi,

1948 (1) S.A. 388 (A.D.), on page 401, that there appears to be no reasonable ground for limiting the damages recoverable by the woman under common law to the flat rate amounts recoverable by her guardian under Native law.

Plaintiff stated that she spent £5 on a layette for the child and the Native Commissioner appears to have intended that the balance of £55 awarded should be general damages. Plaintiff stated that defendant induced her to relinquish her employment and go to East London and when she returned to Umtata on 11th October, 1954, she was unable to resume employment as she was in an advanced state of pregnancy. She did not state, however, what amount she received in wages when she was employed so that there is no basis on which to calculate the amount to which she is entitled as maintenance in respect of lying-in expenses. She stated, however, that she has passed standard 8 and is not a red blanket Native so that the amount of £55 awarded as general damages does not appear to be so excessive that this Court would be justified in reducing it, bearing in mind the decreased purchasing power of money at the present time.

The second ground of appeal also fails and the appeal should be dismissed, with costs.

H. Balk (President: I concur.

A. C. Bates (Member): I concur.

For Appellant: Mr. Vabaza, Libode.

For Respondent: Mr. White, Umtata.

SOUTHERN NATIVE APPEAL COURT.

NCOKO & ANOTHER *v.* AROSI.

N.A.C. CASE No. 65 OF 1956.

UMTATA: 19th February, 1957. Before Balk, President, Warner and Bates, Members of the Court.

PRACTICE AND PROCEDURE.

On application for postponement Native Commissioner should ensure full canvass of factors vital to application of unrepresented applicant—Adjudication upon incomplete facts not a proper discretion.

Summary: Plaintiff having obtained judgment against the defendants for the seduction of his daughter by first defendant, the son of the second defendant, who was the responsible kraalhead, both defendants appealed *inter alia* on the ground that the presiding judicial officer erred in refusing their application for a postponement at the end of their case to enable them to subpoena a witness who had failed to attend court that day.

Held: that, on the question of postponement, although the first defendant did not establish that it was through no fault of his own that the evidence was not available at the moment, as he was not legally represented, the Native Commissioner should have assisted him to ensure that his application was fully canvassed on vital factors which were not clarified.

Held further: That, as the application for postponement was adjudicated upon incomplete facts, the Native Commissioner cannot be said to have exercised a proper discretion in the matter.

Cases referred to:

Estate Norton *v.* Smerling, 1936 O.P.D. 44.

Appeal from the Court of the Native Commissioner: Cala.

Balk (President):—

This is an appeal from the judgment of a Native Commissioner's Court for plaintiff (now respondent) as prayed, with costs, in an action in which he sued the two defendants (present appellants) for five head of cattle or their value, £50, as damages. In the particulars of his claim the plaintiff averred:—

" 1. That the parties hereto are Natives as defined by Act No. 38 of 1927.
2. That the plaintiff is the father and guardian of the above-said Ruth Pindiwe and the second defendant is the father and kraalhead of the said Mwaka, the first-named defendant and was such at the time of the alleged delict.
3. That about or during December, 1954, and at the Matanzima Secondary School, Xalanga, the first-named defendant wrongfully and unlawfully seduced and rendered pregnant plaintiff's said daughter, Ruth Pindiwe.
4. That in the premises the plaintiff has suffered damages to the extent of 5 head of cattle or £50 their value, for which plaintiff holds defendant liable, jointly and severally, and for which plaintiff now makes claim.
5. That the customary report was made to both defendants who, however, denied liability.
6. That despite demand defendants neglect and/or refuse to make payment."

The defendants pleaded as follows:—

" 1. That they admit paragraph 1 of the particulars thereof.
2. That they admit paragraph 2 of the particulars thereof.
3. That defendant No. 1 denies the allegations in the 3rd paragraph of the plaintiff's particulars of claim and puts plaintiff to the proof thereof.
4. That they deny the 4th paragraph of plaintiff's particulars of claim and put plaintiff to the proof thereof. That in any event even if plaintiff were to prove that he has suffered damages defendants deny that they would be responsible for such damages.
5. That they admit the 5th paragraph of plaintiff's particulars of claim.
6. That paragraph 6 of the particulars of claim is likewise admitted by defendants.

Wherefore in the premises set out *supra* defendants pray for Judgment in their favour with costs."

The appeal is brought on the following grounds:—

" 1. That the Judgment is against the weight of evidence and is not supported thereby.
2. That the presiding judicial officer erred in accepting the uncorroborated evidence of Ruth Pindiwe as to the dates on which she alleges she met defendant No. 1 when she alleges she was seduced and rendered pregnant by defendant No. 1, that is, the 4th and 6th December, 1954. In accordance with law she had to be corroborated with regard to meeting defendant No. 1 on these dates.
3. That the evidence of Ruth Pindiwe was most unreliable and unworthy of credence as she contradicted her own evidence in Criminal Case No. 437 of 1955, where she stated, *inter alia*, that she had intercourse with defendant No. 1 on the 4th and 6th December, 1954, and stated further, 'I have not had intercourse since the two occasions either'.
4. That the Court erred in accepting the evidence of Mquqwana who had been brought by the Police in Criminal Case No. 437/55, to substitute the names of Tshijila who had been called by the Court after having been mentioned by Ruth Pindiwe and her witnesses as being the man who was chairman of the concerts referred

to and who is alleged to have called out defendant No. 1's name for singing and who had stated he knew nothing about that and was consequently abandoned by the Police.

5. The presiding judicial officer erred in refusing defendant's application for postponement of the case at the end of their case in order to subpoena the witness R. Ncoko who actually circumcised Mawaka Ncoko, and whose failure to attend Court, the defendants knew nothing about, as he had willingly given evidence for defendant No. 1 in Criminal Case No. 437/55."

Counsel for appellant abandoned the fourth ground of appeal and properly so as it is not covered by the evidence.

Beyond stating that there appears to me to be little merit in the first three grounds of appeal, I do not propose to deal with them as, to my mind, the appeal should succeed on the remaining ground i.e. the fifth ground.

Proceeding to a consideration of this ground, the Native Commissioner gives the following reasons for his refusal of the first defendant's application for a postponement to enable him to call his witness, Ncobo:—

> "In applying for a postponement so that he could call his witness R. Ncoko, Mawaka (first defendant) informed the Court that he had seen Ncoko the previous week but he had not reminded him about the case. This seemed to me to show a singular lack of interest on the part of Mawaka. He did not know whether his attorney (who did not appear at the trial) had subpoenaed Ncoko but no subpoena is filed of record. No allegation is made in the Notice of Appeal that a subpoena was in fact issued and I assume that one was not issued, here again a singular lack of interest. In the circumstances I submit that I was justified in refusing the postponement."

It was laid down in Estate Norton *v.* Smerling, 1936 O.P.D. 44, at page 54, that the Court should exercise its discretion in favour of a defendant applying for an adjournment to obtain further evidence if he establishes—

"(1) that the evidence he desires to make available is relevant and material to an issue in the case;
(2) that there is such further evidence to be had; and
(3) that it is through no fault of his own that the evidence is not available at the moment".

As conceded by Counsel for respondent, the first two conditions are met in the instant case, but he contended that the first defendant had not established that it was through no fault of his own that Ncoko's evidence was not available.

It is true that the first defendant did not establish that the third condition obtained. But this aspect falls to be considered in its proper perspective. It is manifest from the record that the defendants were not legally represented at the trial, the position being that they had made arrangements for an attorney to represent them, that this attorney advised the plaintiff's attorney at the last moment i.e. on the evening preceding the day of the trial, that he was unable to appear thereat and asked him to agree to a postponement, and that the plaintiff's attorney declined to do so both then and at the trial the next day when the Court ordered that the trial should proceed. In these circumstances it seems to me that the Native Commissioner should have assisted the first defendant to ensure that his application was fully canvassed. That this was not done is apparent from what follows. The first defendant's statement that he had seen Ncoko in town and had not reminded him of the case suggests that he had asked him to bear witness. It was not, however, elecited whether the first defendant had in fact done so and, if so, whether Ncoko had agreed to give evidence, both vital factors in adjudicating upon the application; for the practice here is not to subpoena witnesses where they are agreeable to

appear without subpoenas so that the fact that the first defendant could not say whether Ncoko had been subpoenaed is not conclusive. Moreover, the first defendant's attorney, who could perhaps have thrown some light on this respect, did not appear, apparently through no fault of the first defendant. The fact that the first defendant omitted to remind Ncobo of the case is also not conclusive as his failure to remind Ncoko of the case may have been inadvertent and if, in fact, Ncoko had agreed to give evidence and had been informed of the date of the trial, it is not unreasonable for the first defendant to assume that Ncoko would appear at the trial even if he did not remind him. It follows that the application was adjudicated upon on incomplete facts and the Native Commissioner cannot, therefore, be said to have exercised a proper discretion in the matter. Here I wish to make it clear that I do not intend to convey that the Native Commissioner did so wittingly. On the contrary, the record indicates that neither the case of Estate Norton v. Smerling (*supra*) nor any other authority was referred to.

It seems to me that, in the circumstances, it is no more than just that the judgment of the Court *a quo* and its decision on the application should be set aside and that the case should be remitted to that Court for the application to be properly canvassed and thereupon for a fresh decision thereon and a fresh final judgment. Counsel for both parties agreed that in the event of this Court's deciding to adopt this course the costs of appeal should abide the final judgment in the case.

In the result, the appeal should be allowed and the judgment of the Court *a qou* and its decision on the application should be set aside and the case be remitted to it for the application to be properly canvassed and thereupon for a fresh decision thereon and a fresh final judgment. Costs of appeal to abide the final judgment.

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

A. C. Bates (Member): I concur.

For Appellants: Mr. Christolm, Umtata.

For Respondent: Mr. Muggleston, Umtata.

SOUTHERN NATIVE APPEAL COURT.

MZIMKULU *v.* **VUTELA.**

N.A.C. Case No. 72 of 1956.

Umtata: 19th February, 1957. Before Balk, President, Warner and Bates, Members of the Court.

PRACTICE AND PROCEDURE.

Interpleader—Onus of proof on claimant where stock attached in judgment debtor's possession—Effects of failure to exercise ownership over alleged nqoma *stock—when discrepancies are vital.*

Summary: Certain cattle were attached at the judgment debtor's kraal. Appellant, then claimant, who has his own kraal, laid claim to the cattle and an interpleader action, in which he was unsuccessful, was instituted. He appealed on the ground that the judgment was against the weight of evidence.

Held: That, as the cattle were attached in the judgment debtor's possession, the onus of proving that they belonged to claimant rests upon the latter.

Held further: That, where a person fails, without good reason, to exercise acts of ownership over alleged *nqoma* stock this detracts from the merits of his case.

Held further: That, where discrepancies in the evidence for claimant were, in regard to matters closely connected with the transaction, relied upon by him, they must be regarded as vital, particularly where it is alleged that the stock passed to him in circumstances indicating that he relied upon *constitutum possessorium.*

Cases referred to:

Gulani *v.* Gamkile, 1 N.A.C. (S.D.) 279.

Goldinger's Trustee *v.* Whitelaw & Son, 1917 A.D. 66.

Appeal from the Court of the Native Commissioner: Qumbu.

Balk (President):—

This is an appeal from the judgment of a Native Commissioner's Court in an interpleader action, declaring certain two head of cattle, viz. a red cow and its progeny a red heifer, to be executable.

The appeal is brought by the claimant on the ground that the judgment is against the weight of the evidence.

It is manifest from the claimant's testimony that the cattle were attached at the judgment debtor's kraal. It is also manifest from the claimant's evidence that he has a separate kraal so that the onus of proving that the cattle were his property rested on him.

As submitted by Counsel for respondent, it is evident from the Assistant Native Commissioner's reasons for judgment that his approach to the case was correct; for, in arriving at his finding that the claimant had not established his case, he bore in mind that the respondent had not controverted the evidence for the claimant; and he has given cogent reasons in support of this finding viz. firstly, the claimant's failure to earmark the red heifer notwithstanding that it was, according to him, *nqomaed* at the judgment debtor's kraal, and, secondly, the discrepancies in the evidence for the claimant. The claimant stated that he did not earmark the red cow as his earmark was already included in the earmarks on it when he purchased it. But his reason for failing to earmark the red heifer, viz., that he did not expect trouble, cannot be regarded as satisfactory, bearing in mind that, according to him, it was *nqomaed* and his failure to earmark it, therefore, detracts from the merits of his case, see Gulani *v.* Gamkile, 1 N.A.C. (S.D.), 279, at page 280.

Counsel for appellant contended that the discrepancies in the evidence for the claimant were of a minor nature and did not, therefore, justify the rejection of that evidence. But, as pointed out by Counsel for respondent, the discrepancies were in regard to matters closely connected with the transaction relied upon by the claimant, i.e. the alleged purchase by him of the red cow, and so must be regarded as vital, particularly as the evidence for the claimant fell to be scrutinised carefully by the Court in that, according to the claimant, the ownership of the red cow on its purchase passed to him in circumstances indicating that he relied on the doctrine of *constitution possessonium,* see Goldinger's Trustee *v.* Whitelaw & Son, 1917, A.D. 66, at pages 75, 85, 86 and 91.

It follows that it has not been shown that the Native Commissioner was wrong in finding that the claimant had not established his case and the appeal should accordingly be dismissed, with costs.

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

A. C. Bates (Member) I concur.

For Appellant: Mr. Chisholm, Umtata.

For Respondent: Mr. Muggleston, Umtata.

CENTRAL NATIVE APPEAL COURT.

BROWN *v.* DUBE.

N.A.C. CASE No. 29 OF 1956.

JOHANNESBURG: 20th February, 1957. Before Wronsky, President, Menge and O'Driscoll, Members of the Court.

NATIVE CUSTOM.

Custody of minor child—Trafficking in children.

Summary: The guardian of a woman who had a minor child sued the child's paternal grandfather for its custody. The grandfather claimed to be entitled to custody by virtue of having paid damages in respect of its mother's seduction by his son and also some *lobola*. The father of the child took no part in the proceedings.

Held: That whether or not the father of the child and its mother had contracted and were partners in a valid customary union the grandfather had no rights to the custody of the child as against its mother's guardian.

Appeal from the Court of the Native Commissioner, Johannesburg.

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

In this matter the plaintiff sued the defendant for the custody of a minor child born to the daughter of his late brother. He maintained that he is the woman's guardian, and that the defendant, whose son is the natural father of the child, has it in his possession unlawfully.

The defendant pleaded that he is entitled to the child because he was the grandfather and because he paid *lobola* and damages in respect of seduction of the child's mother. This plea does not, of course, disclose a defence; but the parties were not represented and no exception was taken. Instead lengthy evidence was heard from which it emerges as common cause that the defendant's son and the child's mother lived together for a time and that damages for seduction and some, but not all the *lobola*, had been paid. The woman was never handed over and the defendant himself stated in evidence that there was no customary union.

The Native Commissioner made the following order:—

> "For plaintiff for the custody of the child Vuyizile born to Deliwe on the 29th May, 1952, and defendant is ordered to deliver the said child to plaintiff at his home at 3320 Orlando East at 8 a.m. on Thursday the 8th November, 1956. Defendant to pay costs of this action."

Against this judgment the defendant now appeals on various grounds; but the burden of these is, firstly, that the judgment is against the weight of the evidence and secondly, that there is a valid customary union between the defendant's son and the child's mother.

It is clear that the appeal cannot succeed, whatever view one takes of the Native Commissioner's assessment of the evidence. We cannot, however, find fault with his finding that there was no customary union. If, as the defendant himself said in evidence, there was no valid customary union, then the child belongs to the plaintiff as guardian of its mother. The fact that the defendant paid some *lobola* and damages for the seduction on behalf of his son cannot entitle him to the custody of the child. That, as the Native Commissioner points out, would be bartering in children. On the other hand even if as Mr. Stoller on behalf

of the appellant endevoured to show, there had been a customary union the defendant would still not be entitled to the custody of the child as he is not the husband of its mother. Mr. Stoller admitted this but argued that the plaintiff, for his part is also not entitled as against the defendant or anyone else to the custody of the child. Only the father could sue for its custody. This is, of course, not the attitude adopted by the appellant in his pleadings and in his evidence in the court below where he claimed to be entitled to the child by reason of having paid *lobola* on behalf of his son; but the difficulty about this argument is that if there was a customary union there is nothing to show that it has been dissolved; and consequently, if the child and the mother have been abandoned by the father, as appears to be the case from the evidence, there is no reason in Native law why the plaintiff should not claim it as against a third party who has no claim to it whatsoever.

The appeal is dismissed with costs; but it is necessary to extend the order made by the Native Commissioner which has since expired. That can be done by this Court; and, as the parties before us have agreed upon the 3rd March, 1957, as a suitable date for the handing over of the child, the order of the Native Commissioner is amended by the deletion of the words " at 8 a.m. on Thursday the 8th November, 1956 ", and the substitution therefor of the words " not later than 8 a.m. on the 3rd March, 1957."

For Appellant: Adv. I. Stoller, instructed by Messrs Michael Friedland.

Respondent in person.

CENTRAL NATIVE APPEAL COURT.

DUBAZANA *v.* **NOMADOLO.**

N.A.C. CASE No. 32 OF 1956.

JOHANNESBURG: 20th February, 1957. Before Wronsky, President, Menge and O'Driscoll, Members of the Court.

ADMINISTRATION OF ESTATES.

Ejectment from site in municipal location—Cancellation of site permit without regard to statutory requirements—Administration of estate—Re-opening of finalised estate.

Summary: The defendant had been declared heir by the Native Commissioner in an estate of which a municipal location stand formed part. He had obtained a site permit in respect of the stand. Later the Native Commissioner, acting on fresh information, reversed his decision and, informing the location superintendent accordingly, asked him to sell the stand for the benefit of the estate. This was done. A new permit was issued to the buyer (plaintiff) and thereafter the location superintendent, without notice to the defendant, cancelled his permit in view of the Native Commissioner's request. The defendant, however, refused to leave. The plaintiff thereupon sued successfully for the ejectment of the defendant. On appeal against this judgment—

Held: Reversing the decision, that defendant's site permit had been cancelled illegally and he was consequently not in unlawful possession.

Held further: That the Native Commissioner, having finalised the estate by declaring the defendant heir to the property had no power thereafter to review and withdraw that decision.

Statutes referred to:

Administrator's Notices Nos. 268 of 22nd May, 1935, and 853 of 21st September, 1955.
Government Notice No. 1664 of 1929, Section 3.

Appeal from the Court of the Native Commissioner, Springs.

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

Plaintiff Solomon Nomadolo sued for the ejectment of John Dubazana from Stand No. 1091, Payneville Location, Springs.

The facts of this case are that defendant lawfully resided on Stand 1091 since 1935 when Piet Dubazana was the site permit holder. Klaas Dubazana was subsequently granted the site permit on 2nd July, 1940. Klaas died on 23rd March, 1955. In an affidavit made before the Native Commissioner, Springs, defendant alleged he was a son and heir of Klaas. Acting on this information the Native Commissioner on 22nd July, 1955, directed the Superintendent of the location to transfer Site 1091 to defendant—*vide* Exhibit "H". This was done on 27th July, 1955, when a site permit was issued in his favour. Subsequently on the 5th August, 1955, Ellie, a Native woman appeared before the Native Commissioner and in a sworn affidavit alleged that she was the only child of the late Klaas Dubazana and denied that John was a son of Klaas. Thereupon the Native Commissioner called before him Elias Dubazana, Zitha Dubazana, Ellie Dlanqamanele and John Dubazana when a statement was taken in which they all are alleged to have agreed that Elias was the rightful heir in the estate.

On the 6th August, 1955, the Native Commissioner again communicated with the Superintendent of the location—Exhibit "G"—advising him that he should disregard the instructions contained in Exhibit "H" and at the same time authorised the sale of the buildings on the site to the highest bidder. The site was duly advertised and sold to the plaintiff in this action. The proceeds were subsequently paid to Elias. No action at this stage was taken for the cancellation of defendant's site permit.

During these proceedings defendant's attorney was in constant communication with the Superintendent and Native Commissioner, advising them of defendant's claim to the stand.

The Superintendent in evidence stated that in terms of the Native Commissioner's new directions a site permit was issued to plaintiff—Exhibit "A". This permit is in fact not a site permit but a residential permit.

The defendant was requested by Ellie to vacate the premises whereupon he consulted his attorney. It was only on the 11th October, 1955—Exhibit "R"—that defendant received an official communication from the Superintendent advising him that his site permit was cancelled *on that date* and that the improvements had already been sold and the site had been transferred to the plaintiff. Defendant was also called upon to vacate the site immediately.

Judgment was entered for plaintiff with costs—against which defendant noted an appeal on the grounds that the judgment was against the evidence and the weight of evidence and that it was bad in law as set out in the notice.

After the close of the plaintiff's case the attorney for the defendant applied for an absolution judgment and on this being refused he successfully applied for an amendment of his plea by the addition of a clause reading "defendant states further that if the site permit as alleged in plaintiff's summons was issued to plaintiff such permit is invalid and of no force and effect in law".

A large proportion of the evidence was tendered to establish who in fact was the rightful heir to Klaas Dubazana and there seems considerable doubt what the true position is. After the Native Commissioner called the interested parties before him he concluded that Elias, a brother of the deceased, was the rightful heir. The defendant, however, emphatically denies that he agree to this contention as is set out in Exhibit "Q". There appears to be some doubt as to whether this document really reflects what

it purports to do. Simon Monedi, the Native recorder who interpreted when the statement was taken stated "All four whose thumb prints appear on the document agreed that the contents of the documents were correct"—this statement was confirmed by the clerk in charge of tax records. The original document shows that all four including Zitha Dubazana agreed and accepted and signed the statement yet the Assistant Native Commissioner in evidence stated "Zitha did not sign as she could not recollect" but later again admits that the finger prints on the document apparently includes that of Zitha.

Be this as it may the main question to be decided is whether or not the site permit issued to defendant on 27th July, 1955, had been legally cancelled and whether it was competent for the Superintendent to grant plaintiff a residential permit for the site in question in the circumstances.

As has already been pointed out the defendant resided on Site No. 1091 since 1935. The first intimation he received that he was in unlawful occupation was on the 11th October, 195—Exhibit "R"—when he was also advised that his site permit was cancelled on 11th October, 1955, and that the improvements had already been sold and the site transferred to plaintiff. It is significant that the property was sold prior to the cancellation of the permit and also that the residential permit in favour of plaintiff, Exhibit "A", was issued to him on the 6th October, 1955, i.e. five days prior to the cancellation of the permit held by defendant. Incidentally defendant is still in possession of his permit.

When this case commenced Location Regulations No. 268 of 22nd May, 1935, were still in force and a site permit was issued to defendant presumably under section 22 (*a*) of these regulations. Section 22 (*j*) indicates the procedure to be followed in the event of the Council deciding to sell any buildings and erections in circumstances as described in section (*g*). It is clear that defendant was not served with the requisite notice of the intention to sell. Then on the 21st September, 1955, Administrator's Notice No. 268 was repealed and superseded by Administrator's Notice No. 2535 of 21st September, 1955. It was therefore necessary in terms of section 12 (2) of the new regulations for the Superintendent to give defendant one month's notice of his intention to cancel the site permit which he failed to do. The permit was summarily cancelled on the 11th October, 1955.

Furthermore the issue of a residential permit—Exhibit "A"—would also appear to be irregular—*vide* section 4 (1), Ch. III, of Administrator's Notice No. 2535. Such permits can apparently be issued only in respect of municipal dwellings.

The cancellation of defendant's permit in the circumstances described was contrary to the regulations. Furthermore the plaintiff is not the heir to the estate of Klaas and consequently the Superintendent should have satisfied himself that he, the plaintiff, was qualified to occupy a stand in the location before issuing the covering permit. In any event it appears quite irregular to authorize the occupation of a site whilst it was still registered in the name of another person.

The Court finds that the cancellation of defendant's permit was irregular and consequently the defendant was not in unlawful occupation.

There is this further aspect as pointed out by Mr. Helman that the Native Commissioner's authorization to the Location Superintendent to sell the premises was entirely without legal effect. Presumably the Native Commissioner purported to act under the provisions of the regulations governing the administration of Native estates, published under Government Notice No. 1664 of 1929, as amended, but there is nothing in these regulations—and indeed no regulations have been cited—to suggest that a Native Commissioner can reopen an estate once it has been disposed of. No doubt Regulation No. 3 (3) of Government Notice No. 1664 of 1929, enables a Native Commissioner to settle disputes concerning estates, but that power only exists so long as there is an estate to be administered or

distributed. Assuming that the regulations empowered the Native Commissioner to appoint the defendant as heir to the late Klaas, there is nothing to suggest that having done so and having disposed of the estate to the defendant, he can at a later date change his mind and make a fresh order.

Estate property ceases to exist as such as soon as the heir becomes the owner and then, too, the regulations governing its administration cease to apply.

The appeal is upheld with costs and the Native Commissioner's judgment is altered to read "Absolution from the instance with costs".

For Appellant: Mr. H. Helman.

For Defendant: Mr. E. Judes.

CENTRAL NATIVE APPEAL COURT.

MOHALANE AND OTHERS *v.* MOHALANE.

N.A.C. CASE No. 2 OF 1957.

JOHANNESBURG: 26th February, 1957. Before Wronsky, President, Menge and Smithers, Members of the Court.

SUCCESSION.

Applicability of Succession Act, 1934, *in regard to Native civil marriages—Validity of Regulations relating to the administration of Native estates—Cause of action—Absolution from the instance.*

Summary: The defendant was the surviving spouse of one Elias Mohalane to whom she had been married out of community of property under section *twenty-two* (6) of the Native Administration Act, 1927. She had obtained transfer of the estate under the provisions of the Succession Act, 1934. Thereafter she was sued for the estate by four of the deceased's children of a previous marriage in community of property on the ground that they were heirs *ab intestato*. On appeal from a judgment for defendant granted by the Native Commissioner—

Held: The estate of a deceased Native (save as to property specially provided for in section *twenty-three* of the Native Administration Act) who at any time contracted a marriage in community of property must devolve according to common law irrespective of the nature of any subsequent marriage.

Held further: A marriage from which community of property is excluded in terms of section *twenty-two* (6) of the Act, is a marriage out of community of property for the purposes of the Succession Act, 1934.

Held further: Where the merits of a case have not come to trial judgment for defendant should not be granted but absolution from the instance.

Quare: Whether section 2 of the departmental regulations governing the devolution of Native estates is *ultra vires.*

Statutes referred to:

Act No. 13 of 1934.
Sections 22 and 23 of Act No. 38 of 1927.
Section 2 Government Notice No. 1664 of 1929.

Cases referred to:

Ex parte Minister of Native Affairs *in re* Molefe *v.* Molefe, 1946 A.D. 315.
Shata *v.* Shata, 1942 N.A.C. (C. & O.) 42 followed.

Appeal from the Court of the Native Commissioner, Evaton.

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

This is an action concerning the estate of the late Elias Mohalane who died possessed of certain movable and immovable property on the 3rd December, 1940. It appears that the deceased was survived by his widow with whom he had contracted a marriage from which community of property was excluded under the provisions of section *twenty-two* (6) of the Native Administration Act, 1927, and also five children who are now all majors, born of a previous marriage which was in community of property. The widow was invested with the estate and obtained transfer in 1944. In 1956 four of the deceased's children having become aware of the position brought the present action against the widow for an order that she account for the value of the estate and also for a declaration that the plaintiffs are the heirs *ab intestato*.

The plaintiff's right of action is based in the main on the following allegations in the summons:—

> "10. On or about 7th September, 1944, and unknown to plaintiffs, defendant obtained transfer of the said lot into her name on the ground that she was the sole heiress in terms of the Succession Act of 1934 and also the possession of whatever movables had been in the possession of the aforesaid Elias Mohalane.
>
> "11. The defendant obtained transfer by representing to the Native Commissioner at Vereeniging, alternatively to the Registrar of Deeds, that she was the sole heiress and by wilfully failing to disclose that the plaintiff's were children of the aforesaid Elias Mohalane by a prior marriage. The defendant in making the said representation was at all times aware that the said representation was not true.
>
> "14. In truth and in fact at the date of the said death of Elias Mohalane plaintiffs were heirs on intestacy of the aforesaid Elias Mohalane and defendant was aware of this fact."

The plea does not dispute any of the material allegations of fact but denies that the plaintiffs have any rights to the estate.

No evidence was heard. The two marriage certificates and the record of the administration of the estate were handed in, and thereupon, having heard argument, the Native Commissioner granted judgment for defendant with costs.

The plaintiffs then noted an appeal on the following grounds:—

1. That the case of Shata *v.* Shata (1942, N.A.C. (C. & O.) 42, was wrongly decided.
2. That the defendant is not entitled in law to succeed on intestacy to the deceased Elias Mohalane.
3. That the plaintiffs are the legal heirs of the said Elias Mohalane.
4. That the G.N. 1664 of 1929, as amended, was not intended to cover marriages where community of property and profit and loss had been excluded by section *twenty-two* (6) of the Native Administration Act of 1927.
5. That the Act No. 13 of 1934 was not intended to apply to marriages out of community of property as governed by section *twenty-two* (6) of the said Native Administration Act.

The Native Commissioner's reasons are of no assistance. This is a document of a dozen lines drawn quite irresponsibly and in such bad grammar that one cannot make out what was in the Native Commissioner's mind. It read as follows:—

> "FACTS FOUND PROVED.
>
> Administration of Estate and appointment of heir in terms of Succession Act of 1934 by virtue of the marriage.
>
> REASONS FOR JUDGMENT.
>
> Native Commissioner's Court held by decision of Native Appeal Court in the case of Shata v. Shata (1942 N.A.C. (C. & O.) 42.

> Parties agreed that case should be brought for trial before the Native Appeal Court and in fact that the administration of the estate and appointment of the heiress was in terms of the Succession Act of 1934 by virtue of the marriage to the late Elias Mohalane the appointment must stand."

This is the second case this session in which the reasons for judgment furnished by this Native Commissioner have had to be rejected as unintelligible. He should give this matter proper attention in future.

Some doubt was felt as to whether the summons discloses a valid cause of action. There is no allegation that the value of the estate exceeded £600. In fact, it was common cause in argument before us that it did not. Consequently, in the absence of any allegation that the award of the estate to the defendant was tinged with illegality paragraph 10 of the summons is in reality an admission that the defendant is the sole heiress. Paragraph 14 hardly cures this defect since it is no more than an inconsistency, having regard to paragraph 10. Nor does paragraph 11 assist in the absence of any allegation that the defendant was under any obligation to disclose that the deceased had children. Mr. Friedman who appeared before us on behalf of the respondent (i.e. the defendant in the Court *a quo*) also pointed out that there is no allegation that the estate has not yet been wound up. In fact, he pointed out, the estate has already been finalised and in these circumstances, and since the Registrar of Deeds has not been joined in the action, the proper remedy would have been to sue for damages. Mr. Friedman, however, did not ask this Court to pronounce on the validity of the cause of action as that point should have been taken in the Court below. In view of this we propose to deal with the matter on the basis that a valid cause of action has been disclosed.

Mr. Lubinsky who appeared before us and in the Court below for the appellants (plaintiffs) based his appeal on two main submissions. The first concerns the case of Shata *v.* Shata, 1942, N.A.C. (C. & O.) 42, in which it was held that in terms of section *two* (*c*) of Government Notice No. 1664 of 1929, once a Native has contracted a marriage in community of property common law and with it the Succession Act of 1934 must govern the devolution of his estate, even if he contracted a subsequent marriage which was not in community of property. Regulation 2 (*c*) at the time read as follows:—

> " If the deceased had during his lifetime contracted a marriage in community of property or under ante-nuptial contract, the property shall devolve as if he had been a European."

Mr. Lubinsky asked us to hold that this case was wrongly decided. His reasoning was that the results flowing from this decision would be so unjust that they could not have been intended. We do not agree with this contention. The argument put up was not convincing and even if an injustice had been made out it would not be for this Court to alter the clearly expressed intention of the legislature.

Mr. Lubinsky also suggested that Regulation 2 was in any case *ultra vires* the powers conferred by the legislature. It is not necessary for us to decide this question because if the regulation is ruled out the position will still be the same, for all that then remains is section *twenty-three* of the Act (Act No. 38 of 1927 as amended by Act No. 9 of 1929). Now, the estate is not property of the kind specified in this section. Consequently when in 1929 the special provisions in terms of which Native law had to govern the devolution of all such unspecified property were repealed, the devolution was not " left in the air " as has been suggested in certain cases, but the common law again applied; for as Steyn says, citing Grotius, in his " Uitleg van Wette " at page 15:—

> „'n Geval wat nie deur die woorde van die wet gedek word nie, word oorgelaat aan die reëling van die gemene reg."

Mr. Lubinsky's second submission was that the marriage between the deceased and the defendant which excluded community of property under section *twenty-two* (6) of the Act was also not a marriage out of community of property, but a marriage *sui generis* and foreign to the common law. If this is correct then the defendant could not have been the sole heiress because the Succession Act (No. 13 of 1934), which secures the heritable rights of a surviving spouse as regards the first £600 and which deals only with marriages in or out of community of property, would have had no application. Mr. Lubinsky cited the case of *ex parte* Minister of Native Affairs *in re* Molefe *v.* Molefe, 1946 A.D. 315. But this case so far from supporting Mr. Lubinsky's argument is directly against him. In the course of his judgment the Chief Justice said (at page 320): "If a marriage does not introduce community of property between spouses such marriage is necessarily, in the absence of special legislative provision, a marriage out of community of property."

It follows then that the estate had to devolve according to common law and that, in terms of the Succession Act the defendant became rightly the sole heiress. Consequently the appeal is dismissed with costs, but the judgment of the Native Commissioner is altered from one of judgment for defendant with costs to one of absolution from the instance with costs.

For Appellants: Adv. I. E. Lubinsky, instructed by Messrs. Chain Hooper.

For Respondent: Adv. M. W. Freedman, instructed by Messrs. Greenfield and Greenfield.

SOUTHERN NATIVE APPEAL COURT.

KLAAS *v.* **GCWABE.**

N.A.C. CASE No. 46 OF 1956.

KING WILLIAM'S TOWN: 13th March, 1957. Before Balk, President, Warner and Pike, Members of the Court.

PRACTICE AND PROCEDURE.

Late noting of appeal—Failure to ask timeously for Native Commissioner's reasons for judgment—Failure to deposit security for respondent's costs of appeal timeously—Late stamping of notice of appeal—Condonation.

Summary: The Native Commissioner entered judgment on 8th May, 1956. On 29th May, 1956, request was made by appellant's attorney for a written judgment by the presiding judicial officer. The notice of appeal was lodged with the Clerk of the Court on the 14th June, 1956. Security for the respondent's costs of appeal was lodged on 22nd June, 1956. The notice of appeal was stamped on 14th September, 1956.

Held: That, as a request, in terms of Rule 2 (1) of the Rules of this Court, published under Government Notice No. 2887 of 1951, as amended, for a written judgment by the presiding judicial officer, must be made within seven days after judgment, the provision in Rule 4 of those Rules allowing of an appeal being noted within fourteen days after delivery by the judicial officer concerned of the written judgment to the Clerk of the Court, does not obtain here, the request not having been made timeously.

Held further: That, as the appeal was not noted within twenty-one days after the date of judgmenrt, the alternative period allowed under the said Rule 4, the appeal was out of time.

Held further: That the notice of appeal was still not complete until the security for respondent's costs of appeal were lodged on 22nd June, 1956.

Held further: That, as the notice of appeal had not been stamped until after 14th September, 1956, it was not until it had been stamped as required by Rule 76 (4) of the Native Commissioners' Courts Rules, published under Government Notice No. 2886 of 1951, as amended, that the appeal could be regarded as having been noted, for stamping of such a document does not have the effect of validating it with retro-active effect.

Cases referred to:

Ngobese *v.* Makoba, 1953 N.A.C. 216 (N.E.).
Mtembu and Another *v.* Zungu, 1953 N.A.C. 52 (N.E.).
Mpanza *v.* Mpanza d.a., 1953 N.A.C. 66 (N.E.).

Legislation referred to:

Government Notice No. 2886 of 1951, as amended.
Government Notice No. 2887 of 1951, as amended.

Appeal from the Court of the Native Commissioner: Port Elizabeth.

Balk (President):—

In this civil action judgment was entered by the Native Commissioner's Court *a quo* on the 8th May, 1956, but it was not until the 29th idem that a request in writing was made by the appellant's Attorneys for a written judgment by the Native Commissioner *a quo* showing the facts he had found proved and the reasons for his judgment. As in terms of Rule 2 (1) of the Rules of this Court, published under Government Notice No. 2887 of 1951, as amended, such a request must be made within seven days after judgment and as in the instant case the request was not made until after that period had elapsed, the provision in Rule 4 of these Rules allowing of the appeal being noted within fourteen days after the delivery to the Clerk of the Court of the written judgment by the judicial officer concerned does not obtain here, see Ngobese *v.* Makoba 1953 N.A.C. 216 (N.E.), at page 217. That being so and as the notice of appeal in the instant case was not lodged with the Clerk of the Court concerned until the 14th June, 1956, when the alternative period allowed by Rule 4 referred to above for the noting of the appeal i.e. within twenty-one days after the date of judgment, had already expired, the appeal was out of time. Here it should be mentioned that it would appear that the security for the respondent's costs of appeal was not lodged with the Clerk of the Court until the 22nd June, 1956, so that the notice of the appeal was not complete until that date, see Mtembu and Another *v.* Zungu, 1953 N.A.C. 52 (N.E.). In the instant case, however, the appeal could only be regarded as having been noted after the 14th Septemebr, 1956, as it was not until after that date that the notice of appeal was stamped as required by Rule 76 (4) of the Rules for Native Comissioner's Courts, published under Government Notice No. 2886 of 1951, as amended, read with Item 10 of Table C of the Second Annexure to those Rules, and the stamping of that document did not serve to validate it with retro-active effect, see Mpanza *v.* Mpanza d.a., 1953 N.A.C. 66 (N.E.), at page 67.

As the appeal was noted late and there is no application for condonation of the late noting before this Court as required by Rule 4 read with Rule 14 of the Rules of this Court, the appeal should be struck off the roll. There should be no order as to costs as there was no appearance by or on behalf of the respondent.

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

J. G. Pike (Member): I concur.

For Appellant: Mr. Randell, King William's Town.

For Respondent: No appearance.

SOUTHERN NATIVE APPEAL COURT:

MZILENI *v.* **MPUTA.**

N.A.C. CASE No. 56 OF 1956.

KING WILLIAM'S TOWN: 13th March, 1957. Before Balk, President, Warner and Pike, Members of the Court.

LAW OF DELICT.

Seduction—Presumption of virginity—Knowledge by plaintiff of defendant's marriage no bar to action for damages—Effect of admission of intimacy by defendant.

PRACTICE AND PROCEDURE.

Gravity of omissions from certified copies of record—Dismissal of summons equivalent to absolution from instance.

Summary: Defendant, a married man, commenced cohabiting with plaintiff, who was a spinster, and thereafter purported to marry her on the 12th February, 1953. She states that she subsequently ascertained that he was a married man and they parted in February, 1954. A child was born to her and she claimed that defendant was this child's father; but he denied this, although he admitted sexual intercourse with her before the birth of the child. He alleged that she was aware when intimacy began that he was a married man. She was successful in the Court below on her claim for loss of wages and damages for seduction.

In a claim for damages for defamation, which defendant had asked the Court to dismiss, absolution from the instance was decreed. Defendant appealed against the judgment

Held: That the presumption that plaintiff was a virgin when defendant commenced to cohabit with her, arising from his admission that she was a spinster at the time, stands unrebutted.

Held further: That, in view of defendant's admission of sexual intercouse with plaintiff prior to the birth of her child he must prove that it was physically impossible for him to have been the father of her child, to succeed in his denial of parentage.

Held further: That the fact that a woman knew, when she was seduced, that the man seducing her was married does not debar her from maintaining an action for damages for her seduction by him.

Held further: That failure by a Clerk of the Court to ensure that copies of a record correspond in all respects with the original is a grave lapse which cannot be over-emphasized and which may result in the Court's dealing with a case on incorrect premises, thereby causing a miscarriage of justice.

Held further: That a judgment dismissing a summons is equivalent to absolution from the instance.

Cases referred to:

Mda *v.* Gcanga, 1957 N.A.C. (S.).
Bensimon *v.* Barton, 1919 A.D. 13.
Mgijimi *v.* Mgijimi and Another, 1955 N.A.C. 97 (S.).

Appeal from the Court of the Native Commissioner, Salt River.

Balk (President):—

The plaintiff (now respondent) brought an action against the defendant (present appellant) in a Native Commissioner's Court claiming—

"(1) £825 being loss of wages over the period 1st August, 1954, to 31st July, 1957.
(2) £100 damages for seduction and loss of marriage potential.
(3) £100 damages for defamation."

In the particulars of her claim, the plaintiff averred that—

" 1. Plaintiff is Laetitia Mzileni, a spinster, residing at 93 7th Avenue, Maitland East, Windermere, Cape Town.

2. Defendant is Philip Mzileni, a clerk employed by the South African Railways Non-European Staff Association, of 403 Albert Road, Woodstock, Cape Town.

3. The parties hereto are Natives as defined by Act No. 38 of 1927.

4. Plaintiff was married to defendant at Simonstown on the 12th day of February, 1953.

5. Plaintiff ascertained, subsequently to the said marriage, that the defendant at the time of his marriage to her, was already a married man.

6. The defendant was duly convicted in the Simonstown Magistrate's Court on a charge of bigamy on the 20th day of September, 1954, and was sentenced to one month's imprisonment with the option of a fine of £10 and in addition was sentenced to one month imprisonment, suspended for three (3) years on condition that he was not convicted of a similar offence during that time.

7. Plaintiff lived a married life with the defendant from the 12th day of February, 1953, to the 10th day of February, 1954.

8. As a result of this alliance a male child, Samuel Vuyisile Mzileni was born to plaintiff on the 9th day of October, 1954.

9. On the 10th day of February, 1954, plaintiff was forcibly ejected by the defendant from the common household at No. 6, Jungle Walk, Langa, and the defendant has made no effort whatsoever since then to communicate with her with a view to rendering her some support.

10. Plaintiff before she was misled into a marriage ceremony with the defendant, was a qualified nurse by profession.

11. At the time of plaintiff's 'marriage' to defendant, plaintiff received a salary of £23 per month and was a district nurse at Piketberg, Cape Province.

12. From the month of August, 1954, some two months before the birth, plaintiff was unable to continue with her work and to date is still unemployed as she has to look after the said child Samuel Vuyisile Mzileni.

13. Plaintiff will be unable to work for at least another two years in order to look after the said child which will result in her being out of employment for approximately thirty-six months altogether.

14. Plaintiff has suffered a loss to date of £276, this being the salary she would have earned over the past twelve months. Your petitioner is likely to suffer a further loss of £552 for the next twenty-four months.

15. Plaintiff's chances of marriage have been considerably reduced through her "marriage" to the defendant and the birth of the child, and she maintains that she has suffered damages in this respect in an amount of £100.

16. In or about the month of March this year the defendant defamed plaintiff in that he stated to Mr. Goosen of the Native Registry Office at Windermede, that plaintiff was living a married life with another man, which statement is without any foundation of truth and was published maliciously.

17. Plaintiff has suffered damages for this defamation of her character in an amount of one hundred pounds.

18. Despite demand defendant neglects and/or refuses to pay to plaintiff the said amounts."

The defendant pleaded as follows:—

" 1. *Ad Para.* 1, 2, 3. Defendant admits paragraphs 1, 2 en 3 of plaintiff's claim.

2. *Ad. Para.* 4 *and* 6. Defendant denies that he was ever married to plaintiff as alleged in paragraph 4, but admits that he went through a ceremony of marriage with plaintiff, and was convicted as alleged in paragraph 6.

3. *Ad. Para. 5 and 7.* Defendant denies paragraph 5, and states that plaintiff at all times knew he was a married man. Defendant denies that he lived a married life with plaintiff as alleged in paragraph 7, but states that he cohabited with plaintiff on various occasions between 12th February, 1953, and 15th February, 1954.
4. *Ad. Para. 8.* Defendant admits that a child was born to plaintiff on 9th October, 1954, but denies that he is the father of the said child.
5. *Ad. Para. 9.* Defendant denies that a common household ever existed in law, and states that he asked plaintiff to leave his home on 15th February, 1954, and defendant states further that in law there is no duty on him to support plaintiff.
6. *Ad. Para. 10 and 11.* Defendant has no knowledge of these allegations and puts plaintiff to the proof thereof.
7. *Ad. Para. 12, 13, 14.* Defendant denies that plaintiff is unable to be employed as alleged, and denies that she has suffered any loss as alleged. Defendant states that plaintiff voluntarily and of her own accord did not seek work or employment after August, 1954, and still does not seek work or employment. Defendant denies that plaintiff has suffered any loss as alleged, and denies that she will suffer any further loss.
8. *Ad. Para. 15.* Plaintiff's allegations are denied and defendant denies that plaintiff has suffered damages as alleged or in any other manner.
9. *Ad. Para. 16 and 17.* Paragraph 16 is denied and it is denied that plaintiff has suffered any damages.
10. *Ad Para. 18.* Paragraph 18 is admitted.

Wherefore defendant prays that plaintiff's claims be dismissed with costs."

To this plea the plaintiff replied:—

"*Ad Paragraphs 1 and 2 and 3.*

Plaintiff admits, in view of the fact that defendant was already married at the time of her 'marriage' to defendant, that she has at no time been legally married to defendant, but reaffirms that as far as she was concerned she, at the time, understood herself to be entering into a valid contract of marriage, and she did not know at the time of her 'marriage' that defendant was already married.

Ad Paragraph 3.

Plaintiff reaffirms that she did live a married life with defendant in a house at 6 Jungle Walk, Langa, for the period 12th February, 1953, to 15th February, 1954.

Ad Paragraph 4.

Plaintiff reaffirms that defendant is the father of the child born on the 9th day of October, 1954.

Ad Paragraph 5.

Plaintiff reaffirms that a common household did exist in law and that she was forcibly ejected by defendant from this common household on the 10th day of February, 1954.

Ad Paragraph 7.

Plaintiff reaffirms that she is unable to work and persists in her claim that she has suffered a loss as alleged. Plaintiff admits that she did not seek work or employment after August, 1954, and still does not seek work or employment in that it is absolutely impossible for her to carry on her profession and look after the baby at the same time.

Ad Paragraph 8.

Plaintiff reaffirms the allegations in paragraph 15 of her plea, and reaffirms that she has suffered damages as alleged.

Ad Paragraph 9.

Plaintiff reaffirms that she has suffered damages as alleged and that the said defamation took place."

At the conclusion of the hearing, the Court *a quo* entered judgment for the plaintiff in the sum of £50 as damages in respect of claims (1) and (2) together, decreed absolution from the instance in respect of claim (3) and awarded the costs of the action to the plaintiff.

The appeal from that judgment is brought on the ground that it is against the weight of the evidence.

It is common cause that the defendant commenced to cohabit with the plaintiff prior to the 12th February, 1953, when they went through the form of marriage prescribed by law, and that this ceremony did not result in a valid marriage between them as the defendant was at the time married to another woman. It is also common cause that the defendant continued to cohabit with the plaintiff until they, parted on the 10th February, 1954, that they did not cohabit threafter and that the plaintiff's child was born on the 9th October, 1954.

The presumption that the plaintiff was a virgin when the defendant commenced to cohabit with her, arising from his admission in the pleadings that she was a spinster at the time, see Mda *v.* Gcanga, 1957, N.A.C. . . . . (S), has not been called into question by him so that this presumption stands unrebutted.

The plaintiff stated in her evidence that the defendant was the father of her child. In view of his admission of sexual intercourse with her prior to the birth of the child, he must, in order to succeed in his denial of paternity, prove that it was physically impossible for him to be the father, see Mda's case (*supra*). It is manifest from the evidence adduced by him that he has not discharged this onus for not only has he not shown that it was physically impossible for him to be the father of the plaintiff's child but he admitted that he had paid maintenance for it to her at the rate of £3 per month as from early in 1955, and his explanation that he had done so because he had no money to fight the case and had told the Magistrate that he would pay " without prejudice " is singularly unconvincing in the light of the plaintiff's uncontroverted evidence indicating that a year after he had commenced paying the maintenance he had still not reopened that case.

It follows that the plaintiff proved both the seduction and paternity and was entitled to damages based thereon. This position is not affected by the defendant's allegation that the plaintiff knew that he was married when she commenced to cohabit with him; for even assuming that she had this knowledge, it would not debar her from maintaining an action for damages for her seduction by him, see Bensimon *v.* Barton, 1919, A.D. 13; and the question whether she had such knowledge is irrelevant as the reasonableness of the *quantum* of damages awarded to the plaintiff is not raised in the ground of appeal. For the same reason the other factors advanced on behalf of the appellant being, as they are, purely considerations in the assessment of the damages in question, are also irrelevant.

There is obviously no substance in the appeal in so far as it relates to claim (3), for the Court *a quo* absolved the defendant from the instance in respect of this claim consonant with the prayer in his plea that the claim be dismissed which is tantamount to a prayer for absolution from the instance, see Mgijimi *v.* Mgijimi and Another, 1955 N.A.C. 97 (S.), at page 101.

In the result the appeal should be dismissed, with costs.

A further matter calls for comment, viz. that there are a large number of words omitted from the certified copies of the record. The gravity of failure to ensure that such copies correspond in all respects with the original cannot be over-emphasised as it may result in this Court's dealing with a case on incorrect premises and thereby causing a miscarriage of justice. The Native Commissioner is directed to bring the gravity of this matter home to the officer responsible for the lapse in question with a view to obviating similar defects in the future.

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

J. G. Pike (Member): I concur.

For Appellant: Mr. Heathcote, King William's Town.

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

SOUTHERN NATIVE APPEAL COURT.

BATELO *v.* **VAPI.**

N.A.C. CASE No. 67 OF 1956.

KING WILLIAM'S TOWN: 13th March, 1957. Before Balk, President, Warner and Pike, Members of the Court.

PRACTICE AND PROCEDURE.

Condonation of late noting of appeal—When no justification for identifying applicant with his attorney's neglect to extent of debarring him from proceeding with appeal—Onus in ejectment cases on defendant in certain circumstances—When admission of secondary evidence competent—Document in Xhosa without translation in an official language not to be admitted.

Summary: Appellant's attorney lodged an unstamped notice of appeal timeously but failed to stamp it within the period prescribed by regulation. The lapse was entirely due to the attorney's inadvertence.

The appeal was the sequel to an action by the plaintiff for ejectment of the defendant from certain land and homestead site in a Native location of which defendant had taken occupation without permission. Judgment was in favour of plaintiff in respect of the homestead site and defendant appealed.

Held: That, in the circumstances, this was not a case in which the applicant should be identified with his attorney's neglect to the extent of being debarred from proceeding with his appeal.

Held further: That, as plaintiff had produced a valid and current written authority under Proclamation No. 302 of 1928 from the Native Commissioner from which it followed that he was the legal occupier of the site, and as defendant was in possession of the site, the onus rested upon him of proving that he was entitled to occupy the site or some part thereof.

Held further: That, where a contract is alleged to have been entered into by means of correspondence and there is nothing to indicate that the originals of that correspondence were not available at the time of the trial, secondary evidence of the contents of the correspondence is inadmissible.

Held further: That the admission by a Court of a letter in a Bantu language unaccompanied by a translation in one of the official languages is not permissible.

Cases referred to:

Mpanza *v.* Mpanza d.a. 1953 N.A.C. 66 (N.E.).
Rose and Another *v.* Alpha Secretaries, Ltd., 1947 (4) S.A. 511 (A.D.).
De Villiers *v.* De Villiers, 1947 (1) S.A. 635 (A.D.).
Jeena *v.* Minister of Lands, 1955 (2) S.A. 380 (A.D.).
Rex *v.* Amod & Co. (Pty.), Ltd., and Another, 1947 (3) S.A. 32 (A.D.).
Mda *v.* Gcanga, 1957 N.A.C. ...(S.).
Dhlamini *v.* Mbele, 1953 N.A.C. 37 (N.E.).

Legislation referred to:

Government Notice No. 2887 of 1951, as amended.
Government Notice No. 2886 of 1951, as amended.
Proclamation No. 302 of 1928.

Appeal from the Court of the Native Commissioner: Peddie.

Balk (President):

In this case the notice of appeal was lodged with the Clerk of the Court timeously, i.e. within the period prescribed by Rule 4 of the Rules of this Court, published under Government Notice

No. 2887 of 1951, as amended, but it was not, within that period, stamped as required by Rule 76 (4) of the Rules for Native Commissioner's Courts, published under Government Notice No. 2886 of 1951, as amended, read with item 10 (*a*) of Table C of the Second Annexure to those rules, so that the appeal was out of time, see Mpanza *v.* Mpanza d.a. 1953 N.A.C. 66 (N.E.).

It is clear from the affidavit of the applicant's attorney, filed in support of the application for the condonation of the late noting of the appeal, that the applicant himself is in no way to blame for the late stamping of the notice of appeal as this lapse is entirely due to the inadvertence of his attorney.

Applying the principles enunciated in Rose and Another *v.* Alpha Secretaries, Ltd., 1947 (4) S.A. 511 (A.D.), it seems to us that the instant case is not one in which the applicant should be identified with his attorney's neglect to the extent of being debarred from proceeding with his appeal. That being so and as it is by no means clear from the judgment itself of the Court *a quo* that the applicant has no prospect of success on appeal, this Court condones the late noting of the appeal, see De Villiers *v.* De Villiers, 1947 (1) S.A. 635 (A.D.), at page 637.

Turning to the appeal, the plaintiff (now respondent) brought an action against the defendant (present appellant) in a Native Commissioner's Court seeking an order for his ejectment from certain land.

In the particulars of his claim the plaintiff averred that—

"1. The parties hereof are Natives as defined in Act No. 38 of 1927.
2. Plaintiff is the lawful occupier under certificates of occupation issued to him by the Native Commissioner of Peddie of a certain homestead site and a certain arable allotment in Tyefu's Location, District of Peddie.
3. Defendant has wrongfully and unlawfully and without the permission of the plaintiff taken occupation of the said homestead site and arable allotment.
4. Although plaintiff has called upon defendant to vacate the said homestead site and arable allotment, defendant neglects or refuses to do so."

The defendant pleaded as follows:—

"The defendant denies Paragraphs 2, 3 and 4 for plaintiff's summons and puts plaintiff to the proof thereof.
Wherefore defendant prays that plaintiff's summons may be dismissed with costs of suit."

At the conclusion of the hearing the Court *a quo* entered judgment for the plaintiff as prayed, with costs, only in so far as the defendant's ejectment from the homestead site was conceived.

The appeal against that judgment is brought on the following grounds:—

"(1) That the judgment is bad in law in that the plaintiff having contracted for defendant to occupy the hut-site without the necessary consent of the Native Commissioner in terms of Proclamation No. 302 of 1928, he committed an illegal act and as such the learned Native Commissioner should have dismissed Plaintiff's summons with costs.
(2) That the judgment is bad in law in that it having been found as a fact that plaintiff and defendant were *in pari delicto* the learned Native Commissioner should have dismissed plaintiff's summons with costs.
(3) That the judgment is against the weight of evidence."

At the trial the plaintiff put in the written permission of the Native Commissioner under Proclamation No. 302 of 1928, authorising him (plaintiff) to occupy the homestead site in question and it is manifest from the evidence that that permission [Exhibit "A" (1)], which is dated the 27th October, 1938, is still current. It follows that the plaintiff established that he was the legal occupier of the site. That being so and as it is

also manifest from the evidence that the defendant was in possession of the site, the onus rested on him of proving that he was entitled to occupy the site or some part thereof, see Jeena *v.* Minister of Lands, 1955 (2) S.A. 380 (A.D.).

The defendant's testimony as regards the terms of his contract with the plaintiff, under which he (defendant) obtained occupation of the site being, as it is, secondary evidence is inadmissible in that, according to the defendant, that contract was entered into by means of correspondence and there is nothing to indicate that the originals of that correspondence were no longer available at the time of the trial, see Rex *v.* Amod & Co. (Pty.), Ltd., and Another, 1947 (3) S.A. 32 (A.D.), at page 40. The remainder of the defendant's evidence does not establish that the plaintiff actually gave him occupation of the site but at most that he would do so. In any event there are unsatisfactory features in the defendant's evidence which indicate that he cannot be regarded as a reliable witness. He stated explicitly in his examination-in-chief that he had sent all the galvanised iron which he was to give to the plaintiff in exchange for the latter's house on the site, to him (plaintiff) in January, 1953, whereas it is clear from the letter [Exhibit "C" (7)] which was put in by the plaintiff and which the defendant admitted having written, that on the date it was written, viz. the 7th July, 1953, he (defendant) had not yet procured the galvanised iron in question; and the defendant's replies under cross-examination indicate that he had not procured all the galvanised iron even by the 18th May, 1954, for he stated that he had apologised to the plaintiff in his letter [Exhibit "C" (1)] because he had not done so and confirmed that the date appearing on this letter, viz. 18th May, 1954, was correct. Again, the defendant stated in his evidence-in-chief that he had counted the iron sheets on the roof of the plaintiff's house on the site and found that there were forty. In cross-examination he stated that he and the plaintiff were *ad idem* about the exchange of the big building on the site and that although in his agreement with the plaintiff no mention was made of the small building on the site, all buildings thereon were treated as one and that on all the buildings on the site there were forty sheets of galvanised iron. He went on to say that there were ten sheets of galvanised iron on the small building but he could not remember how many such sheets there were on the big building.

The defendant's only witness other than himself, viz. Headman Giba, testified that the plaintiff agreed to transfer the site to the defendant. But Headman Giba's evidence is manifestly unreliable as will be apparent from what follows. He stated that the parties had come to see him at the same time and that the plaintiff had then agreed to transfer the site to the defendant on the understanding that the latter provided him (plaintiff) with galvanised iron to replace that on the buildings on the site; whereas, according to the defendant, he and the plaintiff had contracted by means of correspondence and they had not appeared together before the Headman in connection with the matter at one and the same time. Again, the headman stated that he and the defendant had appeared before the Native Commissioner who had then sanctioned the occupation of the site by the defendant whereas the latter stated that he had no official authority from the Native Commissioner to occupy the site. It follows that the defendant failed to discharge the onus of proving that he was entitled to occupy the site or some part of it.

The plaintiff testified that he did not sanction the occupation of the site by the defendant. Admittedly, there are inconsistencies in the plaintiff's evidence but these do not, in the light of what has been stated above, assist the defendant in discharging the onus of proof resting on him.

In the result the third ground of appeal fails as do the two remaining grounds based, as they are, on the *in pari delicto* rule, which has no application seeing that the defendant failed to prove the contract on which he relied. Accordingly, the appeal should be dismissed with costs.

A further matter calls for comment, viz., the admission by the Court *a quo* of the letter (Exhibit 10) in the Xhosa language unaccompanied by a translation in one of the official languages. In this connection the attention of the presiding judicial officer is directed to the injunction in Mda *v.* Gcanga, 1957 N.A.C. . . . (S), and the authority there cited, viz. Dhlamini *v.* Mbele, 1953 N.A.C. 37 (N.E.), at page 38, that documents not written in either of the official languages should not be admitted without a translation in one of those languages.

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

J. G. Pike (Member): I concur.

For Appellant: Mr. Heathcote, King William's Town.

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

SOUTHERN NATIVE APPEAL COURT.

MGWETYANA *v.* MGWETYANA & ANOTHER.

N.A.C. CASE No. 3 OF 1957.

KING WILLIAM'S TOWN: 13th March, 1957. Before Balk, President, Warner and Pike, Members of the Court.

NATIVE ESTATES.

Enquiry under section 3 (3) *of Government Notice No.* 1664 *of* 1929, *as amended—Native Commissioner's responsibilities—Costs when neither party at fault and Native Commissioner responsible for wrong judgment.*

EVIDENCE.

Improbabilities in party's evidence—When not decisive—When improper to hold against party letter alleged to be written by him.

Summary: In order to determine the heir to a Garden Lot, the Native Commissioner held an inquiry in terms of section 3 (3) of the regulations published under Government Notice No. 1664 of 1929.

The appellant's case is that his mother contracted a customary union with the deceased after the death of his previous wife, and that he is the only son of this union. The Native Commissioner found that he was not the deceased owner's legitimate son and that he was, therefore, not entitled to succeed to the Lot in question. He appealed against the Native Commissioner's decision. Other evidence is available on the subject but the Native Commissioner did not call for this.

Held: That the Native Commissioner is responsible for the conducting of an enquiry under Regulation 3 (3) of Government Notice No. 1664 of 1929, as amended, including the calling of witnesses.

Held further: That improbabilities in a party's evidence are not decisive when he adduces direct evidence which is not contraverted and there is further evidence of a decisive nature available.

Held further: That, when a party is not asked in the Court *a quo* whether he has written a particular letter and there is no evidence that he has done so, it is not proper to hold statements in that letter against him.

Held further: That, as the Native Commissioner is responsible for the calling of witnesses, the respondents cannot be blamed for the aspects in question not having been canvassed at the inquiry and should, therefore, not be mulcted in the costs of the appeal but that, following the general practice in such cases, such costs should be costs in the cause.

Cases referred to:
Bolofo *v.* Maneli, 1942, N.A.C. (C. & O.) 8.
Seedat *v.* Tucker's Shoe Co., 1952 (3) S.A. 513 (T.P.D.).
Tshaka *v.* Betyi, 1 N.A.C. (S.D.) 242.
Mabuyakhulu *v.* Mabuyakhulu, 1953, N.A.C. 251 (N.E.)
Mnyandu *v.* Zulu, 1952, N.A.C. 201 (N.E.).

Legislation referred to:
Proclamation No. 142 of 1910, as amended.
Government Notice No. 1664 of 1929, as amended.

Appeal from the Court of the Native Commissioner, Butterworth.

Balk (President):—

Good cause having been shown, this case was re-instated on the roll and the late noting of the appeal was condoned.

This appeal is from a Native Commissioner's finding in an inquiry held in terms of section 3 (3) of the Regulations for the Administration and Distribution of Native Estates, published under Government Notice No. 1664 of 1929, as amended, to determine the heir to Garden Lot No. 129 situate in Mission Location in the District of Butterworth.

The Native Commissioner found that Alice Kondlo had not been the lawful wife of the late Diamond Mgwetyana, the registered holder of the Garden Lot, and that her son, Mahlombe, was, therefore, not entitled to succeed thereto.

The appeal is brought by Mahlumbe on the following grounds:—

"1. That the judgment is against the weight of evidence and is not supported thereby.
2. That the judicial officer erred in holding that Alice was not the lawful wife of Diamond Mgwetyana.
3. That the judicial officer should have found that, in the absence of Philip, Attwell Mahlombe Mgwetyana is entitled to succeed to Diamond's land."

It is common cause that the late Diamond Mgwetyana (hereinafter referred to as "the deceased") first married Macikazi, by whom he had only one son viz. Phillip, and that, after Macikazi's death, he married Sarah by whom he left no male issue. It is also common cause that Phillip absconded and that he failed to respond to a notice calling upon him to lodge his claim to the Garden Lot. This notice was apparently issued in terms of proviso (*b*) to section *eight* (2) of the Transkeian Proclamation No. 142 of 1910, as amended.

The appellant's case is that his mother, Alice, contracted a customary union with the deceased after the death of the latter's wife, Sarah, and that he is the only son of this union.

In his reasons for judgment the Native Commissioner points out that the deceased's unions with Macikazi and Sarah were marriages by Christian rites and that Alice and her parents were Christians. Here it should be mentioned that, whilst it is manifest from the evidence that the deceased's union with Mcikazi was contracted according to Christian rites, it is not clear therefrom whether his union with Sarah was similarly contracted or was a customary union. The Native Commissioner goes on to say that he accepted Alice's version that her parents were Christians notwithstanding the assertion by her brother, Philip, in his evidence that their parents were heathens for Philip admitted that he had been baptised by his father, an unlikely event if the latter had indeed been a heathen. The Native Commissioner then refers to a discrepancy between Alice's testimony and that of her brother, Philip, given for the appellant, as regards the place from which the deceased is alleged to have taken Alice to his home and then points out that the reason given by Philip for a customary union in Alice's case viz., that Alice wanted to become a witch-doctor, was unconvincing as was Philip's version that the deceased himself had negotiated a customary union with Alice and paid the dowry for her directly to her father.

It is true that Alice's parents being Christians, makes it improbable that they would have agreed to her entering into a customary union and that this improbability is heightened by the fact that her brother, Philip, attempted to conceal that their parents were Christians as is apparent from what has been stated above. It is also true that the reason given by Philip for a customary union in Alice's case is unconvincing as also his testimony that the deceased himself had negotiated his customary union with Alice and that the deceased alone had paid the dowry for her direct to her father, as these acts are contrary to custom. But it seems to me that these improbabilities in the evidence for the appellant and the discrepancy referred to above cannot be regarded as decisive in view of the direct evidence of the customary union between Alice and the deceased, including the payment of dowry for her, the milk ceremony and the slaughter of ceremonial animals, and seeing that the respondents' denial that the deceased entered into a customary union with Alice rests solely on the first respondent's testimony that the deceased did not report to him at any time that he was contracting such a union with her and the first respondent is an interested party being a claimant to the Garden Lot, see Bolofo *v.* Maneli, 1942, N.A.C. (C. & O.) 8, at page 9; and it appears from the letter (Annexure "A") included in the record of the inquiry that further evidence of a decisive nature is available. This letter purports to have been written by attorney Wood at the appellant's instance to the Magistrate, Butterworth, on the day preceding that on which the inquiry was held and in paragraphs 3 and 4 contains statements purporting to have been made by the appellant which are wholly at variance with the evidence given by Alice and Philip in most material respects, viz. (1) as to whether the appellant was born before or after the deceased left for work in South West Africa where the latter died; (2) the extent of the dowry paid for Alice; (3) Whether the deceased ever *twalaed* Alice; and (4) whether Albert Mdanene, who is now employed at Teko Industrial School, ever went to Alice's parents in connection with her alleged customary union with the deceased. The appellant was not asked whether he had made these statements to attorney Wood nor is there any evidence that he did so, so that it is not proper at this stage to draw from the letter an inference adverse to his credibility or that of his mother Alice or her brother, Philip, on whose testimony his case rests, see Seedat *v.* Tucker's Shoe Co., 1952 (3) S.A. 513 (T.P.D.), at page 516. This aspect requires to be canvassed by the Native Commissioner by recalling the appellant and asking him whether he admits or denies having made the statements contained in paragraphs 3 and 4 of the letter (Annexure "A"). If he admits having done so, he should be accorded an opportunity of explaining why he made them. If he denies that he made these statements attorney Wood and, if necessary, his interpreter, should be called by the Native Commissioner to testify thereanent. In either event Albert Mdenene should be called by the Native Commissioner to testify as to the points raised in paragraphs 3 and 4 of the letter (Annexure "A"). Headman C. W. Monakali who, according to his statement of the 15th February, 1956, which is annexed to the record of the inquiry, may also be able to throw light on the matter in issue should also be required by the Native Commissioner to give evidence.

As there is nothing in the record of the inquiry indicating that the letter (Annexure "A") was brought to the respondents' notice and as, in terms of section *three* of the regulations referred to above, the conduct of an inquiry thereunder, including the calling of witnesses, in any event rests with the Native Commissioner, see Tshaka *v.* Betyi 1 N.A.C. (S.D.) 242 and Mabuyakhulu *v.* Mabuyakhulu, 1953, N.A.C. 251 (N.E.), at page 253, the respondents cannot be blamed for the aspects in question not having been canvassed at the inquiry and should, therefore, not be mulcted in the costs of appeal but that, following the general

practice in such cases, such costs should be ordered to be costs in the cause, see Mnyandu *v.* Zulu, 1952 N.A.C. 201 (N.E.), at page 202.

It was conceded in this Court both for the appellant, who was legally represented, and by the respondents, who appeared in person, that, in the circumstances, the inquiry should be re-opened for the hearing of the additional evidence in question and that costs of appeal should be costs in the cause.

In the result the appeal should be allowed, the Native Commissioner's finding should be set aside and the inquiry should be remitted to him for the hearing of Headman C. W. Monakali's evidence as well as the further evidence on the points arising from paragraphs 3 and 4 of the letter (Annexure " A ") and other relevant evidence that may be available and thereupon for a fresh finding. Costs of appeal to be costs in the cause.

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

J. C. Pike (Membe): I concur.

For Appellant: Mr. Tsotsi, Lady Frere.

For Respondents: Both in person.

SOUTHERN NATIVE APPEAL COURT.

NTLANTSANA *v.* NTLANTSANA.

N.A.C. CASE No. 69 OF 1956.

KING WILLIAM'S TOWN: 15th March, 1957. Before Balk, President, Warner and Pike, Members of the Court.

LAW OF THINGS.

Essentials of spoliation—Onus of proof in vindicatory action—Where property spoliated by defendant.
Conditions precedent to competence under Native law for person in charge of stock to remove it from owner's kraal.
When inmate may claim stock from kraalhead.

Summary: Plaintiff (now appellant) unsuccessfully claimed certain stock from defendant in the Native Commissioner's Court. His claim was based on the wrongful removal of stock from his kraal by the defendant and also on defendant's failure to refund stock lent him for dowry purposes by the plaintiff. Defendant denied the first claim, and in regard to the second alleged that plaintiff, his younger brother, had lived with him, but that, on his return from work at the end of 1954, he found that plaintiff had left his kraal and taken the stock with him. He said he found some of the stock and property at different kraals and repossessed himself of these. He claimed that they were his own property.

Held: That, as removal of the stock forcibly, or wrongfully or against the possessor's consent amounts to spoliation, defendant's action in recovering and removing the stock when they were in plaintiff's possession amounted to spoliation.

Held further: That, as defendant spoliated the stock, the onus of proof of ownership is on him.

Held further: That it is not competent, in Native law, for a person left in charge of stock to remove it from the owner's kraal without his consent unless the owner's whereabouts are unknown, or in case of an emergency.

Held further: That, as defendant expressly agreed to replace the stock contributed towards his *lobola* by plaintiff, the latter was entitled to recover this stock from defendant, upon his (plaintiff's) marriage. As other stock had been earmarked for plaintiff and was in existence when he left defendant's kraal to establish his own, he was entitled to recover this from defendant as well.

Cases referred to:

Sibanyoni *v.* Molise, 1929 T.P.D. 342.
Nienaber *v.* Stuckey, 1946 A.D. 1049.
Mbekwa *v.* Mbekwa, 1953 N.A.C. 107 (S.).
Mfazwe *v.* Modikayi, 1939 N.A.C. (C. & O.) 18.
Mlanjeni *v.* Macala, 1947 N.A.C. (C. & O.) 1.

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

Balk (President):

The plaintiff (present appellant) instituted an action in a Native Commissioner's Court preferring the following claims against the defendant (now respondent):—

"CLAIM (A)—

(*a*) the delivery of 5 head of cattle or payment of their value, £100, plus increase and accretions or value thereof;
(*b*) the delivery of 3 sheep or payment of the sum of £12, their value, plus increase and accretions or value thereof;
(*c*) the delivery of 3 bags of mealies or payment of the sum of £9, their value.

CLAIM (B)—

(*a*) the refund of 3 head of cattle or payment of £60, their value;
(*b*) refund of 8 sheep or payment of £32, value thereof and costs of suit."

In the particulars of his claims, as amended with the leave of the Court *a quo*, the plaintiff averred—

"1. That the parties hereunto are Natives as defined by Act 38/1927.
2. *Claim A.*—That in or about January, 1955, defendant wrongfully and unlawfully removed from plaintiff's kraal 5 head of cattle, namely: 1 *ntsundukazi* cow and its bull calf, 1 *ntsundukazi* heifer, 1 black heifer and 1 *waba* ox; 3 sheep and 3 bags of mealies, all plaintiff's lawful property.
3. That the said stock and bags of mealies are in defendant's possession, and despite demand for their return, defendant neglects and/or refuses to deliver same to plaintiff.
4. *Claim B.*—That in or about 1950 plaintiff, at defendant's special instance and request, lent and delivered to the defendant 3 head of cattle and 8 sheep to enable defendant to pay the *lobola* of his customary wife, Noweleni.
5. That thereupon defendant agreed and promised to refund the said cattle and sheep, but despite demand, defendant neglects and/or refuses to make the said refund."

The defendant pleaded as follows:—

"CLAIM (A)—

(1) Paragraph 1 of the summons is admitted.
(2) Defendant denies the allegations contained in paragraphs 2 and 3 of the summons and puts plaintiff to the proof thereof.

CLAIM (B)—

(3) Defendant denies paragraphs 4 and 5 of the plaintiff's summons and puts plaintiff to the proof thereof.
(4) Defendant says that plaintiff is his younger brother and up to the time that defendant went to work in or about 1952 plaintiff resided with defendant. When defendant left for work plaintiff was still living at defendant's kraal and was in charge of defendant's stock (which included the *ntsundukazi* cow, then a heifer, the black heifer and a *waba* ox).
(5) On defendant's return from work, about December, 1954, he found that plaintiff had left his kraal and had removed all defendant's stock from his kraal which included the *ntsundukazi* cow and its bull (not heifer) calf, a black

hornless heifer (not *ntsundukazi* heifer), the black heifer, the *waba* ox and mealies. When defendant returned from work plaintiff was not in the location.

(6) Defendant found six of his cattle including the above five head at the kraal of Madangatye which he repossessed and removed to his own kraal.

(7) Defendant found seven of his sheep and two bags of mealies at the kraal of Ntsali Diliza—which he repossessed and removed to his kraal.

Defendant says that the stock which he has enumerated are his absolute and bona fide property.

Wherefore defendant prays that plaintiff's summons may be dismissed with costs of suit."

The counterclaim brought by the defendant, which was dismissed, with costs, by the Court *a quo*, does not call for consideration as that part of the judgment is not appealed from.

At the conclusion of the hearing, the Court *a quo* entered the following judgment in respect of the claims in convention:—

"On claim (A) absolution from the instance with costs in regard to the 5 head of cattle and 3 sheep. Defendant to return to plaintiff the 3 bags of mealies alternatively payment of their value £9.

"On claim (B) absolution from the instance."

The appeal from that judgment is confined to the decrees of absolution from the instance and is brought on the following grounds:—

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

2. The Court erred in holding that the plaintiff could not be owner of the property claimed merely by reason that when same was acquired plaintiff was a minor.

3. If at the time when the said property was acquired plaintiff's right thereto was less than full ownership, such right ripened into full ownership when plaintiff established his own kraal and became a major at law and consequently when the said property was spoliated from plaintiff, he was full owner thereof.

4. In any event it was not defendant's plea that the stock in question accrued to him by reason of the fact that when plaintiff earned it, he was an unemancipated minor and the Court erred in deciding the case on this point.

5. The onus of proof of ownership was upon the defendant since he spoliated the stock from plaintiff's possession, and defendant failed to discharge this onus."

It is common cause that the defendant is the heir in his late father's Right Hand House, that the plaintiff is the defendant's younger brother in the same House and that Madangatye, who testified for the plaintifl, is the parties' half-brother and the heir in their late father's Great House.

The plaintiff's version is that he and the defendant grew up at Madangatye's kraal. He (plaintiff) contributed three head of cattle and eight sheep towards the *lobola* paid by the defendant when he married in 1951, on condition that the defendant would replace this stock when he (plaintiff) married. He (plaintiff) was married in July, 1954. In 1951 the defendant left Madangatye's kraal and set up his own kraal. He (plaintiff) joined the defendant at the latter's kraal. The defendant went to work in 1952 leaving him (plaintiff) in charge of their livestock. When he (plaintiff) married in 1954, he acquired the kraal of one Ntsali and moved to that kraal taking both his and the defendant's livestock with him with the consent of Madangatye and the defendant's wife to enable him to look after it. He (plaintiff) went to work in December, 1954. In January, 1955, when he visited his kraal, he found that all the stock was gone. His wife made a report to him in consequence of which he found the stock in the defendant's possession. Of this stock, five head of cattle belonged to him (plaintiff) and the remaining five head to the defandant. Three of the sheep taken by defendant were also his (plaintiff's) property. Four of the

five cattle and the three sheep belonging to him (plaintiff) bore his earmark. The fifth beast belonging to him (plaintiff) i.e. the *waba* ox, bore Madangatye's earmark. At his (plaintiff's) request Madangatye convened a family meeting in connection with the removal of the stock by the defendant. The latter did not attend this meeting. He (plaintiff) then went to the Headman and finally to his attorney.

In his evidence the defendant denied that the plaintiff had contributed anything towards the *lobola* for his (defendant's) wife. He also denied that any of the livestock which he had left in the plaintiff's charge when he went to work in 1952 belonged to the plaintiff. He further stated that he had taken only six head of cattle and not ten and that when he took them they were not at the plaintiff's kraal but at that of Madangatye.

The Additional Assistant Native Commissioner states in his reasons for judgment that the plaintiff failed to establish his claims on a balance of the probabilities. He goes on to say—

> "A significant fact is that plaintiff alleges that he obtained ownership of these cattle and sheep while he and defendant were still residing at Madangatye's kraal—the heir to his father's great house. At this time he was an uncircumcised youth. He says Madangayte gave him the 5 head of cattle enumerated in Claim (A). Madangatye says plaintiff earned them.
>
> Plaintiff was only circumcised during 1953, but he obtained the stock mentioned in Claims (A) and (B) prior to 1950. Indeed he was a fortunate youth to have 8 head of cattle and a number of sheep. He does not explain how he acquired the 3 head of cattle referred to in Claim (B)."

In the first place, there is no justification for rejecting the plaintiff's testimony that he acquired the cattle claimed by him, merely because of his youth. Secondly, the plaintiff did not state in his evidence that the five head of cattle referred to in Claim (A) had been given to him by Madangatye. What he said was that three of these cattle, viz. the *ntsundu* cow and its calves, the *ntsundu* heifer and the *ntsundu* bull, were the progeny of a heifer he had purchased from a Mr. Golding, that the fourth beast, i.e. the black heifer, was the progeny of a black cow given to him by Madangatye and that the remaining beast, viz. the *waba* ox, had also been given to him by Mandangatye. This evidence cannot be said to be inconsistent with Madangatye's testimony that both the plaintiff and the defendant had earned stock whilst they lived with him. It is true that the plaintiff did not explain how he acquired the three head of cattle referred to in Claim (B). But then he does not appear to have been asked this question. The plaintiff's evidence is fully borne out by Madangatye, Sikale and Fever who appear to be best qualified to testify to the matters in issue, seeing that Madangatye is the senior member of the family to which the parties belong and they grew up at his kraal and that Sikale and Fever, besides being related to the parties, were the messengers who took the *lobola* cattle for the defendant's wife to her people. That they did so, is not disputed. Moreover, the defendant admitted that he was on good terms with Madangatye and did not advance any reason why Madangatye or Sikale or Fever should bear false witness against him. The Plaintiff's evidence that he found the stock in the defendant's possession in January, 1955, gains support from the testimony of his herdboy, Mofu, who stated that the defendant had taken the ten head of cattle and seventeen sheep from the plaintiff's kraal during the latter's absence. Then, as contended for appellant, there are unsatisfactory features in the evidence for the defendant, indicating that little reliance can be placed thereon. He stated in cross-examination that he had sold the *waba* ox for £9 and not for £16 and the *ntusi* ox also for £9 and not for £17. 10s. In re-examination he said that he had made a mistake when he stated that he had sold these two oxen for £9 each and that the one had in fact realised £17. 5s. and the

other £16. 5s. But he did not explain how he came to make such a mistake. Again, he stated in his evidence-in-chief that he had sent money to the plaintiff to buy cattle but under cross-examination admitted that he had not done so. He also contradicted himself in other respects, viz., as to the action he had taken when he returned from work in December, 1954 and found the stock no longer at his kraal, as to whether he knew of the plaintiff's circumcision and so on. Then, the defendant's witness, Headman Jordan, stated that Madangatye had brought an *nkone* cow to his kraal as a temporary *ubulunga* beast for his (the Headman's) son's wife, who was the defendant's sister, that this cow had two calves, viz. the *waba* ox and a *nala* heifer, and that the defendant had fetched the *nkone* cow and the *waba* ox, leaving the *nala* heifer at his (the Headman's) kraal as a permanent *ubulunga* beast. This testimony is at variance with that of the defendant who stated that the *nkone* cow brought to the Headman's kraal as a temporary *ubulunga* beast for his (defendant's) sister, had two calves, viz., the *waba* ox and a *nala* bull and that he had taken all three of these cattle from the Headman's kraal and given his sister a black heifer as a permanent *ubulunga* beast, which lends colour to Madangatye's testimony that he had provided the defendant's sister with a black heifer as a temporary *ubulunga* beast and that it had no progeny. Again, according to the headman, the *waba* ox was earmarked by him with his son's earmark. The headman admitted that the *waba* ox was not his son's property but he did not explain why he had placed his son's earmark on it. It is significant that, according to the headman and the defendant, the earmark on the *waba* ox is the same as that of Madangatye and the plaintiff claimed that this ox actually bore Madangatye's earmark. Then, the defendant stated that when he had taken the six head of cattle, the relative stock list for dipping purposes (Exhibit "I"), which remained in his name, showed ten head. He admitted that he had not asked the plaintiff about the missing four head. He also admitted that he had not reported to the headman or to the Police that these cattle were missing. His explanation that he had not done so as "dipping time was near" and that he expected the plaintiff to tell him where he had taken the four head of cattle is lame, to say the least. This improbability in the defendant's evidence is heightened by his statement that he had purchased four head of cattle for £48 to enable him to produce the full ten head reflected in his stock list (Exhibit "I") when they were dipped. Here it should be borne in mind that, according to the evidence for the plaintiff, the defendant took all ten cattle. The defendant also stated that he had sold two of the cattle to one Kosie the month before last and another two to one Deliza the previous year. Thereafter he said that he had made a mistake when he stated that he had sold these cattle, that they had in fact always belonged to Kosie and Deliza to whom he had retransferred them, and that he had obtained the cattle from them to bring the number of his cattle, which had been depleted by sales, up to that reflected in his stock list (Exhibit "I"). But he did not explain how he came to make this mistake. Moreover, his testimony regarding the steps taken by him to have the number of cattle he had to produce for dipping purposes, correspond with the number in his stock list, shows that he has no scruples in practising deception when it suits his purpose and that his testimony, therefore, falls to be scrutinised carefully.

The defendant did not dispute that four of the cattle and the three sheep referred to in Claim (A) bore the plaintiff's earmark nor did he offer any explanation in this respect.

It was contended on behalf of the appellant, on the authority of Sibanyoni *v.* Molise, 1929, T.P.D. 342, that as the defendant had spoliated the stock referred to in Claim (A), the onus of proving ownership thereof rested on him. It is not disputed that the defendant left the plaintiff in charge of the stock at his (defendant's) kraal when he (defendant) left for work in 1952 and

it is manifest from the evidence for the plaintiff that the defendant, on his return in December, 1954, took the stock from the plaintiff's kraal whilst it was in the latter's possession. The defendant admitted in his evidence that he took the stock then without consulting the plaintiff and it is implicit in the latter's testimony that the stock was taken against his consent. It was argued for the respondent that as the stock was left in charge of the plaintiff at the defendant's kraal, the plaintiff had no right, without the defendant's consent, to take the stock from the latter's kraal to his own kraal on establishing it and removing thereto at a later date and that the defendant's taking the stock thereafter did not, therefore, amount to spoliation. It seems to me that in the circumstances of this case the plaintiff had no right to remove the stock from the defendant's kraal as, according to custom, the stock should have remained at that kraal unless the defendant sanctioned its removal therefrom or unless some emergency, which is not present here, dictated such removal. It is true that the plaintiff stated that he had removed the stock to his kraal to enable him to continue to look after it and that Madangatye and the defendant's wife had agreed to the removal. In Native law their consent would no doubt have sufficed had the defendant's whereabouts been unknown at the time, but it is clear from the correspondence put in by the defendant at the trial that the plaintiff could have got into touch with him. That being so and as it appears from the plaintiff's testimony that he did not obtain the defendant's consent to move the stock, he had, under Native law, no right to do so. However, the fact remains that the stock was in the plaintiff's possession when the defendant took it and that he did so against the plaintiff's consent. It follows that the defendant's action amounted to spoliation even though the plaintiff had no right to move the stock from the defendant's kraal to his own kraal. In other words the question whether the plaintiff was despoiled of the stock by the defendant is not contingent upon the legality of the plaintiff's possession of the stock, but upon his possession, as determined by the elements *animus* and *detentio,* and the removal of the stock from such possession forcibly or wrongfully or against his consent, see Nienaber *v.* Stuckey, 1946, A.D. 1049, at pages 1053 and 1056, and Mbekwa *v.* Mbekwa, 1953, N.A.C. 107 (S.).

But even assuming that the onus of proving ownership of this stock rested on the plaintiff as it did in respect of the stock referred to in Claim (B), there can be no doubt, in the light of what has been said above, that the plaintiff discharged this onus on a balance of probabilities in respect of both claims.

The Native Commissioner held that the plaintiff was not, in any event, entitled to succeed in his claims for the stock on the ground that he could not acquire ownership thereof seeing that he was unemancipated and the defendant was his kraalhead. In support of this conclusion the Native Commissioner cited Mfazwe *v.* Modikayi, 1939 N.A.C. (C. and O.), 18, and Mlanjeni *v.* Macala, 1947 N.A.C. (C. and O.), 1. But, apart from the fact that the defendant did not rely on this aspect either in his plea or testimony, it is clear from the evidence for the plaintiff that when the latter acquired the stock concerned in both claims, exclusive of course of the later progeny of such stock, Madangatye and not the defendant was his kraalhead. It is equally clear from the evidence for the plaintiff that the defendant expressly agreed to replace on the plaintiff's marriage the three head of cattle and eight sheep which the plaintiff contributed towards the *lobola* for the defendant's wife on that understanding and that Madangatye was the kraalhead of both the plaintiff and the defendant at the time and concurred in that transaction. It follows that the plaintiff was entitled to recover the stock concerned in Claim (B) from the defendant. It is by no means clear from the evidence that the plaintiff was a minor in the sense that he was under the age of twenty-one years, when he left Madangatye's kraal and became an inmate of the defendant's kraal; and, as is manifest from the evidence for the plaintiff,

the stock concerned in Claim (A) had been earmarked for him (plaintiff) and was still in existence when he left the defendant's kraal for the one he had established for himself so that he was also entitled to recover this stock from the defendant, see Mlanjeni's case (*supra*), at pages 1 and 2.

Turning to the question of the money equivalent of the stock, the plaintiff stated that he valued the cattle at £20 each and the sheep at £4 each. These values have not been challenged by the defendant. It is true that the plaintiff's witness, Fever, stated that the average value of Native cattle was £15 but he added that this was the lowest value so that his testimony is of little assistance in arriving at the value of the cattle concerned. It is also true that the defendant stated that one of the oxen sold by him realised £17. 5s. and another £16. 5s. and that he had sold two heifers at £8 each. But, for the reasons given above, the defendant's evidence cannot be regarded as reliable, particularly that concerning the amounts realised by the sale of the stock in view of the inconsistencies therein to which reference has been made. To my mind, therefore, the values placed on the stock by the plaintiff should be accepted.

In the result the appeal should be allowed, with costs, and the judgment of the Court *a quo* altered to read "For plaintiff as prayed, with costs, on both the claims in convention, i.e. on Claims (A) and (B), in their entirety except for increase. The counterclaim is dismissed, with costs."

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

J. G. Pike (Member): I concur.

For Appellant: Mr. Tsotsi, Lady Frere.

For Respondent: Mr. Kelly, Lady Frere.

SOUTHERN NATIVE APPEAL COURT.

NQONO *v.* NQONO.

N.A.C. CASE No. 76 OF 1956.

KING WILLIAM'S TOWN: 16th March, 1957. Before Balk, President, Warner and Pike, Members of the Court.

PRACTICE AND PROCEDURE.

Vindicatory actions—Onus of proof—Essentials of res judicata—*Where determination of issue in prior proceedings between parties essential to arrive at a judgment in such proceedings, issue* res judicata *in latter action— Unnecessary specifically plead* res judicata.

Dismissal of summons equivalent to absolution from the instance.

Summary: Plaintiff, who had previously spoliated certain stock from defendant, claimed them from her in his capacity as heir to his late father. She resisted the claim on the ground that, as the widow of the deceased man in his Right Hand House, she was holding them on behalf of her son, as they were Right Hand House property. The summons was dismissed with costs, and the plaintiff appealed.

Held: That as the action is in essence vindicatory the onus of proof of ownership of the livestock concerned rests on plaintiff.

Held further: That a prior final and competent judgment, by a Court of competent jurisdiction in a case between the same parties on the same subject matter as the one in this case amounts to *res judicata* in later proceedings between the same parties, when the determination of the issue was essential to arrive at a judgment in the earlier matter.

Held further: That there is no rule requiring the defence of *res judicata* to be specially pleaded in every instance.

Held further: That dismissal of a summons is equivalent to absolution from the instance.

Cases referred to:

K. & D. Motors *v.* Wessels, 1949 (1) S.A. 1 (A.D.)
Boshoff *v.* Union Government, 1932, T.P.D. 345.
Turk *v.* Turk, 1954 (3) S.A., 971 (W.L.D.).
Union Government *v.* Landau & Co., 1918, A.D. 388.
Mgijimi *v.* Mgijimi and Another, 1955, N.A.C. 97 (S.)

Legislation referred to:

Government Notice No. 2886 of 1951, as amended.

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

Balk (President):—

The plaintiff (present appellant) brought an action against the defendant (now respondent) in a Native Commissioner's Court seeking a declaration of rights over certain 45 sheep, 40 goats and 2 donkeys and a debate of account of this stock and its increase.

In the particulars of his claim, the plaintiff averred—

"1. That the parties to the suit are Natives as defined by Act No. 38 of 1927.
2. That plaintiff is the heir of his late father Nantiso Nqono, and resides at Agnes location aforesaid.
3. That defendant has in her possession certain stock belonging to the estate of the late Nantiso Nqono but which defendant claims belongs to her sons.
4. That when plaintiff last counted the said stock in or about September, 1954, it consisted of some 45 sheep, 40 goats and 2 donkeys.
5. That plaintiff refers to paragraph 2 above and says that in the premises the said stock is his lawful property according to Native law and custom.
6. That defendant is unlawfully and wrongfully interfering with the said stock by altering the earmarks and has removed some of the said stock to the kraal of one Dovalele Nqono.
7. That in the premises plaintiff prays for a declaration of rights over the said stock and also for an order of court calling upon defendant to give a full and true account of the said stock, together with all increase, progeny and accretions."

The defendant pleaded as follows:—

"1. Defendant admits paragraph 1 of the plaintiff's summons.
2. Defendant admits that plaintiff is the heir of his late father Nantiso Nqono, but states that he is heir only in the Great House. Defendant says she is the widow of late Nantiso Nqono in the Right Hand House.
3. Defendant denies being in possession of any livestock belonging to the estate of the late Nantiso Nqono and states that the stock in her possession belongs to her sons; plaintiff is put to the proof of his allegations.
4. Defendant denies that there were 45 sheep, 40 goats and 2 donkeys at her kraal during September, 1954, and puts plaintiff to the proof thereof.
5. Plaintiff is put to the proof of his allegations contained in paragraphs 5 and 6 of his summons which are denied. Wherefore defendant prays that the plaintiff's summons may be dismissed with costs of suit."

At the conclusion of the hearing, the Court *a quo* dismissed the summons, with costs, and the appeal from that judgment is brought on the following grounds:—

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

2. That the judicial officer should have found that the stock in dispute belong to the etstate of the late Nantiso Nqono and that plaintiff, as heir to the said Estate according to Native law and custom, was entitled to the ownership and possession thereof."

The plaintiff's action is in essence a vindicatory one so that on the pleadings the onus of proof of ownership of the livestock concerned rested on him, see K. & D. Motors *v.* Wessels, 1949 S.A. 1 (A.D.), at pages 11 to 13.

The plaintiff adduced evidence to the effect that the defendant had not "married" his late father, Nantiso (hereinafter referred to as "the deceased") in the sense that she had not contracted a valid customary union with him, admitting in his own testimony that he would have no claim to the stock if the defendant was in fact the Right Hand wife of the deceased. In any event it is clear that, if the finding of the Court *a quo* that the defendant was the deceased's Right Hand wife is correct, the plaintiff has not discharged the onus of proof resting on him on the pleadings i.e. the onus of proof of the ownership of the stock, for the evidence does not establish that the stock belonged to the House created by the customary union of the plaintiff's late mother, Noiron, with the deceased, which is the basis of the plaintiff's claim. Here it should be mentioned that it is not disputed that the deceased contracted a customary union with Noiron before he became associated with the defendant.

It is contended for the appellant (plaintiff) that his admission that the present respondent (defendant) had married the deceased, made by him in the spoliation proceedings brought against him by her (defendant) prior to the institution of the instant action, did not preclude him from maintaining in the instant case that the defendant did not in fact contract a valid customary union with the deceased. The record of the spoliation proceedings (Case No. 88 of 1954) was put in by consent and forms Exhibit "C" in the present action.

But the appellant is estopped from challenging in the instant case the validity of the defendant's customary union with the deceased, or in other words that the defendant was the deceased's Right Hand wife, on the ground of *res judicata;* for it is clear from the record (Exhibit "C") that this issue was decided there and that its determination was essential to arrive at a judgment in that case so that this issue becomes *res judicata,* see Boshoff *v.* Union Government , 1932 T.P.D. 345 and Turk *v.* Turk, 1954 (3) S.A. 971 (W.L.D.). It should be added that it is also clear from the evidence in the present case and the record (Exhibit "C") that the other essentials of *res judicata* are also present here, viz. that the judgment in that case was by a Court of competent jurisdiction; that that judgment was a final and competent one; and that that case was between the same parties and on the same subject matter as the instant one. It is true that *res judicata* was not pleaded in the instant action but then the defendant had no opportunity of doing so as will be apparent from what follows. In paragraph 2 of her plea the defendant averred that she was the widow of the deceased in his Right Hand House. The plaintiff did not reply to this averment so that, in terms of Rule 46 (3) of the Rules for Native Commissioners' Courts, published under Government Notice No. 2886 of 1951, as amended, it must be taken to have been denied by him and, in terms of Rule 46 (4) of those rules, the pleadings thereupon fell to be regarded as closed. That being so and as there is no rule requiring the defence of estoppel to be specially pleaded in every instance, see Union Government *v.* Landau & Co., 1918 A.D. 388, at page 391, the fact that it was not pleaded in the instant case is of no moment. The provision in Rule 46 (3) in terms of which the defendant's averment in her plea that she was the widow of the deceased's Right Hand House was deemed to have been denied by the plaintiff, obviously cannot oust the defence of *res judicata.*

It follows that the plaintiff did not establish his case. It is true that there are unsatisfactory features in the evidence for the defendant but these do not serve to prove the plaintiff's case. That

being so and as the judgment of the Court *a quo* dismissing the summons is equivalent to a decree of absolution from the instance, see Mgijima *v.* Mgijimi and Another, 1955 N.A.C. 97 (S.), at page 101. that judgment cannot be said to be wrong and the appeal should accordingly be dismissed, with costs.

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

J. G. Pike (Member): I concur.

For Appellant: Mr. Tsotsi, Lady Frere.

For Respondent: Mr. Kelly, Lady Frere.

SOUTHERN NATIVE APPEAL COURT.

XALABILE *v.* NGXAZISA & ANOTHER.

N.A.C. CASE No. 80/1956.

KING WILLIAM'S TOWN: 16th March, 1957. Before Balk, President, Warner and Pike, Members of the Court.

PRACTICE AND PROCEDURE.

Evidence—Natives generally not expected to know dates—Rule not applicable when witnesses positively assert occurrence on specific date and there is reason for knowing that date—Seduction—To be decided on probabilities—But girl's testimony requires corroboration—Adverse inference in Native law from girl's failure to report seduction failing explanation.

Summary: Plaintiff (appellant) claimed damages for the abduction and seduction of his daughter who had kept her condition secret. Defendants denied the allegation. In evidence plaintiff's witnesses said the girl was taken from her friends on 19th February, 1956, after she left a church service. On 21st August, 1956, she gave birth to a child which a medical practitioner found to be a 34 to 36 weeks' child.

Held: That Natives ought not in general to be expected to know dates with certainty, but this rule cannot be applied where witnesses assert positively that events occurred on a specific date and there is reason for knowing that date.

Held further: That a seduction case must be decided on the probabilities, but the special rule that the girl's evidence requires corroboration must be applied.

Held further: That an adverse inference must be drawn from the failure of a girl to report her seduction to her parents, in the absence of an explanation for such failure.

Cases referred to:

Komani *v.* Tyesi, 1 N.A.C. (S.D.), 77.
Manakaza *v.* Mhega, 1 N.A.C. (S.D.), 213.
Jagadamba *v.* Boya, 1947 (2) S.A., 283 (N.P.D.).
Dalisile *v.* Dungulu and Dungulu. 1940 N.A.C. (C. & O.), 83.
Mbulawu *v.* Bonkolo, 1932 N.A.C. (C. & O.), 45.

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

Pike (Member):—

In this action the plaintiff claimed 6 head of cattle as damages for the abduction and seduction of his ward, Mina. In his particulars of claim he alleged, *inter alia*—

> "That about or during February, 1956, the first-named defendant wrongfully and unlawfully abducted and/or eloped with plaintiff's said ward, Mina, and during the period of such elopement first-named defendant wrongfully and unlawfully seduced and rendered the said Mina pregnant."

The defendants denied the abduction or elopement and that first defendant seduced Mina and rendered her pregnant.

The judgment entered was absolution from the instance with costs and plaintiff appealed on the grounds that the judgment was against the weight of evidence and that the judicial officer should have found that during or about February the first defendant abducted Mina and had sexual intercourse with her resulting in her pregnancy.

The plaintiff stated that during February, 1956, Mina went to Church on a Sunday and did not return home that evening. He made enquiries and as a result approached defendant No. 1 on 4th March, 1956. He denied any knowledge of Mina's whereabouts. Plaintiff continued with his investigations and on 14th March he found Mina working in Queenstown. He makes no mention of any report made to him by Mina when he found her. In April he discovered that Mina was pregnant, and it was only after this discovery that Mina made a report to him as a result of which he sent messengers to defendant's kraal.

Mina's story is that on 19th February, 1956, after leaving the church service, defendant No. 1 took her away from her girl friends in whose company she was, and that they walked together until they reached a stream where defendant had carnal intercourse with her by force. She stated she was unwilling and wanted to go home but defendant beat her and forcibly had intercourse with her. Thereafter he took her to Gotsho's kraal, then to his sister Boniwe's kraal at dawn the next morning. She remained there until that night when defendant took her away, saying he was taking her to town. He gave her 5s. and she took a bus to Queenstown, defendant having promised to follow a day later but assuring her that his brother would be at the bus stop to meet her. She found no brother there on arrival in Queenstown, and waited until sunset. Then she went to the town location and sought shelter from a stranger. On the Wednesday she went to the bus stop to meet defendant as arranged. He failed to arrive and she was forced to obtain employment in the town. Defendant did not meet her at any time in Queenstown and she remained in employment until the 14th March when the plaintiff found her. She did not report defendant's conduct to plaintiff. He took her home and she admits he discovered her condition in April and thereafter she was sent to defendant's kraal.

Two of Mina's friends supported her evidence that she and defendant walked away together after the church service. Both girls state the date was 19th February, 1956.

Defendant No. 1 admits he attended church on 19th February, 1956, and that he saw Mina there. He denies he took her away from her friends and that he had intercourse with her. He also denies he took her to the kraals of Gotsho and Boniwe and that he gave her any money to go to Queenstown. Both Gotsho and Boniwe supported the denial that Mina was brought to their kraals.

Mina gave birth to a child on 21st August, 1956. Dr. Kunz, a medical practitioner called by the plaintiff, gave evidence that this was a premature child. She stated that Mina was admitted to hospital on 22nd August, the day after the birth of the child. It was not necessary to put the child into an incubator. She proceeded to state:—

> "If the child had been conceived on the date the girl said it was conceived, it would not have been viable—a child born in the 6th month of pregnancy would almost certainly not live unless put into an incubator and fed with a pippet."

Dr. Kunz further stated that this was a 34 to 36 and not a 28 weeks' child.

The Assistant Native Commissioner disbelieved Mina's evidence and in this Court it was argued on behalf of appellant that Mina and her friends being Natives, too much reliance must not be put upon the date 19th February as being the date on which defendant had intercourse with Mina. Whilst it is recognised as a general rule that Natives ought not to be expected to know with certainty the date on which events occurred, this general rule cannot be applied where witnesses all assert positively that events occurred on a specific date and there is a reason for knowing that date, as in the present case.

It was further contended for appellant that the Assistant Native Commissioner should not have found it impossible for a child conceived on 19th February, 1956, to have been born on 21st August, 1956. Stress was also laid upon the degree of corroboration of Mina's evidence, i.e. the testimony of the two girls and defendant's denial of having been in Mina's company on 19th February, 1956.

In Komani *v.* Tyesi, 1 N.A.C. (S.D.), 77 and Manakaza *v.* Mhega, 1 N.A.C. (S.D.), 213, it was held that a seduction case must be decided on the probabilities, but the special rule must be applied that the girl's evidence requires corroboration. These judgments followed the decision in Jagadamba *v.* Boya, 1947 (2), S.A. 283 (N.P.D.), where at page 284 it is stated:—

> "If the balance is against the plaintiff she loses the case. If it is in her favour and there is no corroboration she also loses. If it is in her favour and there is corroboration she wins."

In the instant case the Assistant Native Commissioner rejected the evidence of Mina and if he was justified in doing so the remaining evidence for plaintiff cannot assist his case for it fails on the balance of probabilities.

Mina failed to report the conduct of defendant No. 1 to the plaintiff when he found her in Queenstown on 14th March. She still failed to make any report of his conduct on her return home and it was only in April when others discovered her condition that she made a report. In cross-examination she stated that defendant assaulted her first and then had intercourse with her. She screamed to be left alone and wanted people to come to her assistance. Thereafter defendant pulled her to his kraal and she resisted trying to get away. If that story is true she was treated in a brutal manner by defendant. Thereafter she was sent by him to Queenstown. He failed to keep his promise and left her stranded there. Yet she made no report to plaintiff when he found her, and no explanation was offered for her failure to do so; a factor detrimental to plaintiff's case (see Dalisile *v.* Dungulu and Dungulu, 1940 N.A.C. (C. and O.), page 83 and page 86 and Mbulawu *v.* Bonkolo, 1932, N.A.C. (C. and O.), 45, at page 46]. Bearing this factor in mind as well as the other adverse features referred to above, her evidence concerning the alleged abduction and seduction was rightly rejected by the Assistant Native Commissioner.

The appeal should be dismissed, with costs.

H. Balk (President): I concur.

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

For Appellant: Mr. Tsotsi, Lady Frere.

For Respondent: Mr. Kelly, Lady Frere.

SOUTHERN NATIVE APPEAL COURT.

AM *v.* **KUSE.**

N.A.C. CASE No. 1 OF 1957.

KING WILLIAM'S TOWN: 18th March, 1957. Before Balk, President, Warner and Pike, Members of the Court.

NATIVE CUSTOM.

Twala *and payment of* lobola *constitutes customary union—Woman's adultery not ground for dissolution of customary union—Repudiation of wife under customary union for pre-nuptial* struptum—*Father's right to damages ousted unless husband repudiates wife—Failure of girl to report seduction to family—Acceptable explanation required to minimise detrimental effect on case.*

PRACTICE AND PROCEDURE.

Chief's written record—Criterion as regards pleadings in his Court—Application to correct to be made to Native Commissioner's Court.

Summary: Plaintiff claims that defendant rendered his daughter pregnant, after which she was *twalaed* by another man, who paid *lobola* for her and kept her at his kraal. There her pregnancy, which she had kept secret, was discovered in his absence. A child was born to her six months after the *twala*. Her husband wrote telling her to leave his kraal and claimed the return of his *lobola* cattle from plaintiff, who complied with his request.

He sued defendant successfully in the Chiefs' Court after the customary union had been repudiated by the husband. An appeal was noted to the Native Commissioner's Court. The Native Commissioner dismissed the appeal after a fresh hearing, in which defendant denied the correctness of the Chief's record where he was recorded as having denied that he knew the girl with whom, in the Native Commissioner's Court, he admitted having been intimate.

Held: That *twala* and payment of *lobola* for a girl, who is left at the man's kraal by her guardian, results in a customary union.

Held further: That a women's adultery is not usually a ground for dissolution of her customary union and return of the *lobola* at her husband's instance.

Held further: Where there has been pre-nuptial *stuprum,* of which the husband was unaware when the customary union was entered into, he is, in Native law, entitled to repudiate the union and claim a refund of the *lobola*.

Held further: That, where there has been pre-nuptial *stuprum* of which the husband was unaware, the girl's father may not claim damages for seduction, unless the husband repudiates the customary union on that ground, as, had the husband not done so, he would have been the one entitled to claim the damages.

Held further: That where a girl offers an acceptable explanation of her omission to report her seduction and pregnancy to her people, this minimises the detrimental effect upon the guardian's case.

Held further: That the Chief's written record is the criterion as regards pleadings in a Chief's Court; and if one of the parties wishes to challenge its correctness, application must be made to the Native Commissioner's Court for its correction, which, by implication, it has the power to do.

Cases referred to:

Memami *v.* Makaba, 1 N.A.C. (S.D.) 178
Ngawana *v.* Makuzeni, 1 N.A.C. 220.
Mangaliso *v.* Fekade and Nohanisi, 5 N.A.C. 5.
Gweni *v.* Mhlalo and Monelo, 3 N.A.C. 179.
Ngozi and Another *v.* Mgcaleka, 1947 N.A.C. (C. & O.) 26.
Dolo *v.* Mbewu, 1 N.A.C. (S.D.) 168.
Dimaza *v.* Gxalaba, 1955 N.A.C. 93 (S.).
Malufahla *v.* Kalankomo, 1955 N.A.C. 95 (S.).
Joseph Baynes, Ltd., *v.* Minister of Justice, 1926 T.P.D. 390.

Works of reference consulted:

The Civil Practice of the Superior Courts in South Africa, by Herbstein and Van Winsen.

Legislation referred to:

Government Notice No. 2885 of 1951, as amended.

Appeal from the Court of the Native Commissioner: Middledrift.

Balk (President):—

This is an appeal from the judgment of a Native Commissioner's Court dismissing, with costs, an appeal from the judgment of a Chief's Court for plaintiff (now respondent) as prayed in an action in which he sued the defendant (present appellant) for five head of cattle or £50 for having rendered his daughter pregnant.

Neither the plaintiff nor the defendant restated their pleadings in the Native Commissioner's Court in terms of section 12 of the Regulations for Chiefs' and Headmen's Civil Courts, published under Government Notice No. 2885 of 1951, as amended.

The appeal to this Court is brought on the following grounds:—

"(1) That the judgment is bad in law in that the learned Assistant Native Commissioner erred in finding that defendant's statement made before the Court of Chief Siseko Kama to the effect that he did not know Lala Kuse, and his admission that in September, 1954, he had attempted to have intercourse with the said Lala Kuse, was corroboration of the evidence of the said Lala Kuse.

(2) That the judgment is bad in law as on the balance of probabilities the learned Assistant Native Commissioner should have given judgment for defendant.

(3) That on the facts the judgment is against the weight of evidence.

Alternatively should it be held that the appeal must fail on grounds (1), (2) and (3) defendant appeals on the additional ground:—

(4) That the judgment is bad in law in that the learned Assistant Native Commissioner erred in finding that plaintiff had adduced sufficient evidence to prove that defendant had seduced and rendered pregnant the said Lala Kuse and as there was a direct conflict between plaintiff's evidence and defendant's evidence, the learned Assistant Native Commissioner should have given judgment of absolution from the instance with costs."

Briefly, the plaintiff's case, as disclosed by the evidence adduced by him in the Court *a quo*, is that his daughter, Lala, met the defendant in February, 1950, when the latter commenced making love to her. Thereafter the defendant visited her at her home at night, her sister-in-law, Noweliti, and her nephew, Ngankago, bringing her the messages from him making the appointments. Their relationship continued and in September, 1954, the defendant rendered her pregnant. This was soon after he had been circumcised. It was then that the defendant first had sexual intercourse with her and it was against her will. Prior to that they had *metshaed* only. She last saw her periods

in September, 1954. The defendant visited her again and she spoke to him about missing her periods. In December, 1954, she was *twalaed* by one Fanelo. She went to the latter's home and remained there. Fanelo paid *lobola* to the plaintiff for her when he *twalaed* her. She did not tell Fanelo that she was pregnant. In January, 1955, Fanelo left for work and did not return to his kraal until December, 1955. In March, 1955, the defendant came and asked her to go Cape Town with him, giving her 10s. She accompanied him to Alice where she met her elder sister who brought her to the plaintiff's kraal. The latter took her back to Fanelo's kraal. In April, 1955, Fanelo's mother discovered that she (Lala) was pregnant. She was taken to the plaintiff's kraal. She went back to Fanelo's kraal as all the *lobola* cattle had not been returned by the plaintiff. There she gave birth on the 22nd June, 1955. Thereafter she returned to the plaintiff's kraal with her child as Fanelo wrote telling her to leave his kraal. The plaintiff was required by Fanelo to return the *lobola* for Lala as she had been rendered pregnant by the defendant and he did so except for three of the cattle which had died.

In his evidence the defendant admitted that he and Lala had *metshaed* from 1950 until September, 1954, when he stated she had rejected him. He also admitted that he had tried to have internal sexual intercourse with her in September, 1954, adding that he had not achieved his purpose as she had refused. He denied that he had ever had internal sexual intercourse with her and that she had told him of her pregnancy. He also denied that he had stated in the Chief's Court that he did not know her.

The Native Commissioner states in his reasons for judgment that Lala, although inclined to exagerate, gave her evidence in a satisfactory manner. Admittedly, as pointed out on behalf of appellant, there are inconsistencies in her evidence and discrepancies between her evidence and that of the other witnesses for plaintiff. But it seems to me that with one exception these inconsistencies and discrepancies are not important in the light of the defendant's admission that he was her *metsha* up until September, 1954, when she was rendered pregnant and that he tried to have internal sexual intercourse with her during that month. The exception to which I have referred and which is the one in the main relied upon in the argument on behalf of the appellant, is the discrepancy between plaintiff's evidence and that of Lala as regards when she gave birth to the child. The plaintiff stated that it was in December, 1955, whereas Lala said it was on the 22nd June, 1955. It seems to me, however, that the plaintiff was obviously mistaken when he stated under cross-examination that Lala's child had been born in December, 1955. That he intended to convey that the child had been born during that month there can be no doubt, for he re-iterated in re-examination that the birth had taken place in the summer of 1955/1956. That he was obviously mistaken in this will be apparent from what follows. In his examination-in-chief he stated that Lala had given birth when she had been at Fanelo's kraal for a period of six months which corresponds with Lala's testimony that the birth had taken place in June, 1955 for it is clear from the evidence as a whole that she was *twalaed* and taken to Fanelo's kraal in December, 1954, or at latest in January, 1955. Again, had the child been born in December, 1955, it would not have been competent in Native law for Fanelo to have required, as he did, that the plaintiff should refund Lala's dowry; for it is clear from the evidence as a whole that Lala was *twalaed* and the *lobola* for her was paid in December, 1954, or at latest in January, 1955, and she was allowed to remain at Fanelo's kraal which resulted in a customary union between her and Fanelo as from that time, see Memani *v.* Makaba, 1 N.A.C. (S.D.) 178, at page 180. This postulates that the child if born in December, 1955, was conceived during the subsistence of the customary union and that Lala had committed adultery which in Native law is not a ground for the dissolution of a customary

union and the refund of the *lobola* at the instance of the husband except in circumstances which have no application here, see Ngawana *v.* Makuzeni, 1 N.A.C. 220, at page 221 and Mangaliso *v.* Fekade and Nohanisi, 5 N.A.C. 5, at page 6. But in cases of pre-nuptial *struptum* of which the husband was unaware at the time of the customary union, he is, in Native law, entitled to repudiate the union and require the return of the *lobola*, see Gweni *v.* Mhlalo and Monelo, 3 N.A.C. 179. It follows that Lala's version that the child was born on the 22nd June, 1955, is obviously the correct one. It is true that the plaintiff also stated that he reported Lala's pregnancy to the defendant's kraal in December, 1955, but on a proper understanding of his evidence it seems clear that he linked the reporting of the pregnancy with the birth of the child for he stated that he had made the report on Lala's return home after Fanelo had repudiated her and it is manifest from Lala's testimony that she returned to the plaintiff's kraal in July, 1955, after her repudiation by Fanelo so that it would appear that the report was actually made in July, 1955, and not in December, 1955; and here it must be borne in mind that the plaintiff was not in Native law entitled to claim the "fine" for Lala's pregnancy from the defendant until Fanelo had repudiated his customary union with Lala for, had he not done so, he, and not the plaintiff, would have been entitled to the "fine", see Ngozi and Another *v.* Mgcaleka, 1947 N.A.C. (C. & O. 26. A further apparently unsatisfactory feature in the plaintiff's case is that Lala did not report her seduction to her people. But it seems to me that this omission cannot in the circumstances be regarded as very serious as Lala explained that she had not done so because she was frightened and it must be borne in mind that she was in a difficult position as regards reporting her seduction and pregnancy to her people for not long thereafter she was *twalaed* by Fanelo whom her father, the plaintiff, accepted as her husband by accepting the *lobola* for her from him and allowing her to remain at his kraal. It is also true that Lala was inclined to exaggerate in certain respects but the Native Commissioner took this aspect into consideration in deciding that her testimony was acceptable and there is, to my mind, no justification for finding that the Native Commissioner was wrong in accepting her evidence regard being had to all the circumstances of this case including the obvious untruthfulness of the defendant. For example, he admitted that he had been circumcised in April, 1954, and that the ceremonies were over in August, 1954. He went on to say that it was not the custom to have sexual intercourse after circumcision. Yet he admitted that he had tried to have sexual intercourse with Lala in September, 1954, and in any case the custom is not as stated by him. This brings me to the question whether there is the necessary corroboration of Lala's evidence. It is manifest from the Chief's written record that the defendant's defence in that Court was not only that he did not render Lala pregnant but also that he did not know her. His admissions in the course of his evidence in the Court *a quo* show that he knew Lala intimately. It follows that his denial in the Chief's Court that he knew Lala was false and that the Native Commissioner was justified in relying thereon as affording the necessary corroboration of Lala's testimony, see Dolo *v.* Mbewu 1 N.A.C. (S.D.) 168, at page 169. It is true that the defendant denied in the Court *a quo* that he had stated in the Chief's Court that he did not know Lala. But, as pointed out in Dimaza *v.* Gxalaba, 1955 N.A.C. 93 (S.), at page 94, and Malufahla *v.* Kalankomo, 1955 N.A.C. 95 (S.), at page 96, the criterion in so far as the pleadings in a Chief's Court are concerned is the Chief's written record and unless the correctness of such record is challenged, the particulars contained therein fall to be accepted as reflecting the true position; and the defendant's bald denial in his evidence that he had said in the Chief's Court that he did not know Lala cannot be regarded as challenging the correctness of the Chief's written record. Admittedly, the Regulations for Chief's and Headman's Civil Courts referred to above do not make provision for the correc-

tion of a Chief's written record. But, as a Native Commissioner's Court obviously cannot carry out its functions as an appellate tribunal properly unless it has the power to correct a Chief's written record on application when such correction is justified, it seems to me that it must be held to have that power by implication as in the case of other appellate tribunals, see Joseph Baynes, Ltd., *v.* Minister of Justice, 1926 T.P.D. 390. That being so and as in the instant case no application was made for the correction of the Chief's written record, the defendant's defence as set out therein, including his statement that he did not know Lala, stands and he is precluded from questioning its correctness, see *The Civil Practice of the Superior Courts in South Africa by Herbstein and Van Winsen,* at page 528.

In the result the appeal falls to be dismissed, with costs.

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

J. G. Pike (Member): I concur.

For Appellant: Mr. Heathcote, King William's Town.

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

SENTRALE NATURELLE-APPÈLHOF.

SAAK No. 30 VAN 1956.

MACHIAE *v.* JACOBS.

BLOEMFONTEIN: 9 April 1957. Voor Menge, Waarnemende President, Elston en Fyvie, lede van die Hof.

PRAKTYK EN PROSEDURE.

Gebruiklike verbinding—Terugvordering van Bruidskat—Vorm van uitspraak—Voorwaardelike toestemming tot vonnis—Bevel alleen vir teruglewering van vrou ongeldig—Bewyslas by erkenning en vermyding—Hersieningsmagte van Naturelle-Appèlhof in terme van artikel 15 *van Wet No.* 38 *van* 1927.

Samevatting: Eiser in die laer Hof (nou die respondent) het weens kwaadwillige verlating van sy vrou haar vader gedagvaar vir haar teruglewering of die terugbetaling van sy bruidskat. Die verdediging het aangevoer dat die vrou gedwonge en dus geregtig was om haar man te verlaat; origens was eiser se bewerings gemene saak. Die Naturellekommissaris het die eis as twee eise beskou. Hy het die teruglewering van die vrou gelas, op grond van 'n sogenaamde „ toestemming van vonnis " van die verweerder, en daarna, op 'n later stadium absolusie van die instansie ten opsigte van die terugbetaling van die bruidskat toegestaan. Hierna het die Naturellekommissaris op 'n *ex parte* aansoek van eiser sy vorige bevel aangevul deur 'n datum vas te stel vir die oorhandiging van die vrou. Verweerder het aansoek gedoen vir die tersystelling van hierdie aanvulling, en, toe dit geweier is appèl aangeteken teen hierdie weiering en, daarmee, teen die aanvullende bevel.

Beslis: 'n Eis vir die terugkeer van 'n vrou wat haar man verlaat het kan nie afgesonder word van dié vir die teruggawe van die bruidskat nie.

Ook beslis: Waar verlating nie ontken is nie maar grondige redes vir die verlating gepleit is, rus die bewyslas op die verdediging want dit is dan 'n geval van erkenning en vermyding.

Ook beslis: 'n Bevel vir teruglewering van 'n vrou sonder alternatiewe bevel vir teruggawe van bruidskat is onuitvoerbaar en derhalwe ongeldig.

Ook beslis: In die omstandighede wat in hierdie saak deur die toepassing van foutiewe prosedure geskep is kan hierdie Hof in 'n appèl deur die verweerder teen 'n absolusie uitspraak in sy guns, sonder dat daar 'n teen appèl aangeteken is die uitspraak volledig hersien teneinde vas te stel of die getuienis nie miskien 'n uitspraak ten gunste van eiser regverdig nie.

Appèl van die Hof van Naturellekommissaris, Bultfontein.

Menge, Waarnemende Voorsitter, lewer uitspraak:—

In die Hof van die Naturellekommissaris het eiser (nou respondent) verweerder gedagvaar vir die teruggawe van laasgenoemde se dogter—eggenote van eiser volgens Naturellegebruik —of anders die teruggawe van sy bruidskat van 11 beeste of £55 en koste van geding. Eiser het beweer dat die meid hom in September 1955, kwaadwillig en sonder wettige rede verlaat het. Hier was dus 'n gewone eenvoudige *lobolo*-sakie; maar deurdat daar met die toedoen van almal wat betrokke was een prosesregterlike fout na die ander begaan is, het dit op 'n hopelose deurmekaarspul uitgeloop.

Luidens die dagvaarding is die 23ste Mei 1956, vir die aantekening van verskyning vasgestel. Verskyning is egter nie aangeteken nie, maar 'n sogenoemde „toestemming tot vonnis" is ingedien. Ten spyte van die bepalings van Hofreël No. 40, wat die bewoording van 'n toestemming tot vonnis voorskryf, lui hierdie seldsame dokument soos volg:—

> „Hierby word u in kennis gestel dat die verweerder hiermee toestem tot vonnis in wat betref die teruggawe van sy dogter, Elizabeth aan eiser. Derhalwe verval die alternatiewe eis vir teruglewering van 11 beeste of dit word verdedig. Geen koste word aangebied nie, dit word bestry."

Hierdie dokument het natuurlik geen regsgeldigheid as toestemming tot vonnis nie, want die eis word nie toegestaan nie; dit word inteendeel betwis. Die dokument kan hoogstens geld as 'n aantekening van verskyning, want hier is nie twee afsonderlike eise ter sake nie, maar net een eis vir spesifieke nakoming en, ingebreke daarvan, 'n sekere bedrag geld. Daar kan toegestem word tot vonnis, of die saak kan verdedig word, maar nie albei nie.

Mens sou verwag dat eiser hom hierdie eienaardige prosedure nie sou laat geval nie; maar uit die beknopte en ietwat onduidelike verslag van die verrigtinge is dit nie moontlik om vas te stel wat sy houding was nie. In elk geval, op 23 Mei het die Naturellekommissaris die volgende uitspraak gelewer:—

> „Vonnis vir eiser ingevolge toestemming tot vonnis slegs vir gedeelte van eis—vir teruggawe van vrou, Elizabeth. Elke party betaal sy eie koste."

Hierdie uitspraak is ongeldig. In die eerste plek is dit ongeldig omdat die Hofreëls geen voorsiening maak vir die uitreiking van 'n lasbrief en die uitspraak dus onuitvoerbaar bly. Tweedens is die Naturellekommissaris nie by magte om verligting toe te staan waarvoor eiser se dagvaarding—in die afwesigheid van enige wysiging—nie vra nie. Eiser het wel die teruggawe van sy vrou geëis, maar hy het ook 'n sekere betaling geëis ingeval die vrou nie terugkeer nie; en die Naturellekommissaris het nie die reg gehad om op grond van 'n foutiewe, ongeldige „toestemming" hierdie eis te verander of deels te veronagsaam nie.

Geen verdere stappe is geneem (en kon ook nouliks geneem word) in verband met die uitspraak nie, maar op 2 Julie het verweerder sy pleidooi ingedien. Hierin word beweer dat die meid eiser verlaat het omdat laasgenoemde en sy mense haar van toordery beskuldig het. Ten spyte van die onvoorwaardelike onderneming in sy toestemming tot vonnis om die meid terug te gee word hierdie onderneming nou in die pleidooi aan 'n voorwaarde onderwerp, nl. dat eiser „met sy vader en mense na verweerder se stat moet kom om die oorsake van die verlating waarvoor eiser en sy mense verantwoordelik is, uit die weg te ruim volgens Naturelle gebruik".

Daarna is vir albei kante breedvoerige getuienis gelei. Eiser het aan die begin die nie onredelike houding ingeneem dat, met die oog op die kamtige toestemming tot vonnis, die getuienis beperk behoort te word tot die gebeure ná 23 Mei, d.w.s. tot die vraag of die meid na eiser teruggekeer het aldan nie. Hierdie voorstel is egter verwerp. Nadat getuienis gegee is, het die Naturellekommissaris op 15 Augustus uitspraak gegee van „Absolusie van die instansie en elke party betaal sy eie koste". Hierdie uitspraak het natuurlik slegs betrekking op wat die Naturellekommissaris behandel het as 'n tweede, afsonderlike eis, naamlik die teruggawe van die bruidskat; want in verband met die teruggawe van die vrou het hy reeds op 23 Mei 'n bevel gemaak. Hierdie twee uitsprake het tesame die ongerymde gevolg dat eiser wel geregtig is op die teruggawe van sy vrou maar nogtans sy bruidskat moet verbeur as die bevel vir haar teruggawe

veronagsaam word! Mnr. van Coller het voor ons aangevoer dat die absolusie uitspraak die vorige Hofbevel uitwis. Dit is egter nie die geval nie want die uitspraak van absolusie is ongeldig. Weens 'n prosesregtelike dwaling is dit tog net vir 'n alternatiewe gedeelte van die eis bestem en is dit nie 'n ware uitspraak nie. Dit het glad geen betrekking op die eis nie, slegs op 'n onafsonderbare gedeelte daarvan. Eiser het dit egter nie as ongeldig beskou nie. Hy het op 4 September appèl op die meriete van die saak aangeteken, en redes vir die uitspraak is verstrek.

Op 17 September is die appèl egter teruggetrek en het eiser informeel en blykbaar sonder enige kennisgewing aan verweerder, die Hof versoek om die tydperk, waarin laasgenoemde die meid moet oorhandig, vas te stel. Hy het blykbaar gedink dat hy op hierdie wyse die uitreiking van 'n lasbrief sou bewerkstellig. Die versoek is toegestaan, en die Hof beveel toe: „dat verweerder, July Machiae, sy dogter Eliza terug lewer aan Simon Jacobs op die plaas Verhelsleegte op of voor 4 nm. op Woensdag 26 September 1956". Op die volgende dag (18 September) is hierdie bevel skriftelik deur die Klerk van die Hof aan verweerder en ook aan sy prokureur gerig. Hierdie sonderlinge prosedure word dan ook afgerond deur die volgende byvoegsel wat die Klerk van die Hof blykbaar op eie houtjie by die bevel aangelas het, nl:—

> „Ek neem verder kennis dat indien jy in gebreke bly om aan hierdie bevel gehoor te gee, 'n lasbrief uitgereik sal word vir beslaglegging op die *lobolo* aan jou betaal deur Simon Jacobs te wete 8 beeste, een perd en £10 (die ekwivalent van 11 beeste) of die waarde daarvan, naamlik vyf-en-vyftig pond (£55)."

Al sou hierdie byvoegsel deur die Hof gelas gewees het, sou dit nogtans blote onsin wees aangesien daar alreeds 'n uitspraak van absolusie van die instansie oor die teruggawe van die bruidskat gegee was.

Toe verweerder hierdie bevel ontvang, het hy dadelik aansoek gedoen vir die tersystelling van die bevele wat op 23 Mei en 17 September in verband met die oorhandiging van die meid gemaak is. Hierdie aansoek is op 25 September van die hand gewys.

Natuurlik het die Naturellekommissaris geen reg gehad om op 17 September sy bevel deur enige aanvulling te wysig nie. Sy aanvullende bevel is volkome onreëlmatig, en wel om die volgende redes: (1) die oorspronklike bevel was reeds ongeldig; (2) 'n wesenlike verandering, nie met 'n klaarblyklike fout, was betrokke en daar kon dus nie op 'n informele *ex parte* aansoek gehandel word nie (3) selfs met die aanvulling wat op 17 September deur die Hof beveel was, was die uitvoering van die bevel deur middel van 'n lasbrief nie moontlik nie, want, soos reeds verduidelik, maak die Hofreëls geen voorsiening vir so 'n lasbrief nie.

Verweerder kan nou in hoër beroep teen die Naturellekommissaris se besluit van 26 September (dit behoort te wees 25 September) om nie die bevele ten opsigte van die oorhandiging van die meid tersy te stel nie. Op grond van wat reeds gesê is moet hierdie appèl slaag, en sal daar dan die uitspraak van absolusie van die instansie oorbly. Verweerder het egter ook teen hierdie uitspraak van absolusie appèl aangeteken. Hy meen dat die getuienis 'n uitspraak ten gunste van verweerder regverdig. Die appèl is ten opsigte van hierdie absolusie uitspraak te laat noteer. Kondonasie van die vertraagde notering is egter gevra en is deur ons toegestaan, aangesien die uitspraak, soos reeds aangedui, nie 'n ware uitspraak en gevolglik ongeldig was. Bowendien kon ook nouliks van verweerder verwag word dat hy hierdie uitspraak sou beveg want, vóór die gebeurtenisse van 17 en 18 September toe 'n tydperk vir die aflewering bepaal is en die Klerk van die Hof sy dreigement in verband met die teruggawe van die bruidskat daarby aangelas het, was die bevel in sy guns.

Om sake in die reine te bring is dit nodig om behoorlik op die getuienis in te gaan. Geen teen-appèl is deur eiser aangeteken nie, maar as die getuienis wel 'n uitspraak ten gunste van eiser verg sal ons nietemin dienooreenkomstig moet beslis, want artikel *vyftien* van Wet No. 38 van 1927 verleen aan hierdie Hof volle bevoegdheid „om enige order, vonnis of verrigting van 'n Naturellekommissarishof binne sy regsgebied te hersien."

Volgens die pleitskrifte is dit gemene saak dat eiser en verweerder se dogter in 'n gebruiklike verbintenis getree het; dat die meid na haar vader teruggekeer het, en dat 'n bruidskat vir haar betaal is.

Die getuienis betreffende die getal beeste—11 stuks word geëis—word nie ontken nie, want verweerder maak melding van 12 stuks plus een bees as boete waarvan nog twee uitstaande is. Die bewyslas rus dus op die verweerder om te staaf dat die meid grondige rede gehad het om haar man te verlaat.

Volgens die rekord wil dit voorkom asof nòg die Naturellekommissaris nòg die partye se verteenwoordigers van hierdie regsstelling bewus was. As gevolg hiervan is eiser die geleentheid ontneem om sy vrou se getuienis te weerlê.

Die meid se getuienis staan alleen. Dit kom daarop neer dat sy siek was; dat haar man haar na 'n geneesheer, en later na 'n toordokter geneem het; dat laasgenoemde, wat nie as getuie geroep was nie, vir haar gesê het dat haar kwale aan 'n bose gees, wat sy 'n *tokolosie* noem, toe te skryf is; dat sy hierna in 'n aparte kamer opgesluit is en, weens die „tokolosie" waaraan haar skoonvader (en sy self blykbaar ook) geglo het, belet is om vir haar man en haar skoonvader te kook. Van toorkunste word niks gerep nie. Sy sê: „Simon" (d.w.s. eiser) „het gevra waarom ek weggegaan het. Ek het gesê ek het na my ouers gekom sodat hulle my na die dokters kan neem. Ek het gesê hulle moet my na dokters vat, want my man het my nie na dokters gevat nie. Ek het gegaan dat my vader *tokolosie* kan uitneem deur dokters." Haar griewe is blykbaar teen haar skoonvader. Sy sê nie dat haar man haar verstoot of weggejaag het nie. Sy sê: „Simon se pa het my weggejaag . . . Simon het ook gesê ek moet loop. Simon sê ek moet loop dan gaan haal hy my weer en dan slaap ek by hom." Sy getuig ook hoe haar man talle kere gekom het om haar weer terug te neem en selfs hoedat hy by so 'n geleentheid met haar geslaap en 'n kind verwek het. Die slotsom van hierdie getuienis kom dus op niks meer neer as dat sy haar man verlaat het omdat hy versuim het om haar na 'n dokter te neem om haar van 'n *tokolosie* te bevry. Maar terselfdertyd getuig sy nogtans dat haar man haar na 'n blanke geneesheer en ook na 'n toordokter geneem het!

Verweerder sê in sy getuienis: „Ek weet van geen toordery van my dogter nie." Hy beweer dat sy dogter van 'n *tokolosie* beskuldig is en dat 'n bees daarvoor betaalbaar is. Hy gaan voort: „Ek het haar nie vir Simon en sy pa gegee nie om saam te gaan nie, al vorens hy die bees betaal het nie, om my dogter se naam skoon te maak." Dit blyk as of die verweerder se oorspronklike onderneming om die meid terug te gee nou deur nog 'n voorwaarde gewysig word. Hoe dit ook mag wees, verweerder se getuienis wek maar min vertroue. Hy beëindig bv. sy getuienis met die volgende woorde (waar dit gaan oor samesprekings toe die eiser sy vrou kom soek het): „Ek het nie gesê ons wil haar eers dokter toe stuur nie. Ek het nie bees gevra vir *tokolosie* belediging. Ek het gesê ek sal haar eers dokters toe stuur dan sal ek haar terug stuur. Ek het nie so gesê. Ek wou die vrou terugbesorg nie (*sic*). Ek het toegestem dat Elizabeth terug gaan. Die toestemming om Elizabeth terug te stuur het ek verkeerd verstaan."

Met die oog op die bewyslas behoort die uitspraak ten gunste van die eiser te gewees het. Die Naturellekommissaris lê nadruk daarop dat eiser op 'n vraag van die Hof gesê het: „Ek vra nie my vrou nie. Ek vra my beeste". Hierdie getuienis kom egter nie op 'n wysiging van die eis, waarin immers om die teruggawe van die vrou gevra word, neer nie. Op hierdie stadium en tot tyd en wyl die vrou na eiser terugkeer is sy houding teenoor haar gladnie ter sake nie.

Die enigste manier om hierdie verknoeide verrigtinge in order te bring is om alles behalwe die getuienis tersy te stel en dan in die lig van die getuienis 'n paslike order te maak, d.w.s. vir die teruggawe van die bruidskat tensy die vrou nie binne 'n redelike tydperk terugkeer nie. In 'n sekere tegniese opsig slaag die appèl waar dit die tersysetting van die twee bevele i.v.m. die aflewering van die vrou aangaan; maar aangesien verweerder deur die sogenaamde „toestemming tot vonnis" self die uitreiking van hierdie bevele waarteen hy nou appèlleer bewerkstellig het, en die appèl oor die algemeen teen hom beslis moet word, moet hy die koste dra.

Die appèl word dus met koste van die hand gewys, maar in die regsbelange word die Naturellekommissaris se uitsprake almal tersy gestel en deur die volgende uitspraak vervang: „Vir eiser ten opsigte van 11 beeste of £55 tensy sy vrou, die dogter van verweerder, nie later dan 31 Mei 1957, na eiser terugkeer nie. Eiser is slegs geregtig op koste aangegaan voor die 17de September 1956."

Vir appellant: Adv. A. P. van Coller, gelas deur mnre. De Wal, Leinberger & Potgieter (Bloemfontein) en mnre. Edmeades & De Kock (Bultfontein).

Vir respondent: Mnr. P. B. Eagar.

CENTRAL NATIVE APPEAL COURT.

CASE No. 4 A OF 1957.

MGOMEZULU *v.* **MAKUBO.**

JOHANNESBURG: 24th April, 1957. Before Menge, Acting President, Garcia and Ackron, Members of the Court.

LAW OF DELICT.

Adultery—Measure of damages—Pleadings—Cattle and alternative money value.

Summary: Plaintiff in the Court below sued defendant for damages in respect of adultery committed with plaintiff's wife. He was awarded £40, being £25 special damages and £15 (representing 3 head of cattle) as general damages. Defendant appealed unsuccessfully. But there was also a cross-appeal by plaintiff on the ground that the £15 awarded as general damages were too low.

Held: (Increasing the award to £30) that the alternative money value for cattle—other than dowry cattle—customarily fixed at £5 per head is no longer maintainable in view of the higher prices paid for livestock.

Held further: Special damages, details of which are given in evidence, can be claimed under the heading of general damages where there is no prejudice.

Held further: In an action against a co-respondent for damages an undertaking in the summons that the plaintiff will sue his wife for divorce is not required and is moreover *contra bonos mores.*

Statutes cited:

Section 15 of Act No. 38 of 1927.

Cases referred to:

Viviers *v.* Kilian, 1927 A.D. 449.

Ndodoza *v.* Tshaniwa, 1939 N.A.C. (T. & N.) 64.

Appeal from the Court of Native Commissioner, Balfour.

Menge, Acting President (delivering the judgment of the Court).

This is an appeal from an award of £40 damages which plaintiff obtained against defendant (the present appellant) in the Court below in an action in which plaintiff alleged that defendant had enticed his wife away from him and committed adultery with her. The marriage was by civil rites and it still subsists, although the parties are living apart. Defendant tendered £15 without prejudice.

At the close of plaintiff's case there was before the Court some evidence of enticement and abduction, but not of adultery. There was also evidence that plaintiff spent at least £25 on taxi fares in searching for his wife to induce her to return to him. Apparently he still wants the woman back.

Defendant alone gave evidence. This amounts to a mere denial of the allegations of abduction and adultery, although defendant admitted having frequently conveyed plaintiff's wife in his taxi; and the circumstances of one of these occasions do arouse grave suspicion.

After the close of the defence case the Native Commissioner called Jemina, the wife of plaintiff. The following note appears in the record: "Both plaintiff and defendant ask the Court to call the witness Jemina." This woman testified both to the abduction and the adultery and also to her willingness to return to plaintiff.

The Native Commissioner thereupon, having heard argument, granted judgment in the sum of £40, being £25 special and £15 general damages.

The defendant now appeals on four grounds as follows:—

(1) The Native Commissioner erred in finding that defendant had committed adultery with plaintiff's wife as there was no proof of such adultery.

(2) That should adultery as alleged have been committed by defendant and plaintiff's wife then such adultery took place after plaintiff's wife had deserted plaintiff, and defendant would not be liable in law for any damages.

(3) That the Native Commissioner erred in finding the plaintiff had suffered damages in the sum of £25 being moneys expended on taxi fares or in any amount whatsoever.

(4) That the Native Commissioner erred in finding that the defendant is liable in law for any damages suffered by plaintiff in respect of money spent on taxi fares in searching for his wife.

There is also a cross-appeal in which plaintiff attacks the award of £15 general damages as too low and as wrongly determined on Native law principles.

No fault can be found with the Native Commissioner's findings. The evidence overwhelmingly supports the conclusions that the defendant abducted plaintiff's wife, Jemina, and thereafter committed adultery with her, and that plaintiff spent at least £25 in endeavouring to secure his wife's return. Whatever the position may have been if Jemina had not given evidence, her testimony—in the light of the evidence of the other witnesses leaves no doubt as to the defendant's guilt. All that remains to be said is that there is not even a suggestion of collusion. The first two grounds of appeal, therefore, must fail.

The reasons of the Native Commissioner for awarding £25 special and £15 general damages are well founded. It is trite law that such damages can be awarded irrespective of divorce proceedings being instituted (see Viviers *v.* Kilian, 1927 A.D. 449). True, plaintiff's claim was, according to the further particulars, for general damages, no mention being made or particulars being furnished as regards special damages. But evidence of the special damages was led and the witnesses were cross-examined, no objection having been raised. In the circumstances the absence of a specific reference to special damages could hardly have prejudiced the defence (see section 15 of Act 38 of 1927).

During the proceedings plaintiff applied for, and was granted, permission to amend his summons by adding the following words: "The plaintiff undertakes to institute divorce proceedings against his said wife to proceed to the termination thereof." This undertaking is *contra bonos mores* and not binding on the plaintiff. Its inclusion in the summons serves no purpose whatsoever and the amendment should not have been allowed.

The appeal clearly must fail.

As regards the cross appeal, the award of £15 is not unfair having regard to the case of Ndodoza *v.* Tshaniwa, 1939, N.A.C. (T & N) 64, where it was said: "Damages for adultery according to Native law and custom, vary from three to five head of cattle according to tribe and the alternative money value is generally fixed at £5 per head. It is considered that monetary damages awarded under common law should bear some relation to the amount to which Natives generally are accustomed under their own law and custom." But it is well known that the pound has since 1939 lost approximately half its value. Having regard to the fact that on present indications plaintiff will probably have to bring up the defendant's child by Jemina—the parties not being divorced and their marriage being in community of property—there is no reason why the value of three head of cattle should not be awarded. But that value would no longer be £15. It is only for dowry purposes that case law has in the Transvaal fixed the value of stock (somewhat lowly) at £3 per head. Taking all the circumstances into consideration and the fact that these were to some extent of an aggravated nature it is considered that £30 general damages should have been awarded.

The appeal is dismissed and the cross-appeal upheld. The Native Commissioner's judgment is altered to read: "For plaintiff on the first claim in the sum of £55 and costs." The appellant to pay costs of appeal and cross-appeal.

For Appellant: Mr. A. B. Lanser.

For Respondent: Mr. L. S. Levinsohn.

CENTRAL NATIVE APPEAL COURT.

CASE No. 9 OF 1957.

KOBE *v.* QOBOSE.

JOHANNESBURG: 26th April, 1957. Before Menge, Acting President, and Messrs. Garcia and Lambly, Members of the Court.

COMMON LAW.

Seduction—Claim for loss of wages.

Summary: Appellant, an unmarried woman, had been unsuccessful in obtaining damages in respect of loss of wages occasioned by giving birth to a child of which the respondent was the father. The appellant was not a virgin at the time.

Held: The mother of an illegitimate child has no action for loss of earnings against the father of the child if she had, prior to the intercourse which gave rise to the birth of the child, already been seduced by another man.

Cases referred to:

Bensimon *v.* Barton, 1919 A.D. 13.

Maluleka *v.* Thipe, 1953 N.A.C. 62.

Appeal from the Court of Native Commissioner, Johannesburg.

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

The appellant, a Native woman, successfully sued the respondent for breach of promise, affiliation, and maintenance of her illegitimate child. She made two further claims, the one for general damages in respect of seduction, and the other for £50 special damages comprising lying-in expenses (£10) and loss of earnings (£40). The claim for general damages was withdrawn when it was established in evidence that the appellant already had one child by another man. In regard to the lying-in expenses the Native Commissioner awarded £10; but he considered that the claim for loss of earnings had not been proved and that, even if it had been, such a claim was not competent. He referred to McKerron on Delicts in support of this contention, but he also drew attention to the case of Maluleka *v.* Thipe, 1953, N.A.C. 62 as a precedent to the contrary.

The appellant now appeals only against the Native Commissioner's decision on the claim concerning loss of earnings. The grounds of appeal are that the claim has been proved and that it is competent.

It does not seem that the claim has been proved, at least to the extent of £40. But it is not necessary to deal with this aspect because of the conclusion which we have reached in regard to the validity of the claim.

The question is whether the mother of an illegitimate child has an action for personal damages against the father if she had, prior to the intercourse which gave rise to the birth of the child, already been seduced by another man. This proposition seems to be completely in conflict with the following statement of Innes, C.J., in Bensimon *v.* Barton, 1919 A.D. 13: "Of special interest is his" (van der Kessel's) "reminder that the sole foundation of

the action is the seduction, a point sometimes overlooked by controversialists, but important to be borne in mind." The appellant was not seduced by the respondent, and she, being a consenting party to the intercourse with defendant, has no action for personal damages against him as father of her child as he cannot found the action on seduction. The father is only liable for damages which have reference to the child itself, such as maintenance or lying-in expenses.

The case of Maluleka (*supra*) cited by the Native Commissioner is not in point as there the woman had been seduced by the man concerned. Indeed, McKerron in the 4th edition of his book *The law of delict* submits that damages in respect of loss of earnings cannot be claimed even if based on an act of seduction. Be that as it may, they certainly cannot be claimed where there is no question of seduction.

The appeal is dismissed.

For Appellant: Mr. H. Helman.

Respondent in default.

CENTRAL NATIVE APPEAL COURT.

CASE No. 11 OF 1957.

TELA v. KUMALO.

JOHANNESBURG: 24th April, 1957. Before Menge, Acting President, Smithers and Ackron, Members of the Court.

PRACTICE AND PROCEDURE.

Default judgment—"Wilful" default—Claim for rendering and debatement of account.

Summary: Respondent had obtained judgment by default on a claim for the rendering and debatement of a partnership account. The appellant then applied to have the judgment set aside, but this was refused as the Native Commissioner decided that the applicant had been in wilful default.

Held: A defendant who has been informed by the plaintiff that the case against him will not be proceeded with on the day of hearing, and who consequently does not attend on that day is not in wilful default.

An order to render a statement of account and debatement thereof and the enforcement of such an order discussed.

Cases referred to:

S.A. Fire and Accident Insurance Co. Ltd. *v.* Hickman, 1955 (2) S.A. 131.

Appeal from the Court of Native Commissioner, Springs.

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

This is an application for the rescission of a default judgment granted by the Native Commissioner on the 24th January, 1957. The respondent's summons contains the following particulars and claims:—

"(1) In or about the month of July, 1953, plaintiff and defendant agreed to carry on business of a butchery in Shop 4, Monametsi Street, Kwa Thema Native Township, Springs, in partnership.

(2) It was further agreed, *inter alia*, that prior to commencement of business operations, plaintiff and defendant would each contribute £100 as their respective capital in the partnership. Plaintiff made his capital contribution of £100 as agreed. In addition, both plaintiff and defendant would give all his time and labour to the partnership business and the profits would be divided equally.

(3) Accounts of the partnership were kept initially by a bookkeeper and later by defendant.

(4) The said partnership was terminated by the defendant on or about the 29th July, 1956.

(5) Notwithstanding demand, defendant fails, neglects and refuses to render plaintiff any statement of account from the 29th July, 1956.

Wherefore plaintiff claims—

(*a*) an Order that defendant shall render to him a full statement of account duly supported by vouchers showing all expenditure and receipt relating to the aforesaid business;
(*b*) a debatement of such account;
(*c*) payment of what is found to be due to plaintiff;
(*d*) costs of suit;
(*e*) alternative relief."

Further particulars were asked for and furnished but these do not add materially to what has been set out save that plaintiff and not defendant is alleged to have kept the accounts. A notice of an application to amend the summons so as to substitute "plaintiff" for "defendant" in paragraph 3 and also to amend the date in paragraph 4 to read "21st September, 1956," was filed but nothing was done about it at the hearing.

Defendant (the present applicant) pleaded that he was not a partner at all but merely an employee of plaintiff and that he was discharged on the 21st September, 1956.

On the trial day, however, defendant failed to appear. Thereupon plaintiff applied for default judgment and this was granted and recorded as follows:—

"By default for plaintiff as prayed with costs. Plaintiff declared a necessary witness."

Thereafter defendant applied to have this judgment set aside on the ground that pursuant to certain settlement discussions plaintiff personally had promised him not to proceed with the action. He claimed, therefore, that his default was not wilful. In a lengthy replying affidavit plaintiff admitted that settlement discussions had taken place, but he denied that he had promised to withdraw the action and that he would not proceed with it on the day of hearing.

The application was heard on the 28th February, 1957. The applicant asked the Native Commissioner to hear evidence in order to resolve the conflicting versions deposed to in the affidavits. The Native Commissioner, however, declined to hear evidence and then refused the application for rescission with costs. He held that the applicant was in wilful default.

The applicant now appeals on the grounds that there was no wilful default and that evidence should have been heard on the conflicting versions of fact in the affidavits.

In his reasons the Native Commisioner cites a number of eases in support of his contention that there was a wilful default; but none of these support him. In all these eases the defaulter knew that the ease was coming on. But that is not the position here. If, as the appellant stated, he was promised that the action would not be proceeded with, then, so far from knowing that the ease was coming on on the day for which it was set down, he had every reason to think that it was not coming on. Whether or not the promise he relied on was in fact made can only be determined by hearing oral evidence as to what was the outcome of the settlement talks.

Clearly, therefore, evidence should have been heard on the issue whether the applicant was in wilful default or whether he had a good defence. But there are reasons why the default judgment cannot in any event stand. The only sanctions for the enforcement of a judgment of this nature are proceedings for committal for contempt of Court or a separate suit for damages occasioned by the failure to carry out the order. Neither method of execution could be resorted to in this instance for the following reasons:—

> Firstly: No time limit has been fixed within which the statement of account is to be rendered and debated; secondly: there cannot be any order for the payment of what may be found to be due until this amount has been determined at the conclusion of the debate of the account [see S.A. Fire and Accident Insurance Co., Ltd. *v.* Hickman, 1955 (2) S.A. 131]. Thirdly; the summons discloses no cause of action. It does not even make sense. The plaintiff claims a statement of account concerning receipts and expenses of the partnership as from the date when the partnership was no longer in existence. Even if, as Mr. Bisset somewhat hesitatingly informed us, the omission to change the date (29/7/56) in 5 of the summons to 21/9/56—as was sought in respect of paragraph 4—was intentional the claim still does not make sense; for the partnership books were kept by the plaintiff himself, so that there is still no reason why the defendant should, or how he could be expected to account for the partnership activities even between the brief period from 29th July and the 21st September, 1956. And, moreover, what is the significance of the 29th July?

The appeal is upheld, with costs, and the Native Commissioner's judgment is altered to read: "Application granted with costs and default judgment of 24 January, 1957 set aside."

For appellant: Mr. R. Selvan.

For Respondent: Mr. C. Bisset.

SOUTHERN NATIVE APPEAL COURT.

CASE No. 70 OF 1956.

KEPU *v.* **MVABA.**

PORT ST. JOHN'S: 1st June, 1957. Before Balk, President, Wakeford and Grant, Members of the Court.

PRACTICE AND PROCEDURE.

Applications under Rule 15, *Government Notice No.* 2887 *of* 1951 (*Native Appeal Court Rules*)—*Considerations.*

Summary: An appeal to this Court having lapsed for want of prosecution, application was made under Rule 15 of the Rules for Native Appeal Courts, published under Government Notice No. 2887 of 1951, as amended, for leave to prosecute the appeal at the following session of the Court at the same centre.

Held that: Although the rule does not state specifically that the granting of such leave is contingent upon good cause being shown by the applicant but leaves the matter entirely in the Court's discretion, such discretion falls to be exercised judicially, so that to succeed, the applicant must show why the Court's discretion should be exercised in his favour. In other words, he must show good cause.

Statutes, etc., referred to: Government Notice No. 2887 of 1951.
Appeal from the Court of the Native Commissioner, Ngqeleni.
Balk (President):—

This is an application under rule 15 of the Rules of this Court, published under Government Notice No. 2887 of 1951, as amended, for leave to prosecute at this session of this Court an appeal from the judgment of a Native Commissioner's Court in a civil action, which lapsed for want of prosecution at the last session of this Court.

Although the Rule does not state specifically that the granting of such leave is contingent upon good cause being shown by the applicant but leaves the matter entirely in the Court's discretion, such discretion falls to be exercised judicially so that to succeed, the applicant must show why the Court's discretion should be exercised in his favour; in other words he must show good cause.

Proceeding to a consideration of the instant application, the applicant states therein that his failure to prosecute the appeal at the last session of this Court was due to lack of funds wherewith to instruct his attorneys. But this reason cannot be regarded as satisfactory as it was open to him to have prosecuted the appeal in person. The applicant further states in his application that he has a good defence to the action apparently intending to convey that he has a good prospect of success on appeal. But, to my mind, it is quite clear from the Court *a quo's* judgment itself that the applicant has in fact no prospect of success on appeal as will be apparent from what follows so that in any event the leave sought falls to be refused, see de Villiers *v.* de Villiers, 1947 (1) S.A. 635 (A.D.), at page 637.

The ground of appeal is that the judgment is against the weight of the evidence. As pointed out by the Assistant Native Commissioner in his reasons for judgment, the testimony of the plaintiff (now respondent) and that of his witnesses substantially supports his case as set out in the particulars of his claim; whereas, apart from the fact that the defendant's (present applicant's) testimony, which is the only evidence for the defence, is a mass of blatant contradictions, he admitted under cross-examination that he had in fact pointed out the cattle which he has received as dowry for his daughter, Nomcoyi, to the plaintiff and the latter's witness, Toba; and his explanation for so doing, viz., because the plaintiff was related to him and had shown him his dowry cattle, is singularly unconvincing particularly in the light of his denial earlier in his evidence that he had pointed out the cattle to the plaintiff and bearing in mind the plaintiff's testimony supported by that of his witness, Toba, that the defendant had pointed out the cattle to him (plaintiff) because of their agreement that the *nqoma* cattle owned by the plaintiff which the defendant had disposed of for his own purposes, were to be replaced by him with stock which he received as dowry for his daughter, Nomcoyi.

It follows that the Court *a quo* cannot be said to be wrong in its finding for the plaintiff and the application should accordingly be refused, with costs.

For Appellant: Mr. F. C. W. Stanford, Flagstaff.
For Respondent: Mr. J. G. S. Vabaza, Libode.

SOUTHERN NATIVE APPEAL COURT.

NGQUBA *v.* ADAM.

CASE No. 77 OF 1956.

PORT ST. JOHN'S: 29th May, 1957. Before Balk, President, Wakeford and Olivier, Members of the Court.

NATIVE CUSTOM.

Representation of parties—Object of dowry.

Summary: Plaintiff sued defendant in the Native Commissioner's Court for nine head of cattle or their value, alleging that he was grandson and heir of one Adam, who had paid nine head of cattle for the dowry of the late Ngquba, under an agreement that the latter would reimburse the former from the dowry of a daughter to be born to Ngquba. As Ngquba had no daughter the cattle were to be refunded from the dowry of Ngquba's granddaughter. As this girl had married, the nine cattle were returnable from her dowry by the defendant who was her brother and heir to her late father and the late Ngquba. In defendant's plea it was alleged that only seven goats had been contributed to the late Ngquba's dowry and their equivalent in number was offered by way of refund. As defendant was an absconder the attorney appearing for the defendant asked for leave for defendant's heir, one Sidudu, to be allowed to defend the action in defendant's name. Plaintiff's attorney consented. Plaintiff was substantially successful. An appeal was noted on the grounds that the judgment was against the weight of evidence.

Held: That it was not competent for Sidudu to defend the action in his personal capacity but only in a representative capacity as there was nothing to indicate that the defendant had died.

Held further: That the object underlying the payment of dowry is the protection of both partners of a customary union.

Cases referred to: Mdontsa v. Fumbalele, 1946, N.A.C. (C. & O.), 68.

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

This is an appeal from the judgment of a Native Commissioner's Court for plaintiff (now respondent) for eight head of cattle or for their value, £64, with costs, in an action in which he sued the defendant (present appellant) for nine head of cattle or for their value, £72, averring in the particulars of his claim that:—

"1. The parties hereto are Natives.

2. That plaintiff is the grandson and surviving heir to the late Adam who paid 9 head of cattle for the dowry of the wife of late Ngquba and the defendant is the grandson and heir to late Ngquba, and the agreement between late Adam and Ngquba was that the latter would reimburse the former from the dowry of a daughter of Ngquba by the marriage, but late Ngquba had no daughters.

3. That defendant's father is the late Pasi, who is the son and heir of late Ngquba, and Pasi has a daughter, Nomabali, sister of defendant and to whom defendant is guardian and dowry eater.

4. That the said Nomabali has now been given in marriage and dowry of 9 head of cattle have been paid for her, and plaintiff has made demand upon defendant for the payment of 9 head of cattle against the defendant without success and plaintiff values the said cattle at £8 each."

The defendant pleaded:—

" 1. That paragraph 1 is admitted.

2. That defendant is a minor and Situtu Ngquba is his guardian.

3. That the late Adam only contributed 7 goats towards the dowry of the late Ngquba's wife not 9 head of cattle.

4. That defendant is the son of the late Sigede and is heir of the late Pasi.

5. That defendant is prepared to refund 7 goats to plaintiff if demanded but denies any liability otherwise.

Wherefore defendant prays judgment with costs ".

The plaintiff's replication reads as follows:—

" 1. Plaintiff denies defendant is a minor, and states that he is a major and has been away from home at work for about 8 years.

2. Plaintiff further denies all the material allegations of fact and conclusions of law contained in defendant's plea, puts him to the proof thereof, and joins issue with defendant and reiterates his prayer for judgment in terms of his claim."

The appeal is brought on the ground that the judgment is against the weight of the evidence.

At the commencement of the hearing in the Court *a quo*, the defendant's attorney intimated that the defendant was an absconder and that the latter's heir was one Sidudu and applied for leave for Sidudu to defend the action in the defendant's name, adding that Sidudu would accept responsibility for the payment of such costs as might be awarded to the plaintiff. The plaintiff's attorney ultimately consented to the " substitution " of Sidudu for the defendant. Presumably, in consenting in these terms, the plaintiff's attorney had no more in mind than to consent to the application for leave for Sidudu to defend the action in the defendant's name. However that may be, it was not competent for Sidudu to defend the action in his personal capacity but only in a representative capacity as there is nothing to indicate that the defendant had died, see Mdontsa *v.* Fumbalele, 1946, N.A.C. (C. & O.) 68, at pages 69 and 70.

Proceeding to a consideration of the appeal, it is not disputed that the plaintiff is the heir of the late Adam and that the defendant is the heir of the late Ngquba and, as such, liable to replace the dowry advanced by Adam to Ngquba. It follows that the only issue that the Court *a quo* had to decide was the *quantum* of the dowry advanced by Adam to Ngquba which, according to the evidence for the plaintiff, was eight head of cattle but according to the defence evidence seven goats only. (The learned President thereupon considered the evidence in detail, pointing out that certain evidence for the defence was not consistent with the object underlying the payment of dowry, viz: the protection of both the partners of the customary union, and concluded as follows:—

> In the circumstances the Court *a quo* cannot be said to be wrong in finding for the plaintiff and the appeal should accordingly be dismissed with costs.

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

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

SOUTHERN NATIVE APPEAL COURT.

MAGANGEZWE v. SILANDA.

CASE No. 78 OF 1956.

PORT ST. JOHN'S: 28th May, 1957. Before Balk, President, Wakeford and Grant, Members of the Court.

NATIVE CUSTOM.

Customary requirement for nqoma *cattle to be earmarked by owner with his earmark.*

Summary: Plaintiff successfully sued defendant (now appellant) for certain seven head of cattle, or their value, *nqomaed* by the former to the latter's son, who placed them with his father for safe custody.

On appeal based on the ground that the judgment was against the weight of evidence the question of the earmarking of *nqoma* stock was considered.

Held: That, according to Native custom, a *nqomaed* beast should be earmarked by the owner.

Cases referred to: Gulani *v.* Gamkile 1, N.A.C. (S.D.) 279.

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

Balk (President), after setting out the pleading and considering the evidence in detail concluded as follows:—

To my mind the unsatisfactory features in the evidence for the defendant leave no room for doubt that the probabilities weigh heavily in favour of the plaintiff whose evidence is not only substantially borne out by his witnesses but is also in accordance with the probabilities; and, in coming to this conclusion, I have not lost sight of the fact that the plaintiff admitted that neither Zola nor he had earmarked the heifer, thus failing to comply with the custom that a *nqomaed* beast should be earmarked by the owner and detracting from the merits of the plaintiff's case, see Gulani *v.* Gamkile, 1 N.A.C. (S.D.) 279, at page 280.

In the result I am of opinion that the appeal should be dismissed with costs.

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

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

SOUTHERN NATIVE APPEAL COURT.

QOYO v. MPISEKAYA.

CASE No. 79 OF 1956.

PORT ST. JOHN'S: 1st June, 1957. Before Balk, President, Wakeford and Grant, Members of the Court.

EVIDENCE.

Summary: The facts are immaterial for the purpose of this report, the appeal being based on the question of credibility of evidence.

Held: That time as measured by European standards is often meaningless to uneducated Natives, so that discrepancies in evidence as regards time should not in general be held against them.

Appeal from the Court of the Native Commissioner, Ngqeleni.
Balk (President), in the course of analysing the evidence remarked as follows:—

In finding for the plaintiff, the Commissioner took into account the discrepancy between the plaintiff's evidence and that of Noluzile as regards the time when her child was born. The plaintiff stated that it was a week after the Christmas of 1955, whereas Noluzile said it was towards the end of February, 1956, The importance of this discrepancy was emphasised in the argument on behalf of the appellant but, as the Commissioner points out, Noluzile has better cause to recollect the date of her child's birth correctly than the plaintiff as is clear from her testimony that it was born six days before she made a certain statement early in March, 1956; and, as is apparent from the decisions of this Court, time as measured by European standards is often meaningless to uneducated Natives so that discrepancies in evidence as regards time should not in general be held against them.

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

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

SOUTHERN NATIVE APPEAL COURT.

NQIWA *v.* QIKI.

CASE No. 5 OF 1957.

PORT ST. JOHN'S: 1st June, 1957. Before Balk, President, Wakeford and Grant, Members of the Court.

PRACTICE AND PROCEDURE.

Conditions precedent to evidence of witness in one case being relied upon to contradict his evidence in another.

Summary: The facts of the case are immaterial. This Court was asked on appeal to find that, on the contradictory evidence disclosed by plaintiff's (respondent's) witnesses from the consolidated evidence in this case and another heard subsequently to this one, the Native Commissioner should have given judgment in favour of the appellant.

Held: That the case relied upon by the appellant does not lend itself to being used for the purpose of refuting any evidence in the instant case in that the conditions precedent permitting of its use for that purpose are wanting; for the evidence adduced in that case could neither be proved nor put in in the instant case as the former was tried after the latter; nor, for the same reason, could any of the witnesses in the instant case have been asked whether they had given the evidence contained in the record of the former case.

Cases referred to: Goold *v.* Bladwell, 1919, T.P.D. 53.
Appeal from the Court of the Native Commissioner, Bizana.
Balk (President):—

This is an appeal brought by the defendant against the judgment of a Native Commissioner's Court dismissing with costs his appeal from the judgment of a Chief's Court for the plaintiff for a certain black heifer and two other cattle.

The pleadings in the Chief's Court, as reflected in his written record, read as follows:—

> "*Particulars of Claim:* Delivery by defendant to plaintiff of one black heifer which was paid by defendant to Nkamnkam Matu, and Zibale Nondawo, by description when defendant was caught committing adultery with Myekelwa's wife named Malubalweni in the hut of Myekelwa, plus 2 head of cattle to be paid by defendant to plaintiff as balance.
>
> *Particulars of Defence:* Defendant denies liability on the ground that he, defendant, was attacked by Nkamnkam and Zibale and was also assaulted by them on the head when defendant was going to his *Dikazi* but defendant admits that he paid a black heifer to Nkamnkam and Zibale which is at Sigxava's kraal in Imizizi Location."

The appeal of this Court is brought on the following grounds:—

> "That the judgment is against the evidence and the probabilities of the case and on the contradictory evidence disclosed by plaintiff's witnesses on material issues from the consolidated evidence of case Nos. 141 of 1956 and 107 of 1956 between Stanford Nqiwa *v.* Zibale Nondawo and Kamkam Matu, the Native Commissioner, it is respectively submitted, should have given judgment for the appellant (Stanford Nqiwa), on the adultery accusation with costs.
>
> Alternatively it is respectfully submitted that the Native Commissioner should have absolved the defendant (Stanford Nqiwa) from the instance with costs."

To my mind the Native Commissioner has given cogent reasons for dismissing the appeal from the Chief's judgment. As pointed out by him, the testimony of the plaintiff's wife, Malubalweni, that the defendant was caught in adultery with her as borne out by the evidence of the remaining witnesses, called by the plaintiff, in the Court *a quo* viz., by Kamkam, Zibale and Headman Gwebityala. It is true that there are seeming inconsistencies in Kamkam and Zibale's testimony but it seems to me that, viewed in their proper perspective, these inconsistencies are more apparent than real; whereas there can, in my view, be no doubt that the discrepancies in the evidence for the defendant which are referred to by the Native Commissioner, coupled with the improbabilities therein, not only justify its rejection by him but serve to confirm that the defendant was in fact caught in adultery with Malubalweni; for it seems to me to be improbable that Kamkam and Zibale would for no reason have waylaid and injured the defendant and then have taken him to Malubalweni's hut and there accused him of adultery with her, as the defendant would have the Court believe. Admittedly, the defendant did state in his testimony in the Court *a quo* that he had had a row with Kamkam in connection with the repayment of two shillings which the latter had taken from him. But, to my mind, it is hardly likely that such a trivial matter would be the motive not only of the assault on the defendant by Kamkam and Zibale but also of their falsely accussing him of adultery with Malubalweni particularly, if the defendant's admission in cross-examination that prior to the assault and false accusation he had been on good terms with Kamkam and Zibale, be borne in mind. Moreover, the defendant also admitted that there was no reason why Headman Gwebityala should bear false witness against him. Then, as pointed out by the Native Commissioner, it is improbable that the defendant's brother, Konkile, should have taken no steps to release the defendant from Kamkam and Zibale if the defendant had in fact protested his innocence to him particularly as the defendant bore head injuries inflicted by Kamkam and Zibale.

Case No. 107/56 relied upon by the appellant, does not lend itself to being used for the purpose of refuting any of the evidence in the instant case (Native Commissioner's Number 141/56) in that the conditions precedent permitting of its use for that purpose are wanting; for the evidence adduced in Case No. 107/56 could neither be proved nor put in in the instant case as the former was tried *after* the latter; nor for the same reason, could any of the witnesses in the instant case have been asked whether they had given the evidence contained in the record of Case No. 107/56, see Goold *v.* Bladwell, 1919, T.P.D. 53.

In the circumstances the Native Commissioner cannot be said to be wrong in dismissing the appeal from the Chief's judgment and the appeal to this Court accordingly also falls to be dismissed. As there was no appearance by or on behalf of the respondent in this Court after due notice to him of the date of the hearing of the instant appeal, there should be no order as to costs of appeal in this Court.

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

For Respondent: No appearance.

SOUTHERN NATIVE APPEAL COURT.

NOVUNGWANA *v.* ZABO.

CASE No. 9 OF 1957.

PORT ST. JOHN'S: 1st June, 1957. Before Balk, President, Wakeford and Grant, Members of the Court.

NATIVE CUSTOM.

Two methods of dissolving customary union when man rejects the woman for no good reason—Customary deductions in Pondoland for dowry returnable on dissolution of customary union—When customary union dissolved by keta *of dowry one beast is returnable where customary deductions equal dowry paid.*

PRACTICE AND PROCEDURE.

Procedure on appeal where onus on defendant in Court a quo *and plaintiff is given judgment after close of defendant's case, without any evidence having been adduced for plaintiff without his having closed his case—Court will not rectify judgment on appeal unless the point on which rectification turns is covered by the grounds of appeal or cross-appeal—Award of "any increase" to stock indefinite and legally incapable of execution.*

Summary: Plaintiff alleged that defendant had given his (plaintiff's) daughter in marriage and had received dowry for her, which dowry he refused to deliver to plaintiff, and asked for an order for delivery to him of this dowry.

Defendant denied that the girl was born during the subsistence of the customary union between plaintiff and her mother but alleged that that union had been dissolved before she was born.

The onus being on him, defendant adduced evidence in support of his allegation that the union had been dissolved before the birth of the girl. At the end of his case and without evidence having been adduced for plaintiff, who had also not yet closed his case, the Native Commissioner entered judgment in favour of plaintiff.

Defendant thereupon appealed on the ground that he had discharged the onus on him by the uncontradicted evidence of his witnesses and himself to the effect that the marriage had been dissolved by *keta* and that the girl was born, not of the marriage, but after its dissolution. He thought that plaintiff had a case to meet, which the latter had not met. The appeal turned on the question whether the procedure adopted resulted in prejudice to the defendant.

Held: That where a woman is rejected by her partner in a customary union for no good reason it was open to her guardian to have dissolved the union between them either without the return of any dowry by having the partner publicly repudiate her before the chief or headman, or, alternatively, by *ketaing* her dowry, less the customary deductions, and returning this to the partner.

Held further: That, in accordance with Pondo custom, deductions of one beast for each child born, one for the marriage outfit and one for the woman's services, may be made from the dowry returnable upon dissolution of a marriage.

Held further: That, in the case of *keta* of dowry, where the customary deductions to be made from the dowry returnable equals the dowry paid for the woman one beast only is returnable to the man to mark the dissolution of the latter's customary union with the woman.

Held further: That, when judgment has been entered for plaintiff before he has closed his case or adduced evidence, the onus of discharging the burden of proof being on defendant, the appeal turns on the question whether that procedure resulted in prejudice to the defendant as would be the case if he had in fact, *prima facie,* discharged the burden of proof resting on him.

Held further: That it is not proper for this Court to give effect to a request that it should, by virtue of the wide powers vested in it, rectify a judgment in respect of an aspect not covered by the grounds of appeal.

Held further: That the award by the Court of "any increase" to stock is indefinite and legally incapable of execution.

Cases referred to:

Belonje *v.* Greyling, Schelling en Kie., Beperk, 1956 (2) S.A. 632 (T.P.D.).

Bobotyana *v.* Jack, 1944, N.A.C. (C. & O.), 9.

Njikazi *v.* Ngawu, 3 N.A.C. 66.

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

The plaintiff (now respondent) instituted an action in a Native Commissioner's Court claiming from the defendant (present appellant) certain cattle, together with any increase, or their value.

The pleadings, as amended with the leave of the Court *a quo,* read as follows:—

"*Particulars of Claim.*

1 Many years ago the plaintiff married a woman named Mandiloni, the daughter of Tseku Mtala of Ntshangase location and of their marriage amongst other two daughters were born named Nyiselwa and Timbani, the latter having been born during the subsistence of an adulterous union.

2. Some years ago the said Manjiloni left the kraal of the plaintiff and returned to her people's kraal taking the girl, Nyiselwa, and another child with her and thereafter the girl Nyiselwa went to stay at the kraal of the defendant on a visit and while there the defendant wrongfully and unlawfully gave her in marriage and received 5 head of cattle and £20 cash as dowry for her. Plaintiff is entitled to this dowry as father and guardian of the said Nyiselwa and to the increase of such dowry.

3. The defendant neglects or refuses to deliver the said dowry to plaintiff after demand and although requested to do so. Wherefore plaintiff prays that defendant may be ordered to deliver to him the above referred to cattle or to pay their value £15 each, further that defendant may be ordered to render a statement of account of the increase of the said 5 cattle and to deliver such increase or pay their value at £15 per head, for alternative relief and costs of suit.

Defendant's Plea.

1. Defendant admits that many years ago plaintiff married a woman named Manjiloni but denies that two daughters named Nyiselwa and Timbani were born of the marriage. Defendant states that before Manjiloni left plaintiff's kraal all her children had died.

2. Paragraph two of the summons is denied. Defendant states that plaintiff drove Manjiloni away from his kraal, demanded and received the return of all his dowry thereby dissolving the marriage between him and Manjiloni and that after that Manjiloni gave birth to Nyiselwa and Timbani of whom plaintiff is not the natural father. Defendant admits that he gave Nyiselwa in marriage and that he received three head of cattle and £20 cash as dowry for her but that he received this dowry on behalf of Nyiselwa's guardian Siweke's son and heir Minoshwa. Alternatively but only in the event of the Court finding that plaintiff is the father of Nyiselwa which is denied defendant states that when Manjiloni left plaintiff's kraal her marriage to plaintiff was dissolved and all dowry in respect of Manjiloni was returned to plaintiff and no customary deductions were made for any children born of the marriage and that plaintiff is therefore not entitled to any dowry paid for Nyiselwa.

3. Paragraph three of the summons is admitted. Wherefore defendant prays that plaintiff's claim be dismissed with costs."

After the defendant, on whom onus of proof on the pleadings rested, had adduced evidence and closed his case, the Court below entered the following judgment on application by the plaintiff's attorney and without the plaintiff's having adduced any evidence or closed his case:—

"For plaintiff for five head of cattle and £20 and any increase with costs."

The appeal from that judgment is brought by the defendant on the following grounds:—

"(1) That the judgment is wrong in law for the following reasons:—

A. That the onus was upon the defendant to prove—

(i) that the marriage between plaintiff and Manjiloni was dissolved;

(ii) that the girl, Nyiselwa, was not born during the marriage between plaintiff and Manjiloni and was born after the dissolution of the said marriage.

B. The uncontradicted evidence of defendant and his witnesses proves that the said marriage was dissolved, that the said Nyiselwa was not born of the marriage between plaintiff and Manjiloni and that Nyiselwa was born after the dissolution of the said marriage.

C. Defendant therefore discharged the onus cast upon him and there was at the end of defendant's case a case for plaintiff to meet which plaintiff failed to do.

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

As the judgment was given by the Court *a quo* after the defendant, on whom the onus of proof on the pleadings rested, had closed his case and without the plaintiff's having adduced any evidence or closed his case, the appeal turns on the question whether that procedure resulted in prejudice to the defendant as would be the case if he had in fact, *prima facie,* discharged the burden of proof resting on him, see Belonje *v.* Greyling, Schelling en Kie, Beperk, 1956 (2) S.A. 632 (T.P.D.), at page 635.

Turning to a consideration of this aspect, the defendant's attorney, *in limine,* intimated in the Court below that he was not relying on the alternative part of paragraph 2 of the defendant's plea but solely on the averment in the main part of that paragraph that the customary union between the plaintiff and Manjiloni had been dissolved prior to Nyiselwa's birth.

Briefly, the defendant's case as disclosed by the evidence adduced by him, is that, whilst he was Nyiselwa's "custodian", he received 5 head of cattle and £20 in cash as dowry in respect of a customary union entered into by her and that the heir of the late Siweke who was the guardian of Nyiselwa's mother, Manjiloni, and not the plaintiff, was entitled to this dowry as the customary union between the plaintiff and Manjiloni had been dissolved by the *keta,* before Nyiselwa's birth, of the dowry paid for Manjiloni. It also emerges from the evidence for the defendant, that the plaintiff had accused Manjiloni of killing their four children and had beaten and driven her away. It was thus open to Siweke to have dissolved the customary union between the plaintiff and Manjiloni either without the return of any of the dowry by having the plaintiff publicly repudiate her before the Chief or Headman or, alternatively, by *ketaing* her dowry, less the customary deductions, to the plaintiff, see Bobotyana *v.* Jack, 1944 N.A.C. (C. & O.) 9, at page 11.

According to the evidence for the defendant, Siweke adopted the latter course and refunded to the plaintiff the whole of the dowry paid to him for Manjiloni, consisting of six head of cattle. As it is manifest from that evidence that Manjiloni had four children by the plaintiff all of whom had died prior to the alleged restoration of her dowry and that Siweke had provided a marriage outfit for her, he (Siweke) was, in accordance with Pondo custom which obtains here, entitled to deduct six head of cattle from the dowry returnable i.e., one beast for each of the four deceased children, a fifth beast for the marriage outfit and a sixth beast for Manjiloni's services. However, as according to the evidence for the defendant, the dowry paid for Manjiloni equalled the customary deductions in respect of the four deceased children, wedding outfit, and her services, one beast only was returnable by Siweke to the plaintiff to mark the dissolution of the latter's customary union with Manjiloni, see Njikazi *v.* Ngawu, 3 N.A.C. 66. As stated above, the defendant's case is that all six head of cattle paid to Siweke as dowry for Manjiloni were in fact returned to the plaintiff and, apropos thereof, the Native Commissioner states in his reasons for judgment that this alleged repayment is in the circumstances of the instant case so improba-

ble and contrary to established custom as to be quite unacceptable. With this view I am wholly in agreement. It follows that the defendant cannot be said to have, *prima facie,* discharged the onus of proof resting on him on the pleadings and the appeal accordingly fails.

Mr. Birkett, in the course of his argument on behalf of the appellant, asked that in the event of this Court finding against him, it should, by virtue of the wide powers vested in it, reduce the judgment in the plaintiff's favour by £20 as it is clear from the uncontroverted testimony of the defendant that he provided Nyiselwa with a marriage outfit costing this amount. It seems to me, however, that it would not be proper for this Court to give effect to this request as this aspect is not covered by the grounds of appeal.

A further aspect calls for comment, viz., the inclusion in the judgment of the Court *a quo* of an award of "any increase". The award in this respect is indefinite and thus legally incapable of execution. The remainder of the judgment is of course valid and executable. It should be added that although it is manifest from the evidence for the defendant that there was in fact one increase of the five head of cattle concerned, it does not behove this Court to vary the judgment of the Court below so as to include this increase in the absence of a cross-appeal.

In the result the appeal should be dismissed with costs.

For Appellant: Mr. H. H. Birkett of Port St. John's.

For Respondent: Mr. F. C. W. Stanford of Flagstaff.

NORTH-EASTERN NATIVE APPEAL COURT.

NSELE *v.* BUTHELEZI AND ANOTHER.

N.A.C. CASE No. 14 OF 1957.

VRYHEID: 2nd July, 1957. Before Menge, President, Ashton and McCabe, Members of the Court.

Application for condonation of late noting of appeal: Ineffective noting.

PRACTICE AND PROCEDURE.

Summary: Applicant had noted an appeal against a Native Commissioner's judgment given on the 27th December, 1956. His legal representative noted the appeal on the 28th February, 1957, without having any knowledge of the case and without being able to frame grounds of appeal. He made no formal application for condonation of the late noting; only an affidavit by applicant was put up asking for condonation on the ground that at the relevant time the applicant was too ill to take action. It was almost two months later that the applicant was in a position to file grounds of appeal. He then sought to amend his notice of appeal by adding grounds which referred to quite a different cause of action.

Held: That there was neither an appeal nor an application for condonation of late noting before the Court.

Appeal from the Court of the Native Commissioner, Nongoma.

Menge (President) delivering the judgment of the Court:

In this appeal the record discloses that the appellant sued the respondent before the Chief for one beast. The claim according to the written record (N.A. 502) reads: "I want my beast from defendant, defendant does not want to pay me for medical treatment". The Chief gave judgment for plaintiff and thereupon the defendant appealed to the Native Commissioner. The notice of hearing (N.A. 503) describes the claim as follows: "I want my beast from defendant, being payment for my services as (Inyanga) witch doctor". The Chief's reasons for judgment were that "there was sufficient proof in evidence that plaintiff did treat defendant medically". Paragraph 4 of the reasons reads as follows:—

> "The witness further stated that he actually saw defendant point out a yellow heifer with a white face to plaintiff."

The evidence recorded by the Native Commissioner is brief. It reads:—

> "Molivane Nsele s/s/: I am a Native from this District. I know the defendants who are now appealing against the Chief's judgment.
>
> I am an Inyanga, I am not a licenced Inyanga."

Thereupon, apparently without an opportunity having been given to plaintiff to address the Court, the record continues:—

> "In view of the fact that the Inyanga is not registered it is ruled that he has no right to claim fees and claim is therefore unlawful."

Thereupon the Native Commissioner altered the Chief's judgment to one for defendant with costs. This was on the 27th of December, 1956.

The plaintiff noted the present appeal on 28/2/57 on the following grounds:—

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

2. Other grounds as may later appear on perusal of the record."

This notice refers to a judgment of the Native Commissioner dated 23/10/56. In any case, the notice is out of time. There is no application for condonation of the late noting, only an affidavit which may or may not have been intended as an annexure to the notice of appeal. There is nothing to indicate that a copy of this affidavit was served on the opposite party nor is it stamped as an application. This document is also brief. It reads as follows:—

"1. I am the appellant in Case No. 90/1956 in which judgment was given against me in the Native Commissioner's Court on the 27th day of December, 1956.

2. During the month of January, 1957, I was so severely ill and indisposed that I was unable to attend to any business.

3. I am now noting an appeal against the Native Commissioner aforesaid.

4. I hereby pray the Court to condone the late filing of notice of appeal herein."

So far brevity has been the hall mark of these proceedings, but on 23/4/57 there is a distinct change. The applicant decided that his claim was not based on remuneration for services rendered, but on ownership. In an application for an amendment of the grounds of appeal, supported by a lengthy affidavit of seventeen clauses the appellant explains that his claim has all along been misunderstood; that he in reality had sued for three head of cattle which were his own property and which the defendant was withholding from him.

It is not necessary to deal further with this amendment because the request for late noting of the appeal must fail. Paragraph 2 of the earlier affidavit is by no means a sufficient explanation for not taking action; but the chief difficulty facing the applicant lies in paragraph 3. No appeal has in fact been noted. The notice of appeal *ex facie* indicates that it was drafted before the applicant's attorneys had any idea of what they were appealing against. That notice means no more than that the applicant on 11/2/57 (the date of the so-called notice of appeal) informed the Court that he proposes to note an an appeal on some future date when his attorney has discovered what the matter is all about—as was actually done, on the 23/4/57. There is no provision in the rules or in any law for thus reserving a future right of appeal.

The position is then that the "application for late noting", defective in itself, refers to an appeal which has not even been properly noted; and that two months later it is sought to introduce an entirely new case.

No doubt if the applicant wishes to sue the defandant in respect of a matter which has not yet come before the courts he can do so, but he cannot do so by way of appeal. His notice of appeal in the present proceedings is entirely misconceived and out of time.

The appeal is, therefore, struck off the roll. As respondent did not appear before this Court no order is made as to costs.

For Applicant: C. J. Uys on behalf of Cowley and Cowley.

Respondent in default.

SOUTHERN NATIVE APPEAL COURT.

TSHAKA *v.* SIQOLANA AND ANOTHER.

N.A.C. CASE No. 8 OF 1957.

KING WILLIAM'S TOWN: 10th July, 1957. Before Balk, President, Harvey and Welman, Members of the Court.

LAW OF EVIDENCE.

Meaning of "corroboration"—Seduction.

Summary: Plaintiff (Appellant) sued the defendants for damages for the seduction and pregnancy. The Assistant Native Commissioner found that the first defendant had sexual intercourse with the girl, but gave judgment against the plaintiff as there was no corroboration of the alleged initial act of sexual intercourse, but only of a subsequent act.

Held: That corroboration is afforded by any acceptable evidence *aliunde* which, in some degree, is consistent with the girl's testimony that the defendant seduced her and inconsistent with his innocence.

Cases referred to:

Wiehman *v.* Simon, N.O. 1938 A.D. 447.
Davel v. Swanepoel, 1954 (1) S.A. 383 (A.D.).
Dolo *v.* Mbewu, 1 N.A.C. (S.D.) 168.

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

Balk (President):

This is an appeal from the judgment of a Native Commissioner's Court decreeing absolution from the instance, with costs, after the close by both parties of their cases, in an action in which the plaintiff (present appellant) sued the two defendants (now respondents) for five head of cattle or their value, £50, averring:

"1. That the parties hereto are Natives as defined by Act 38/1927.

2. That plaintiff is the guardian according to Native law and custom of one Mildred and 2nd defendant is the kraalhead and guardian of the 1st named defendant and as such jointly and severally liable with 1st defendant for torts or delicts committed by the latter.

3. That in or about September, 1955, and at Zwartwater location the 1st named defendant wrongfully and unlawfully seduced and rendered pregnant the said Mildred.

4. That in the premises plaintiff has suffered damages in the extent of 5 head of cattle or £50 their value for which the plaintiff holds defendants jointly and severally liable and for which plaintiff hereby makes claim.

5. That the customary report was duly made.

6. That when the matter was heard by Headman Rayi of Zwartwater location, judgment was given against the defendants.

7. That despite demand defendants refuse and/or neglect to make payment.

Wherefore plaintiff prays for judgment against the defendants, jointly and severally for the delivery of 5 head of cattle or payment of the sum of £50 their value with costs."

The defendants pleaded:—

" 1. Defendants admit paragraphs 1, 5, 6 and 7 of the plaintiff's summons.

2. As to paragraph 2 of the Summons defendants do not admit that plaintiff is guardian of the said Mildred according to Native law and custom and put plaintiff to the proof thereof. Second-named defendant admits being kraal head of first-named defendant.

3. As to paragraph 3 of the Summons first-named defendant denies having seduced and rendered pregnant the said Mildred.

4. Defendants deny liability as claimed in paragraph 4 of the Summons.

Wherefore defendants pray that plaintiff's Summons may be dismissed with costs of suit."

The appeal is brought on the following grounds:—

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

2. That the Court should have found as a proved fact that the first defendant did seduce and render pregnant the complainant during or about September, 1955.

3. That there was an onus on the first defendant to prove that he did reject the complainant in August, 1955; that the first defendant failed to discharge this onus and that on the balance of probabilities he was still a metsha of the complainant on the various occasions when she alleged he had intercourse with her, as the result of which she became pregnant."

The Assistant Native Commissioner states in his reasons for judgment that he found that the first defendant had sexual intercourse with Mildred. He goes on to say that he accepted the testimony of the plaintiff's witness, Nobendiba, but came to the conclusion that the plaintiff had not proved his case sufficiently to enable him to succeed. The Assistant Native Commissioner's reasons for judgment indicate that he was under the impression that the plaintiff was not entitled to judgment because there was no corroboration of the alleged initial act of sexual intercourse between the first defendant and Mildred but only of a subsequent act. But, in taking this view, the Assistant Native Commissioner has misdirected himself for corroboration is afforded by any acceptable evidence *aliunde* which in some degree, is consistent with the girl's testimony that the defendant seduced her and inconsistent with his innocence, see Wiehman *v.* Simon, N.O. 1938 A.D. 447, at page 450, and Davel *v.* Swanepoel, 1954 (1) S.A. 383 (A.D.), at pages 388 and 389; and Nobendiba's evidence is manifestly consistent with Mildred's testimony that the first defendant seduced her and inconsistent with the first defendant's innocence. Moreover, the Assistant Native Commissioner's finding that the first defendant's denial in the course of his evidence that Nobendiba had called Mildred to join him at his behest on a certain night during the *Jaka* ceremony at Mlungisi's kraal, is false also affords the necessary corroboration of Mildred's testimony of her seduction by the first defendant, see Dolo v. Mbewu, 1 N.A.C. (S.D.) 168, at page 169.

There can, to my mind, be no doubt that the Assistant Native Commissioner properly accepted Mildred's testimony and that of Nobendiba that the first defendant seduced and rendered Mildred pregnant; for their evidence has both the impress of truth and sincerity being, as it is, in accordance with the probabilities, the inconsistencies therein being more apparent than real; whereas the inconsistencies and improbabilities inherent in the defendant's evidence, in particular as regards the manner in which he and Mildred *metshaed* and his version of the events leading up to the termination of their intimacy, amply justify its rejection. In addition the plaintiff's uncontroverted evidence that he is Mildred's guardian established that fact.

A further point calls for comment and that is that the Assistant Native Commissioner's reasons for judgment appear to indicate that he took into account the contents of the letter (Exhibit "A") which was handed in by the defendant with a view to showing that Mildred had been intimate with another man. But as this letter was not written by Mildred but to her—according to the defendant's evidence he intercepted it—the contents are hearsay and inadmissible.

In the result the appeal falls to be allowed, with costs, and the judgment of the Court *a quo* altered to one for plaintiff as prayed, with costs.

Harvey, K.G. (Member): I concur.

Welman, R. (Member): I concur.

For Appellant: Mr. W. M. Tsotsi of Lady Frere.

For Respondent: Mr. H. J. C. Kelly of Lady Frere.

SOUTHERN NATIVE APPEAL COURT.

NGQOYIYANA *v.* **MARASI.**

N.A.C. CASE No. 10 OF 1957.

KING WILLIAM'S TOWN: 11th July, 1957. Before Balk, President, Harvey and Welman, Members of the Court.

LAW OF CONTRACT.

Rents Act, 1950—*Ejectment under section* twenty-one (1) (*c*)—*Effect of statutory notice—Valid common law notice terminating monthly lease—Damages for holding over—Determination of period in respect of damages for holding over.*

Summary: Plaintiff let a certain room in Duncan Village, East London, on a monthly tenancy at 16s. per month payable in advance to defendant. On 11th October, 1955, he gave defendant three months' written notice to vacate the premises on the ground that they were required for plaintiff's personal occupation. Defendant failed to vacate the premises and plaintiff, unsuccessfully claimed an ejectment order, and damages at 16s. per month from 1st August, 1956, to date upon which defendant vacates.

In his particulars of claim he alleged as an alternative that, as the agreement of tenancy had been cancelled with effect from the end of January, 1956, defendant had remained in possession of the room after that date protected by virtue of the Rents Act, as amended, but that, as defendant had failed to make payment of the rental for August and September, 1956, within seven days of due date, he had lost the protection afforded him by that Act.

Defendant, who admitted receiving written notice, denied that plaintiff required the premises for his personal occupation, and alleged that he had not received one months' notice of termination of the common law tenancy as required by law. He denied that he had become a statutory tenant and that he was, therefore, legally obliged to pay rental for August and September, 1956, within seven days of due date, as alleged in the alternative particulars of plaintiff's claim.

It was clear from plaintiff's uncontroverted evidence that he reasonably required the premises for his personal occupation.

The appeal resolved itself in the first instance into the question whether the statutory notice served the dual purpose of being both a compliance with the requirements of section *twenty-one* (1) (*c*) of the Rents Act, 1950, as amended, and a valid common law notice terminating the monthly lease, the Assistant Native Commissioner having held that the statutory notice did not terminate the monthly lease.

Held: That a statutory notice of the nature in question was also a valid notice for the purpose of bringing to an end a monthly tenancy.

Held further: That plaintiff is entitled to damages for holding over in respect of the period during which defendant held over, but paid no rent to plaintiff.

Held further: That this period cannot properly go beyond the date of the judgment of the Court *a quo*, because to award damages up to the date on which the premises are vacated by the defendant would make the judgment in this respect indefinite and thus unenforceable; and in any event the date of judgment here finalises this issue.

Cases referred to:

Brokensha *v.* Smith, 1947 (4) S.A. 58 (N.P.D.).

Bok Street Bottle Store *v.* Kahn, 1948 (1) S.A. 1068 (W.L.D.).

Da Silva *v.* Razak, 1953 (1) S.A. 146 (C.P.D.).

Lawson and Kirk (Pty.), Ltd., *v.* Phil Markel Ltd., 1953 (3) S.A. 324 (A.D.).

Legislation referred to:

Section *twenty-one* (1) (*c*) Rents Act, 1950.

Appeal from the Court of the Native Commissioner, East London.

Balk (President):

Good cause having been shown, the late noting of the appeal was condoned.

The plaintiff (present appellant) instituted an action against the defendant (now respondent) in a Native Commissioner's Court claiming—

"(*a*) An Order of ejectment.

(*b*) Payment of the sum of 16s. per month as and for damages for holding over occupation of the said room from the 1st August, 1956, to date on which Defendant vacates.

(*c*) Costs of suit."

The pleadings, including the further particulars furnished by the parties in response to requests therefor, read as follows:—

Particulars of Plaintiff's Claim.

"(1) The parties hereto are Natives as defined by Act No. 38 of 1927.

(2) The Defendant hires from Plaintiff a certain room at 1381 Mbola Street, Duncan Village, East London, in terms of a monthly agreement of tenancy, the rental in respect thereof being 16s. per month payable in advance at the commencement of each month.

(3) On or about the 11th October, 1955, Plaintiff through his Attorneys, duly gave defendant three months notice to vacate the premises on the grounds that plaintiff reasonably requires the said premises for his personal occupation.

(4) Plaintiff still requires the said premises for his personal occupation but despite the said notice, defendant is still in occupation thereof.

(5) A copy of the letter of notice referred to had been forwarded to the Secretary of the Rent Board, East London.

(6) Alternatively by reason of the said letter, plaintiff had duly cancelled the agreement of tenancy existing between plaintiff and defendant, and defendant from the end of January, 1956, remains in possession of the room protected by virtue of the Rents Act as amended.

(7) The defendant has failed to make payment of the rental for the months of August to September, 1956, inclusive, within 7 days of due date and has thus lost the protection afforded to him under and by virtue of the said Act.

(8) Defendant fails, refuses and/or neglects to vacate the said room."

Copy of Notice referred to in Paragraph three of Particulars of Plaintiff's Claim, furnished as Further Particulars.

" 11th October, 1955.

Mr. Templeton Marasi,
1381, Mbola Street,
East Bank Location,
East London.

Greetings:

re: *Lease Sidney Ngqoyiyana.*

We are acting for Sidney Ngqoyiyana from whom you lease one room on hutsite No. 1381 Mbola Street.

Our client has now advised us that he now requires the room rented by you for his personal occupation, and in terms of section *twenty-one* (1) (*c*) of the Rents Act, 1950, we hereby give you three (3) months' notice to vacate the said premises.

Yours faithfully,
RANDELL AND BAX.
per D. T. SANDERSON."

Defendant's Plea.

" 1. Defendant admits paragraphs 1, 2 and 3 of plaintiff's claim.

2. *Ad Para.* 4:—Save that defendant admits that he did receive said letter of notice and that he is still in occupation of premises referred to in paragraph 2 of plaintiff's claim, defendant denies that said premises are reasonably required for plaintiff's personal occupation.

3. Alternatively to paragraph 2 herein, defendant further pleads that plaintiff revived the lease that had been terminated by virtue of notice given and referred to in paragraph 3 of plaintiff's claim by accepting rentals in respect of the said premises after the termination for the months of February, March, 1956, April, 1956, May, 1956, June, 1956, July, 1956, August, 1956, September, 1956, October, 1956.

4. *Ad Para* 6:—Defendant denies that the letter of notice referred to in paragraph 3 of plaintiff's summons terminated the agreement of tenancy either from the end of January, 1956, or at all and plaintiff is put to proof of this allegation and defendant further specifically denies that he remained in possession of the room protected by virtue of Rents Act after the end of January, 1956.

5. *Ad Para* 7:—Defendant denies that he was legally obliged to pay rental for the months of August and September, 1956 within seven days of due date and plaintiff is put to proof of this allegation.

6. *Ad Para* 8:—Save that defendant admits that he refuses to vacate the premises, defendant denies that his refusal is unlawful and further states that he is in law entitled to remain in occupation of said room.

Wherefore defendant prays that plaintiff's claim be dismissed with costs."

Futher Particulars in regard to Defendant's Plea.

"Payments of rentals for the months of February to August, 1956, were made to Messrs. Randell and Bax and payments in respect of September and October, 1956, were tendered to plaintiff who refused to accept same and defendant then paid the rentals for said months at Attorney. V.V.T. Mbomo's office.

Rent for February:—16th February, 1956.
Rent for March, 1956:—29th March, 1956.
Rent for April, 1956:—27th April, 1956.
Rent for May, 1956:—24th May, 1956.
Rent for June, 1956:—June the 8th, 1956.
Rent for July, 1956:—August the 10th, 1956.
Rent for August, 1956:—August the 23rd, 1956.
Rent for September, 1956:—11th September, 1956.
Rent for October, 1956:—6th October, 1956.

Payments for May and July accepted unconditionally. Payments for September and October, 1956, refused; otherwise payments were accepted without prejudice.

Copies of receipts referred to above are attached hereto marked "A" "B" "C" "D" "E" except receipts for the months of June, 1956 and August, 1956 which have been misplaced by defendant and cannot be obtained but their respective Nos. are 6290 and 7404 as obtained from the offices of Messrs. Randell and Bax.

Defendant was not given One Month's notice of termination of common law tenancy as required by law.

Defendant was and is still not a statutory tenant and in the premises he was not legally obliged to pay his rentals for August and September, 1956 within seven days of due date."

The Court *a quo* dismissed the plaintiff's claim, with costs. The appeal against that judgment is brought on the following grounds:—

"(1) The appellant having proved—

(*a*) that the premises are reasonably required for his own use in terms of section *twenty-one* (1) (*c*) of the Rents Act 1950 as amended, and

(*b*) that three months notice having been given in terms of the aforesaid Section

the Commissioner erred in not granting an Order of ejectment.

(2) The Commissioner erred in holding that the Respondent did not become a "statutory tenant" after the expiration of the period of notice.

(3) The Commissioner erred in holding that the rental for September and October, 1956, had been tendered as the Respondent did not in his evidence support that contention.

(4) The Commissioner, having found that the rental for the months of February to September, 1956, inclusive had not been paid on due date, erred in holding that the alternative claim had in addition to the main claim not been proved.

(5) That in any event appellant was entitled to judgment in addition to an Order of ejectment, in terms of paragraph (*b*) of appellant's prayer in the summons."

At the commencement of the hearing in the Court below the defendant's Attorney abandoned paragraph 3 of the defendant's plea so that the question of the alleged revival of the lease does not call for consideration.

It is common cause that the premises were let by the plaintiff to the defendant on a monthly basis and that the only notice in writing given to the defendant thereanent is the statutory one referred to in paragraph 3 of the particulars of the plaintiff's claim. That being so, and as it is clear from the plaintiffs uncontroverted testimony that the premises in question are reasonably required by him for his personal occupation, the appeal in the first instance resolves itself to the question whether the statutory notice serves the dual purpose of being both a compliance with the requirements of section *twenty-one* (1) (*c*) of the Rents Act, 1950, as amended, and a valid common law notice terminating the monthly lease. The Assistant Native Commissioner answered this question in the negative, holding that the statutory notice did not terminate the monthly lease. and for that reason dismissed the plaintiff's claim. But in Brokensha *v.* Smith, 1947 (4) S.A. 58 (N.P.D.), at page 60, which was cited in the course of the argument on behalf of the appellant, it was held that a statutory notice of the nature in question was also a valid notice for the purpose of bringing to an end a monthly tenancy. A similar conclusion was reached in Bok Street Bottle Store *v.* Kahn 1948 (1) S.A. 1068 (W.L.D.), at pages 1072 and 1073 and in Da Silva *v.* Razak 1953 (1) S.A. 146 (C.P.D.), at pages 148 and 149. With this view I am, with respect, in agreement as it also seems to me that a timeous notice to vacate leased premises amounts by necessary implication to a notice of termination of a monthly lease, perticularly as the criterion in cases of this nature is the situation at the time of the hearing of the action, see Lawson and Kirk (Pty.), Ltd., *v.* Phil Markel Ltd., 1953 (3) S.A. 324 (A.D.), at pages 333 and 334. It follows that the plaintiff is entitled both to an order for the defendant's ejectment from the premises in question and damages in respect of the period during which the defendant held over and in respect of which he paid no rent to the plaintiff. This period, according to the further particulars furnished by the defendant and the admission made by the plaintiff's Attorney during the hearing of the case in the Court below, flows as from the 1st September, 1956, and cannot properly go beyond the date of the judgment of the Court *a quo*, because to award damages as prayed i.e. up to the date on which the premises are vacated by the defendant, would make the judgment in this respect indefinite and thus unenforceable; and in any event the date of judgment here finalises this issue.

In the result the appeal falls to be allowed, with costs, and the judgment of the Court *a quo* altered to read—

> "For plaintiff, with costs, as follows:—
> "On claim (*a*) as prayed and on claim (*b*) for damages calculated at the rate of 16s. per month as from the 1st September, 1956, to date of judgment i.e. to the 15th February, 1957.

Harvey, K. G. (Member): I concur.

Welman, R. (Member): I concur.

For appellant: Mr. E. M. Heathcote of King William's Town.
For respondent: No appearance.

NORTH-EASTERN NATIVE APPEAL COURT.

KUMALO *v.* VILAKAZI.

N.A.C. CASE No. 28 OF 1957.

PIETERMARITZBURG: 16th July, 1957. Before Menge, President, Ashton and Bridle, Members of the Court.

PRACTICE AND PROCEDURE.

Appeal—Condonation of late noting—Furnishing reasons for judgment.

Summary: The relevant facts appear from the judgment of the President.

Held: (The President dissenting) that there is no obligation on Clerks of the Court under Rule 4 of the Native Appeal Court Rules to advise appellants that reasons for judgment are available.

Cases referred to:

Shangase *v.* Kumalo, 1952 N.A.C. 240.

Statutes referred to:

Rules 2 and 4 and Table A—Item 3 (*a*) of the Native Appeal Court rules.

Appeal from the Court of the Native Commissioner, Pietermaritzburg.

Menge (President) dissentiente:

This is an application for the condonation of the late noting of an appeal against the Native Commissioner's judgment for plaintiff in an action for the return of dowry and an *Isibizo* fee totalling £22, plus costs.

Judgment was given on 11th February, 1957. On the 18th, it is alleged, reasons were asked for. These are dated 7th March, 1957; and on 30th March, 1957, a copy (presumably) was sent to the applicant by the Clerk of the Court. The appeal was noted on 11th April, 1957. The first question which arises is whether the appeal is out of time. There is nothing in the record to indicate when the request for reasons of judgment was received by the Native Commissioner who gave the judgment. Consequently, as the applicant's office is in Pietermaritzburg, it is reasonable to suppose that the request for these reasons was within the time limit specified in Native Appeal Court Rule No. 2. The Clerk of the Court has explained, in reply to an enquiry by the Registrar of this Court, that he received the judicial officer's reasons on the 15th March, 1957. It is not known why they were only sent to the applicant on the 30th March, 1957. The question is, now, whether the applicant was still within the time limit of 14 days laid down in Rule 4 when he noted his appeal on 11th April, 1957.

In Shangase *v.* Kumalo, 1952 N.A.C. 240, it was stated in this Court: "In the first instance the appellant should have enquired from the Clerk of the Court, on the expiration of ten days after his request, whether the judgment had been filed. It was not the duty of the Clerk of the Court to notify the appellant that such a judgment had been filed". With respect, I do not agree. It may be that the rules do not specifically instruct the Clerk of the Court to advise an appellant that the reasons asked for are ready; but that by no means relieves him

of the duty of so advising him. If a request is made to a public officer for information which it takes some time to provide, then common courtesy requires that an intimation be given when the information becomes available. In this connection it is observed that the duty to advise the appellant is specifically laid down in the Magistrates' Courts' Rules [Rule 47 (2)]. In this case, of course, the appellant was duly advised; but only on the 30th March, 1947. He did not know that the reasons were available before that date, and, having made his request, there was no obligation on him to enquire from day to day how the matter is progressing.

It follows that the appeal was not noted late. It is properly before us and the application for late noting should be struck off the roll.

It remains to remark in this connection that in posting to the applicant a copy of the reasons the Clerk of the Court went too far, unless (which from the record seems doubtful) an application for the supply thereof was made and payment was made therefor in terms of the tariff prescribed in Table A—Item 3 (*a*). All that was required of the Clerk of the Court was to advise the appellant that the reasons for judgment were availabe.

Ashton (Permanent Member):

In an action for damages for assault the Assistant Native Commissioner gave judgment for plaintiff for £22 and costs. The defendant was not satisfied with the judgment and lodged a notice of appeal.

The appeal was noted late and an application for condonation of the late noting is before the Court.

The reasons set out in the affidavit for the late noting are not acceptable and the answer to the question whether there is a reasonable prospect of an appeal being successful is in the negative.

The application for condonation is accordingly refused.

There being no appearance for respondent no costs accompany the refusal of the application.

Bridle (Member): I concur in the judgment of the Permanent Member.

Judgment delivered: The application for late noting of the appeal is dismissed.

For Applicant: Adv. J. A. van Heerden, i/b C. C. C. Raulstone and Co.

Respondent in default.

NORTH-EASTERN NATIVE APPEAL COURT.

JILI *v.* DUMA AND ANOTHER.

N.A.C. Case No. 22 of 1957.

Pietermaritzburg: 19th July, 1957. Before Menge, President, Ashton and Bridle, Members of the Court.

SUCCESSION.

Native Estate Regulations—Validity.

Summary: The facts appear from the judgment of the President. The validity of the regulations for the Administration and Distribution of Native Estates was in issue.

Held: That section 2 of Government Notice No. 1664 of 1929 relating to the administration and distribution of Native estates is *ultra vires* and of no force and effect in so far as it purports to lay down substantive rules of devolution.

Cases referred to:

Mzolisa *v.* Mzolisa, 1930 N.A.C. (C & O) 3.
Shata *v.* Shata, 1942 N.A.C. (C & O) 42.
Danana *v.* Sotatsha, 1947 N.A.C. (C & O) 48 dissented from.
Sigcau *v.* Sigcau, 1941 C.P.D. 334.
Njapa *v.* Njapa, 1932 N.P.D. 421.
Ntisana *v.* Ntisana, 1944 E.D.L. 69.
Venter *v.* Rex, 1907 T.S. 910.
Bok Street Bottle Store *v.* Kahn 1948 (1) S.A. 1068.

Statutes referred to:

Government Notice No. 1664 of 1929.
Sections 108-118, Natal Code of Native Law.
Sections 23 and 24 of Act No. 38 of 1927.

Appeal from the Court of the Native Commissioner, Ixopo. Menge (President):

This appeal concerns an action based on the following certificate issued in the course of administering the estate of one Charka (or Shaka) Duma who died in 1951:—

> "I, Leslie James Gifford Addnl. Native Commissioner Ixopo District, in terms of Rule 4 (1) of the Rules and Regulations contained in Government Notice No. 1664 dated the 20th September, 1929 and framed under section *twenty-three* of the Native Administration Act of 1927 and after due enquiry hereby appoint Bekizizwe Duma of Webbstown Ixopo Natal Unexempted Native to represent the Intestate of his brother Charka Duma and as general heir of the Estate of the late Charka Duma with full power and authority to transfer to himself the said Bekizizwe Duma as General Heir and sole heir ab intestato of his late brother the said Charka Duma an undivided 31/57ths of a piece of land being Sub. 14 of Remainder of Subdivision E of Hancock Grange County of Pietermaritzburg Province of Natal in extent 57 acres and 30·40 perches as per Deed of Transfer No. 155/1912 dated 22nd January, 1912 in favour of Ndhleleni Duma and three others, the said Charka Duma being the General Heir of the said Ndhleleni Duma
>
> Dated at Ixopo this 18th day of February, 1953."

Bekizizwe Duma, the designated general heir, sold 25 acres of the property on the 18th February, 1953, to Mbiyose Jili (the present appellant) for £200. This amount was duly paid and occupation taken, but transfer has not been registered.

Meanwhile one Joseph Kumalo was in possession of a will of the deceased. In this the property of the deceased is left to his five daughters, and Kumalo is appointed executor. Kumalo explained in evidence that he handed the will to his attorney early in 1952 but that the latter overlooked it until the 4th March, 1953, when it was handed to the Native Commissioner by the attorney concerned. On receipt of the will the Native Commissioner revoked his certificate. He was empowered by the regulations under which the certificate was issued to revoke the appointment, but it does not appear that he was empowered to revoke his declaration that Bekizizwe Duma is the sole heir. However that may be, the Master issued letters of administration in favour of Kumalo two years later, on the 18th April, 1955. It may be mentioned that a Death Notice was completed by Kumalo on the 7th March, 1953.

In August, 1956, the appellant—the purchaser of the property —sued Bekizizwe Duma (first defendant) and Joseph Kumalo (second defendant,) the present respondents —respectively the general heir designate and the executor testamentary—for:—

"1. A Declaration that he lawfully purchased the property described as a subdivision of Lot 14 of Remainder of Sub E Hancock Grange (Webbstown) situate in the County of Pietermaritzburg, Province of Natal, in extent Twenty-five (25) acres, from the Estate of the Late Shaka Duma, and that he paid the purchase price thereof.

2. An order that 2nd Defendant in his capacity as the Executor Testamentary of the Estate of the late Shaka Duma, or any successor in office, do give immediate transfer thereof to the plaintiff, and

3. That 2nd Defendant or any successor in office be and he is hereby ordered to execute all necessary documents to give effect to this order.

4. That plaintiff be awarded the costs of this action.

Alternatively:—

Plaintiff claims from 2nd defendant in his capacity aforesaid or any successor in office, the sum of Two Hundred Pounds (£200) as a refund of the purchase price of the said land which was lawfully paid by plaintiff to the legal representative of the Estate at the time of purchase."

First defendant consented to judgment, but second defendant contested the claim on the ground that whatever contract the first defendant had concluded with plaintiff was concluded in his private capacity and not as representative of the estate.

After hearing some brief evidence the Native Commissioner gave judgment for defendants. Plaintiff now appeals on the following grounds:—

"1. It is bad in law to hold, and the Native Commissioner erred in holding that:—

(*a*) The certificate granted by the Native Commissioner on 18th February, 1953, was void.

(*b*) That the said certificate did not at any time give 1st defendant the legal authority to dispose of the land on behalf of the Estate.

(*c*) That in the circumstances of this case, it is possible to differentiate between 1st defendant as an individual, and as the representative of the Estate.

(*d*) That the Estate received no benefit from the £200 received by 1st defendant

(*e*) That the Estate was in no way bound by what 1st defendant may have done in regard to the land.

2. The plaintiff as an innocent 3rd party should not be prejudiced by 1st defendant's failure to account to 2nd defendant or to the authorities when 1st defendant's letter of appointment was cancelled.

3. At least Plaintiff is entitled to a refund of his £200 which should be a charge against the assets of the Estate.

4. That the Native Commissioner's judgment is against the law and contrary to the facts disclosed in this case."

The important point to clear up is whether the designation of first defendant as general heir in the certificate granted by the Native Commissioner was at the time correct. If it was—if the first defendant was, as the certificate states, entitled to receive transfer of the land—then he was also entitled, as owner of the right to receive transfer, to sell that right to plaintiff; and then, of course, the estate is liable in law to plaintiff to give him transfer. If on the other hand the first defendant was not the heir to the estate, then the plaintiff can only succeed against the second defendant if he can show that the estate was enriched by his having paid first defendant for the property, for as representative of the estate by appointment of the Native Commissioner the first defendant is not the agent of the heirs, and his actions cannot bind them.

The appellant contends that the certificate was valid. The second defendant did not actually dispute this in the Court below but in effect he disputed the heirship of first defendant. The Native Commissioner concluded that the certificate was not valid, but he gave no reasons for this finding. It seems that the plaintiff's case depends mainly on the validity of the designation of first defendant as heir. It was not contended that he is the heir at common law. It is therefore necessary to examine the regulations under which the designation was made. They were promulgated under Government Notice No. 1664 of 1929 and amended by Government Notice No. 716 of 1939, 1171 of 1939 and 939 of 1947. It seems that they empower a Native Commissioner to determine the heir in an estate, such as this was at the time, where there is no will. His authority flows from section *twenty-three* of Act No. 38 of 1927 and from regulation 2 of Government Notice No. 1664 of 1929 made thereunder. The latter lays down substative rules for the devolution of Native intestate estates, which is somewhat surprising having regard to sub-section 23 (10) of the Act. The first question to be decided, therefore, is whether this section is *intra vires* the enabling act in so far as it purports to lay down such rules.

In Mzolisa *v.* Mzolisa, 1930 N.A.C. (C & O) 3 this question was raised in the Native Appeal Court for the first time. It was contended that the regulations are not valid, but the contention was not pressed in the end and the court rejected it without, however, giving any reasons. Twelve years later in Shata *v.* Shata 1942 N.A.C. (C & O) 42, it was submitted in argument that paragraph (*e*) of section *two* which provides for devolution according to Native Custom, is *ultra vires*. The court did not feel itself called upon to give a decision on the point as it disposed of the matter in hand under paragraph (*c*)—now (*c*) (ii)—the validity of which had not been questioned. Nevertheless the President accounted for these regulations by explaining that the amendment of section 23 of the Act by section *seven* of Act No. 9 of 1929—when the provision for the devolution of undevised property according to Native Law and Custom was deleted—left the way open for the promulgation of regulations under the powers granted to the Governor-General by sub-section 23 (10).

In Danana *v.* Sotatsha, 1947 N.A.C. (C & O) 48, the court for the first time dealt with the question with the view to giving a ruling thereon. As in Shata's case the validity of section *two* (*e*) had been questioned, not, however, by one of the parties but by the Native Commissioner *mero motu*. The Court held that the regulation was valid. The reasoning is as follows: *firstly*, the word distributed is synonymous with devolved. *Secondly*, through the deletion of the last sentence of sub-section 23 (3) of the Act by section *seven* of Act No. 9 of 1929 "the way was..... cleared for the promulgation of regulations, inconsistent with Native Law, prescribing the manner of administration and devolution of devisable property in Native estates,"—something which, so the argument runs, was quite

unnecessary as the sub-section originally read since that sub-section "itself..... made provision not only for the devolution but also for the administration of all property a Native could possibly own." Lastly, the regulations which were promulgated when the way was thus cleared have the force of the provisions of the enabling Act.

The second of these arguments overlooks the fact that the enabling section—i.e. 23 (10)—appeared already in the original Act. Consequently the legislature must have considered regulations necessary in spite of the completeness of the provisions for devolution originally made. However, the President's reasoning is largely based on the case of Ntisane *v.* Ntisane, 1944 E.D.L. 69. Consequently it will be dealt with presently in conjunction with the review of that case.

Turning, then to the Supreme Court decisions dealing with the matter, the first is Sigcau *v.* Sigcau, 1941 C.P.D. 334. In this case there appears a passage which indicates quite clearly that the court had no difficulty about accepting section *two* of the regulations at its face value. Actually the validity of regulation 2 was not dealt with. It seems to have been taken for granted; but in the course of his reasoning when he reviewed the history of the Act and of the regulations, the learned judge did say: "Section *twenty-three* (3) of the Act originally read: 'All other property of whatsoever kind belonging to a Native shall be capable of being devised by will. Any such property not so devised shall devolve and be administered according to Native Law and custom.' No regulations were necessary; the devolution and administration of the estate of any Native who died intestate was provided for by sub-sections (1), (2) and (3) of section *twenty-three*. But by section *seven* of the amending Act of 1929, the last sentence of sub-section (3) was deleted. Both the devolution and administration of any property belonging to a Native who left no valid will, other than property falling under sub-sections (1) and (2) of section *twenty-three*, were left entirely in the air. The devolution and administration of the 'other property' of an intestate Native had now to be dealt with by regulation—the devolution was consequently provided for by Regulation 2 and the administration by Regulation 4."

Notwithstanding the weight of this statement of the law, the case did not decide that Regulation 2 was *intra vires*. That point was neither directly nor indirectly in issue. The actual decision—that under Regulation 4 it is not competent to appoint anybody to administer estate property which in terms of sub-section 23 (1) of the Act has to devolve and be administered according to Native Law and Custom—would have been the same even if Regulation 2 had been declared to be *ultra vires*. Besides, the statement is, with respect, open to criticism.

Firstly, the learned judge says that no regulations were necessary as the Act read originally, since all property not devised had to devolve according to Native Law and Custom. Certainly no separate rules for the devolution of estates *ab intestato* were necessary; but regulations were, and still are, very necessary for the administration of estates. It is surely for rules of precisely this nature that the provisions of sub-section 10 (*a*) of section *twenty-three* of the Act were intended. They could not possibly have been intended for the framing of substantive rules of succession because they already appear in the original Act wherein, as the learned judge says, the devolution of all manner of property had at the time been provided for.

Secondly, it is said that by the deletion of the last sentence of sub-section 23 (3) the devolution and administration of property not falling under sub-sections (1) and (2) of a Native dying intestate were "left entirely in the air." But why? Parliament when it gets down to legislating on a specific problem does not normally shelve half of it. Besides, when a law which makes special provision for certain matters, taking them out of the operation of the ordinary law of the land, is repealed the result cannot be a legal vacuum.

The ordinary law of intestate succession in South Africa is the common law, modified to some extent by statute, e.g. by the Succession Act. It applies to all persons regardless of sex, race or colour, except in so far as special provision has been made inconsistent therewith in respect of any particular class. Such special provision was made in the last sentence of the original sub-section 23 (3). When that provision was repealed the estates of Natives dying intestate once more came to be governed by the common law. As Steyn says in his „*Uitleg van Wette*" (page 15): „'n Geval wat nie deur die woorde van die wet gedek word nie, word oorgelaat aan die reëling van die gemene reg" and he quotes Grotius: *Casus qui non comprehenditur verbis statuti, relinquitur dispositioni juris communis.*

Finally, the learned judge seems to regard the words "shall be . . . distributed" in sub-section (10) (a) of section *twenty-three* as synonymous with "shall devolve". In Sigcau's case Davis, J. had stated, with reference to paragraph (*d*)—now paragraph (*e*)—of regulation 2, that it makes provision for the devolution of property, without touching its administration. Now this paragraph does not use the word devolve. It reads "shall be distributed." These are also the words used in the opening paragraph of regulation 2; and the fact that notwithstanding this the word "devolve" appears in paragraphs (*b*), (*c*) and (*d*) shows that the draftsman of the regulations also considered devolution and distribution as meaning one and the same thing. But these words do not mean the same; nor do the corresponding words in the Afrikaans version of the Act (which version was signed by the Governor-General) viz. "oorgaan" and "word verdeel".

In the Administration of Estates, Act, the word "distribute" never means anything more than to deal out or pay over in terms of the law of succession or in terms of a valid will, as the case may be. Section 68 (1), for instance, which deals with the duties of executors, provides that "Every executor shall administer and distribute the estate in respect of which he is appointed, according to law and the provisions of any valid will relating to that estate." In relation to the law of succession devolution can only mean the passing from the deceased to a person entitled according to law; administration means the handling of an estate until it has so passed, and distribution the mere act of giving effect to the passing. It is quite wrong to interchange devolution and distribution and to use the latter in a sense wide enough to include the formulating of rules of succession. Indeed, the legislature seems to have been fully aware of this, for when the word distribution is used in section *twenty-three* of the Act [vide sub-sections (4), (5), (7) and (9)] it refers to procedure rather than to the substantive law of succession. In fact, in sub-section (9) it cannot possibly mean devolution.

If then these words are not interchangeable, and if the enabling law allows the Executive to frame regulations for the distribution of estates, then this hardly enables the Executive to frame substantive rules of devolution. That seems indeed to be the view Hathorn, J., took in Njapa *v.* Njapa, 1932 N.P.D. 421. In that case the learned judge said: "It is true, of course, that one of the issues on the pleadings is whether or not the plaintiff is his father's heir but *prima facie* that question does not arise out of the administration or distribution of his father's estate."

There is a further aspect: One can only speak of "distributing" an estate according to Native Law when house property to which sub-section 23 (1) of the Act refers is under consideration, because all other property of a deceased Native devolves in bulk upon one male person who is his successor under the system of primogeniture.

The only other Supreme Court case which is directly in point is Ntisana N.O. *v.* Ntisana, 1944 E.D.L. 69. In that case it was actually stated in so many words that the regulations are not *ultra vires.*

In his judgment Gutsche, A. J. P., cited with approval the passage from the judgment of Davis J., in *Sigcau's case* quoted above. He said, furthermore: "..... the provisions of the Act, in its present form, are wholly insufficient *per se* to carry out the intention of the Legislature, and..... the regulations must be invoked to give full effect to the Act, in order to provide fully for the administration and distribution of all Native Estates." After pointing out that section *seven* of Act No. 9 of 1929 deleted part of the provisions of sub-section 23 (3) without substituting new provisions, he went on to say: "The devolution and administration of the 'other property' of an intestate Native had now to be dealt with by regulation—the devolution was consequently provided for by Regulation 2 and the administration by Regulation 4. It is, therefore, abundantly clear that the Regulations implement and form part of the Act."

Finally, the learned judge said with reference to the repeal of the last sentence of sub-section 23 (3) of the Act that this "would in its turn leave the way open for other provisions. Such other provisions were made by Regulation 2 (*c*) in 1929, and in view of the repeal of the last sentence of sub-section 23 (3) of Act 38 of 1927 it cannot be said that this regulation is inconsistent with the Act or on any other ground *ultra vires*."

Before discussing this judgment it is necessary to draw attention to one more passage appearing therein at page 74. The learned judge said (very rightly, with respect): "The tendency of modern legislation is to lay down general principles and to avoid administrative details." Having regard to the conclusions arrived at it would seem that substantive rules of succession and whether common law or Native law and custom should apply are mere "administrative details." This, with great respect, is somewhat startling.

At the outset it is necessary to enquire whether the judgment is at all a binding precedent or the proposition that at least paragraph (*c*) of Regulation 2 is *intra vires*.

This enquiry involves the question, somewhat difficult in its application, as to wherein the binding quality of decided cases is to be found. It is suggested that in every precedent the binding principle upon which the case was decided must be looked for in the decision itself viewed as an event against the back ground of the data upon which it was given; and that the reasons for judgment are not necessarily a precise enunciation of this principle but rather an aid in extracting it. What, then, was actually decided in *Ntisana's* case?

The decision, viewed simply as an event—an objective fact—is that the property (not being "house" property or quitrent land) of a deceased Native who left no valid will devolved, after the 1929 amendment of section *twenty-three* of the Act, according to the ordinary common law rules of intestate succession. Now, this decision is in no way dependent on the question whether or not the regulations are valid. It was arrived at on the understanding that they were valid; but, even if the contrary had been established, the decision would still have been the same. It was easy for the learned judge—and for Davis, J. in *Sigcau's* case—to describe the effect of the amendment to sub-section 23 (3) as leaving matters in the air because that had not really taken place. The regulations had, after all, filled the gap (or purported to do so). But it would not have been so easy to say this if they had been faced with the proposition that there were no valid regulations to fill the gap. The Judges could not very well have said: "Well, there is no longer any law now to deal with property not devised by will. That law has been repealed. Therefore the property simply cannot devolve at all!" They would have had to find that in consequence of the repeal of the special provisions the ordinary law of the land applied.

It follows that the ruling as regards the validity of regulation 2 (*c*) is in the nature of an opinion—an *obiter dictum*. And the final dictum of Gutsche, A. J. P. that "it cannot be said that this regulation is on any other ground *ultra vires*" is *obiter* because this had not been argued or even raised.

In view of this one is at liberty to dissent from the dicta in these cases relating to the validity of the regulations without in any way questioning the correctness of the judgments themselves.

On the strength, then, of all that has been said it follows that when the legislature amended sub-section 23 (3) of the Act it re-introduced the common law rules of devolution. Sub-section (9), as substituted, seems in a measure to support this conclusion. This deals with a testate estate where the will does not dispose of all the devisable property. The residue, it provides, may not be administered under Native Law and custom (as it could have been in certain circumstances) but must be dealt with under the Administration of Estates Act. It follows that paragraphs (*a*) and (*f*) of sub-section 23 (10) of the Act refer to procedure only and not to substantive rules of devolution.

As regards paragraph (*d*) of section *two* of the regulations, it is quite evident that this is *ultra vires* for the reason—which seems to have escaped the attention of the courts—that there has been an unauthorised delegation of powers. Even if one were to concede that sub-section 23 (10) (*a*) empowers the Governor-General to lay down substantive rules for the devolution of estates on intestacy, that still does not allow him, in the absence of special provision, to delegate this function to the Minister of Native Affairs as has been done. *Delegatus non potest delegare.* Alternatively one may go so far as to say that paragraph (*d*) is a negation of rules of devolution. So far from prescribing rules of devolution paragraph (*d*) actually prescribes that there shall be no rules at all. It will all be left to the Minister's discretion. There is no indication that Parliament ever intended that this should be so.

It seems, therefore, that the provisions for the devolution of estates contained in Regulation 2 are not valid. But before passing a final verdict on this point it is necessary to deal with two provisions which create difficulties, unless some explanation can be found. The one is contained in sub-section (4) of section *twenty-three* of the Act, and the other in certain sections of the Natal Code of Native Law, which refer to property which must devolve or be administered according to Native Law "in terms of section *twenty-three* of the Act and the regulations framed thereunder."

As to sub-section (4) of section *twenty-three*, this is still as originally drafted. Now, if the regulations are not valid, one must conclude that devolution according to Native Law can only take place in respect of movable house property in terms of section *twenty-three* (1). Yet sub-section (4) speaks of *immovable* property of which the administration or distribution in accordance with Native Law may lead to a dispute. So then, according to this sub-section, the legislator contemplated that property other than that mentioned in sub-section (1) can devolve in accordance with Native Law. Can one conclude from this that the legislature deliberately left the devolution of such other property to be dealt with, as has been done, by regulation? One cannot. As sub-section (3) originally stood there was a purpose in sub-section (4). After the amendment it served a purpose only in respect of movable house property; and one can consequently say that its effect must be confined to such property, and that for the rest it now stands repealed because *lex posterior derogat priori.*

But this drastic construction does not even appear to be necessary for it is possible to give force to the sub-section even if one claims that since the amending Act only movable house property can devolve according to Native Law. The sub-section refers only to "administration and distribution" and it assumes, therefore, that the actual *devolution* according to Native Law is already settled. Now, the amending Act took effect on the 3rd April, 1929. For about three months, therefore, the original act was in operation. The legislature in leaving sub-section (4) unamended no doubt contemplated that there may be estates where Native Law had become applicable under the original act or even under the pre-1927 legislation and in respect of which it would be desirable to let Native Commissioners handle any disputes. There would, therefore, be no reason to amend sub-section (4).

So far as the provisions of the Natal Code of Native Law are concerned these clearly contemplate that in terms of section *twenty-three* or in terms of the regulations thereunder, or both, property other than movable house property can devolve or be administered in accordance with Native Law. Now, under the Code—not only the present Code but also the former version appearing in the schedule to Natal Law No. 19 of 1891, as amended—there is much that is inconsistent with section *twenty-three* of the Act. But the Code derives its validity from section *twenty-four* and it, therefore, has a special force of its own in Natal and Zululand, independent of what section *twenty-three* provides. Consequently the provisions of the Code relating to inheritance and succession (sections 108 to 118) cannot be said to be *ultra vires*. Does that then mean that the provisions of Regulation 2 as regards devolution are valid at any rate in Natal and Zululand? Decidedly not. If the Governor-General in amending the Code chooses to legislate by reference, then the provisions he enacts must stand or fall by the provisions referred to (in this case the regulations under section *twenty-three* of the Act). He cannot endow invalid regulations with efficacy by merely adopting them; even if—as seems to be the case—he could, under section *twenty-four*, have included identical or similar provisions of his own in his amendments of the Code.

It must consequently be concluded that Regulation 2, paragraphs (*b*) to (*e*), i.e. so much of the regulations as purports to lay down substantive rules of devolution, is *ultra vires* and of no force and effect.

It follows that whether the Native Commissioner determined the heir in this case in accordance with Regulation 2 of the estate regulations or in accordance with the provisions of the Natal Code, his determination is not valid because the property concerned does not fall within the ambit of sub-sections (1) and (2) of section *twenty-three* of the Act. Sub-section (1) refers to movable property and sub-section (2) to quitrent land, a form of tenure confined to the Transkei and Ciskeian Districts of the Cape. The land in this estate—if it ever vested in the deceased—would but for the will have had to devolve in accordance with common law. All that a representative appointed under Regulation 4 was empowered to do was to transfer the property to the common law heirs *ab intestato*. The designation of first defendant as general heir was *ab initio* void.

This conclusion virtually disposes of the entire appeal, because it removes the grounds for any suggestion that the estate has been enriched by the purchase price paid to first defendant. The plaintiff has unfortunately misconceived his remedy. He did not purchase land from an estate but from one Bekizizwe Duma and the latter, albeit unwittingly, sold him land which did not belong to him and which he had no right to sell for his own benefit. The estate of the late Shaka Duma at all events is not at all liable to plaintiff. The appeal is, for these reasons, dismissed with costs.

ASHTON (Permanent Member) dissenting:

Plaintiff's claim in this matter, which comes before this Court on appeal at his instance, was for (1) a declaration that he lawfully purchased certain immovable property from the Estate of the late Shaka Duma and that he had paid the purchase price and (2) an order that the Executor of the Estate should give him transfer of the land or refund to him the purchase price (£200) which he had paid.

There were two defendants—First defendant who had been appointed Representative of the Estate in terms of the Regulations for the Administration of Native Estates and had been authorised to transfer from the Estate to himself the immovable property and Second defendant who had been appointed by the Master of the Supreme Court as Executor Testamentary under a will bequeathing the immovable property to deceased's five daughters (thus excluding First defendant from inheriting the property).

The decision of the dispute between the parties revolves around two documents namely (*a*) that appointing First defendant as the Representative of the Estate and authorising him to transfer the immovable property to himself as heir and (*b*) that setting forth the agreement between plaintiff and First defendant and the rights which First defendant acquired to the immovable property.

It should here be mentioned that although the brother of First defendant died leaving a valid will it was not brought to light until after First defendant had been appointed as the Representative of the Estate (then regarded as intestate) and had contracted with plaintiff for the sale of the immovable property to him.

It is necessary therefore to examine these two documents together to ascertain the relationship between plaintiff as purchaser and First defendant as seller of the immovable property which was still an asset in the Estate.

The document appointing First defendant as the Representative of the Estate was issued on the 18th day of February 1953—some two years before Second defendant was appointed Executor Testamentary of the Estate.

Section No. 4 (1) of the Native Estate Regulations (Government Notice No. 1664 of 1929 as amended) under which the Assistant Native Commissioner purported to act refers to estates of deceased Natives falling under section *two* of the Regulations and that section commences as follows:—

> "2. If a Native dies leaving no valid will, so much of his property as does not fall within the purview of sub-section (1) or sub-section (2) of section *twenty-three* shall be distributed in the manner following....."

As stated before, it was discovered at a later date that the deceased did leave a valid will. This will was produced to the Master of the Supreme Court and was acted upon by him.

Armed with the document issued by the Assistant Native Commissioner First defendant negotiated with plaintiff to sell to him the immovable property, which he was authorised to transfer to himself. And on the same day as that document was signed by the Assistant Native Commissioner First defendant and plaintiff had a document drawn up by which the former sold to the latter the immovable property in question.

The Agreement of sale followed the usual lines of such documents and it was agreed that on payment of the purchase price of £200 plaintiff could demand from First defendant his signature to all the documents necessary to enable him to obtain transfer.

The point that Rule No. 2 of the Regulations published under Government Notice No. 1664 of 1929 (as amended) is *ultra vires* the enabling Act No. 38 of 1927 has been raised by the learned President of this Court and it is as well to deal with that point now.

The Regulations depend for their validity on section *twenty-three* (10) of Act No. 38 of 1927 and put briefly the point taken is that rules regarding the devolution of Native Estates do not fall within the connotation of the words "administered and distributed" contained in section *twenty-three* (10) (*a*) of the Act which reads:—

"(10) The Governor-General may make regulations not inconsistent with this Act:—

(*a*) Prescribing the manner in which the estates of deceased Natives shall be *administered and distributed;*"

Section *twenty-three* of the Act is headed "Succession" and in sub-sections (1) and (2) it indicates how certain property devolves while in sub-section (3) it states that all other property of whatsoever kind may be devised by will. This last mentioned sub-section underwent amendment in 1929 when the sentence "Any such property not so devised shall devolve and be administered according to Native Law and Custom" which it then contained was deleted.

Shortly after the amendment there were published regulations under Government Notice No. 1664 of 1929, section *two* of which contained rules for the devolution of estates of certain deceased Natives who died leaving no valid wills and property which fell outside the provisions of sub-sections (1) and (2) of section *twenty-three* of the Act. These rules were subsequently amended but that amendment does not affect the question under consideration.

It is significant that the Government Notice of 1929 replaced that part of a Notice published the previous year which related purely to the procedure to be followed when estates fell to be administered under Native Law. It was then necessary to procedural regulations only as the Act had already laid down what laws of succession applied. But when the Act failed to lay down how the assets in Native estates should devolve (by the deletion of the last sentence of sub-section No. 3 of section *twenty-three* of Act No. 38 of 1927 as described above) it became necessary to use the powers contained under sub-section (10) of section *twenty-three* of the Act to promulgate rules to remedy the omission.

That is the position today and this Court is now proposing of its own motion to declare that Regulation No. 2 is *ultra vires* the Act despite the facts that the position has been in force for more than a quarter of a century, that it has been previously accepted by the Courts and that in the particular case on appeal the point has not been raised by the litigants who by their pleadings have indicated that they accept the appointments made in terms of the Regulations.

In ordinary parlance the word "distribution" when used in relation to an estate can be said to include the manner in which the assets devolve but on a strict dictionary meaning of the word it is possible even probable that it does not. But in the interpretation of the meaning of a statue it is necessary in certain circumstances to look to the intention of the legislature and I think that it is necessary to do so in this case.

In the case of Venter *v.* Rex, 1907 T.S. 910, at page 913, Innes C. J. is reported to have said:—

> "In construing the statute the object is of course to ascertain the intention which the legislature meant to express from the language which it employed. By far the most important rule to guide Courts in arriving at that intention is to take the language of the instrument or of the relevant portion of the instrument as a whole; and when the words are clear and unambiguous to place upon them the grammatical construction and give them their ordinary effect. But it is universally recognised that though this what some judges call a golden rule, it is subject to certain exceptions. These arise from the difficulty—difficulty inherent in the nature of language—that no matter how carefully words are chosen there is a difficulty in selecting language which while on the face of it expressing generally the idea of the framer of the measure, will not, when applied under certain circumstances go beyond it and when applied under other circumstances, fall short of it."

Further on the learned Chief Justice is reported to have said:—

> ". . . it appears to me that the principle we should adopt may be expressed somewhat in this way—that when to give the plain words of the statute their ordinary meaning would lead to absurdity so glaring that it could never have been contemplated by the legislature or where it would lead to a result contrary to the intention of the legislature as shown by the content or by such other consideration as the Court is justified in taking into account, the Court may depart from the ordinary effect of the words to the extent necessary to remove the absurdity and to give effect to the true intention of the legislature."

Price J. in Bok Street Bottle Store *v.* Kahn, 1948 (1) S.A. 1068, at page 1074, said in this same regard:—

> "Of course there are cases where the absurdity or injustice caused by giving the words their literal meaning is so glaring that it could not possibly have been the intention of the Legislature that such a result should be brought about and then the Courts are forced to adopt some other meaning in order to avoid an absurdity or injustice that Parliament could not have intended."

The Native Administration Act, No. 38 of 1927, is entitled "To provide for the better control and management of Native Affairs" and it devotes one paragraph No. 23 to "succession". Its purpose was to place Native law on a proper footing and having initially provided that broadly speaking the assets of estates of deceased Natives not falling within the term of house property may be devised by will and failing the existence of a will must devolve according to Native law, it was amended in such a way as to make no specific provision for the devolution of such assets in the Act itself but leaving the matter to be dealt with by Regulation. In this connection it is worthy of note that sub-section No. (9) of section No. *twenty-three* of the Act, specifically excludes from the operation of Native law and custom estates where property other than that referred to in sub-sections Nos. (1) and (2) is concerned and the deceased died leaving a valid will.

If by interpreting the word "distributed" in sub-section No. (10) of section No. *twenty-three* of the Act, so as to exclude the connotation of "devolution" of the assets of an estate the result is that all such estates fall to be dealt with under the common law as is contended, it is my view that such a result is so glaringly absurd and unjust as to force the Courts to conclude that it was never the intention of the Legislature that there should be such a result and that therefore this Court should not so interpret the sub-section.

The case before the Court is a Natal case and in this Province where "kraal" property is recognised in contradistinction to "house" property it would be little short of calamitous to decide that such property should devolve in any way other than that which is recognised in Natal Native law as has been the case for so long and with general acceptance and approval.

I therefore differ from the learned President and learned Member of this Court in their decision that the Regulation in question is *ultra vires* the Act—it is my opinion that it is *intra vires*.

Having reached that conclusion there remains to consider whether apart from it the Native Commissioner who never for a moment regarded the rules as other than *intra vires* came to the correct conclusion.

It has been seen from what appears earlier in this judgment that only if a deceased person leaves no valid will do the provisions of Rule 2 of the Regulations come into force and that in fact a valid will was left by the testator in this case. It has been suggested in argument that no will can be said to have been in existence or to have been left by the deceased until it is actually produced and that consequently all that was done in the belief that there was no valid will was lawfully done otherwise there would be no certainty in inheritance *ab intestato* as a valid will might crop up at any time.

In the Administration of Estates Act, No. 24 of 1913, there is a specific provision (section No. 28) protecting the disposal of property of a deceased person until the Master of the Courts have authorised such disposal but there is nothing of the same sort in the Native Estate Regulations and it must be presumed that the point was overlooked by the framers of the Regulations. The provision making certain property devisable by will could almost with impunity be avoided by an astute person if his acts prior to the production of a will were to be regarded as valid and enforceable against an estate and the testamentary heirs would have no security of inheritance.

It would be difficult, however, to assume from this that the appointment of the first defendant by the Assistant Native Commissioner as the representative of the estate was in any way vitiated although he himself cancelled that appointment as soon as he knew of the existence of the will. It would seem therefore that first defendant acting under the appointment which he held was able to bind the estate to plaintiff and in fact he did do so.

In the circumstances it is my view that the appeal should be upheld with costs, the Native Commissioner's judgment should be set aside and for it substituted "For plaintiff against second defendant for the transfer of the property or refund of £200, the purchase price plus costs and in regard to first defendant absolution from the instance with costs" (As to first defendant it should be noted that his consent to judgment was not in terms of the claim against him).

Bridle (Member): I agree with the judgment of the learned President.

For Appellant: H. L. Bulcock.

For Respondent: Adv. J. A. van Heerden, i/b C.C.C. Raulstone and Co.

NORTH-EASTERN NATIVE APPEAL COURT.

SHEZI *v.* **ZUNGU.**

N.A.C. CASE No. 37 OF 1957.

ESHOWE: 23rd July, 1957. Before Menge, President, Ashton and Alfers, Members of the Court.

ZULU LAW AND CUSTOM.

Amasi beast.

Summary: The facts appear from the judgment.

Held: That a cow given for milking purposes to a woman accrues to the house to which she belongs.

Cases referred to:

Lamula *v.* Lamula, 1924 N.H.C. 30.

Appeal from the Court of the Native Commissioner, Nkandhla.

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

Plaintiff sued defendant for the return of three head of cattle the original of which he declared he had *sisa'd* with his sister, the wife of defendant when they entered a customary union which had recently been dissolved.

The original beast was described by the plaintiff as an "*amasi*" beast and his uncle sought to distinguish it from another beast which he said plaintiff gave to his sister as an "*mbeko*" beast.

The Assistant Native Commissioner found that the beast was a gift to the defendant's wife and that it formed part of her "house" and could not be regarded as a "*sisa*" beast and so returnable. He accordingly gave judgment for defendant.

Plaintiff has now appealed against the judgment on the ground that it is against the weight of evidence.
But plaintiff himself in evidence said:

> "The beast in dispute is called the "*Amasi*" beast so that the bride can obtain "*Amasi*". It is not the "*Mbeko*" beast. It is not an "*Endisa*" beast. If my sister and defendant had not been divorced the cow would have remained with her until her death. I would have taken the increase."

In the case of Lamula *v.* Lamula, 1924 N.H.C. 30, it was held that a cow given for milking purposes accrued to the "house" of the woman to whom it was given. There is nothing convincing in the evidence for plaintiff that the beast was other than a gift and the Assistant Native Commissioner was right in his judgment.

The appeal is dismissed with costs.

Appellant in person.

Respondent in person.

NORTH-EASTERN NATIVE APPEAL COURT.

NZAMA *v.* MVUBU.

N.A.C. CASE No. 21 OF 1957.

DURBAN: 29th July, 1957. Before Menge, President, Ashton and Oftebro, Members of the Court.

PRACTICE AND PROCEDURE.

Application for condonation of late noting of appeal.—Faulty practice.

Summary: The nature of the pleadings appears from the judgment. The application was allowed but the appeal was dismissed on the merits. The faulty procedure adopted by the appellant was discussed.

Cases referred to:

Natal Vermiculite (Pty.), Ltd. *v.* Clark, 1957, 1957 (2) S.A. 431.

Appeal from the Court of the Native Commissioner, Pinetown.

Menge (President):

This is an application for the condonation of the late noting of an appeal.

The matter is one in which the Native Commissioner upheld an appeal from a Chief's judgment. The Chief had found for plaintiff (now applicant) in his Court in a matter in which delivery of a heifer or its value, £10, was claimed. The Native Commissioner altered this judgment to one for defendant with costs. This was on the 18th January, 1957. On the 7th February, 1957, applicant's attorneys drafted a notice of appeal on the following grounds:—

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

2. Other grounds as may later appear on perusal of the record."

This notice was only filed on the 14th March, 1957, that is over a month late. The application for condonation which is dated 16th March, 1957, is supported by an affidavit by the applicant in which he briefly states as follows:—

"3. I duly and timeously instructed my Attorneys, and they duly drew the Notice.

4. Due to a misunderstanding by the Staff of my Attorneys there was a delay in posting the Notice.

5. In fact the Notice was posted on the 12th February, 1957, which was the end of the 21 days period allowed for noting the appeal.

6. In fact the Notice of Appeal was received on the 14th February, and was, therefore, only two days late.

7. The delay in noting the appeal was not wilful."

This affidavit conveys nothing. What is stated therein is either pure hearsay or mere argument. In any case paragraphs 5 and 6 are false. The notice of appeal was only filed on the 14th March, 1957. This is probably just carelessness on the part of the applicant's attorneys, because as a deliberate attempt to mislead the Court it is too obvious. Nevertheless, in future this Court may have to consider awarding costs *de bonis propriis* in such cases. As was recently said by James, J., in Natal Vermiculite (Pty.), Ltd. *v.* Clark, 1957 (2) S.A. 431: "Attorneys are responsible for the technical side of litigation and they have a duty to see that their clients understand the importance of complying with the Rules of this Court."

Besides, there is nothing at all to show that the applicant has any prospects of success. In this respect the notice of appeal is of no assistance. It is not stated therein in what respects the judgment is against the weight of the evidence, and in view of paragraph 2 thereof (about which more will be said presently) it was not possible for the applicant at that time to give any indication. But by the 16th of March, when the application for condonation was drafted, the applicant's attorneys should have been in a position to indicate in what respects the judgment is against the weight of the evidence. Incidentally, from a perusal of the record I am not convinced that the judgment is against the weight of the evidence. It follows that the applicant has not shown just cause for the relief for which he asks.

To come back to the notice of appeal, the second ground of appeal has appeared in a number of appeals before us prepared by the same attorneys; but it is not a ground at all. It is for this Court to decide on a proper application whether an appellant should be allowed to amend or add to his grounds of appeal. Grounds of appeal such as appear in paragraph two in this case should be omitted from notices of appeal in future.

In my opinion the application should be dismissed with costs; but as my colleagues differ from me on the question whether the applicant has prospects of success, the judgment of the Court is that the application for condonation of the late noting of the appeal is granted.

(The Court thereupon heard argument on the merits and the judgment of the President continues as follows):

Mr. McClung who appeared for the respondent argued that the appeal ought not to succeed for the reason that no contractual relationship between the appellant and the respondent had been established on the evidence. I agree with that submission and indeed, counsel for appellant frankly confessed himself unable to dispute this. Accordingly the appeal is dismissed with costs.

For appellant: D. B. Theron, on behalf of Cowley & Cowley.

For respondent: Darby, Higgs & McClung.

NORTH-EASTERN NATIVE APPEAL COURT.

CELE AND ANOTHER *v.* CELE.

N.A.C. CASE No. 41 OF 1957.

PIETERMARITZBURG: Before Menge, President, Ashton and Bridle, Members of the Court.

PRACTICE AND PROCEDURE: NATAL CODE.

Malicious desertion—Attempts at reconciliation as an essential averment under Natal Code—Curator ad litem—*Exhibits in the vernacular.*

Summary: In an action for divorce on the grounds of malicious desertion and for the return of dowry paid, the plaintiff's wife, first defendant, was assisted by her father, the second defendant; but when the latter failed to appear at an adjourned hearing, a nominee of the plaintiff was appointed as curator *ad litem* to assist first defendant. In evidence plaintiff read extracts of a letter in the vernacular which was then handed in unaccompanied by a translation.

The Native Commissioner gave judgment in favour of plaintiff. On appeal the point was taken, *inter alia,* that attempts at reconciliation made after issue of summons were not a compliance with section 78 (3) of the Natal Code.

Held: That previous decisions to the effect that Courts may allow the parties an opportunity to comply with the provisions of section 78 (3) of the Code at any time before judgment have not been wrongly decided.

Held further: that the appointment of a curator *ad litem* was unnecessary and in the circumstances irregular.

Held further: That a document in the vernacular is inadmissible in evidence as proof of the contents thereof unless it is accompanied by a translation in one of the official langauges.

Statutes referred to:

Section 78 (3) Natal Code of the Native law.
Appeal from the Court of the Native Commissioner, Greytown.

Menge (President) delivering the judgment of the court:

This is an appeal in an action wherein the Native Commissioner granted judgment in favour of the plaintiff on a claim for the dissolution of his customary union with first defendant and the refund of dowry paid as against second defendant. The Native Commissioner ordered the restoration of eight head of cattle and he awarded custody of the children, a boy of five years and another of one year to the mother until they reach their seventh year. He also made an order of maintenance against the plaintiff in respect of the children.

The woman's father, second defendant, appeared at the first hearing, but when the case was postponed to give the parties an opportunity to arrive at a possible reconciliation, he failed to attend at the postponed hearing. On that occasion the plaintiff's attorney applied to have a certain person who was present appointed curator *ad litem* to assist the first defendant. The Native Commissioner in his reasons states that he granted the application, although there is nothing on the record itself to indicate that this was done. There was, of course, no need for such an appointment. If the second defendant decided to remain in default that is no reason why the case against him and against the first defendant should not proceed. She was still assisted by the second defendant.

Mr. Pretorius, who appeared before us on behalf of the appellants (the defendants in the Court below), made a number of submissions, the first of which was that on a proper reading of section 78 (3) of the Natal Code of Native law an attempt at reconciliation is an essential element of the cause of action in cases of desertion; and that as in this case the attempt at reconciliation was made after issue of summons the plaintiff's case was defective. Decisions of this Court to the contrary, he urged, were wrong in law. We do not agree with that view. The attempt at reconciliation can be made at any time before judgment as has been held in the past; but this does not mean that the Court intends that reconciliation should be postponed until after litigation has begun—it is obvious that before that stage is reached efforts should be made and if they have not been made then the Court may afford the parties an opportunity of doing so.

Secondly Mr. Pretorius argued that on the facts the desertion of plaintiff by defendant No. 1 had not been proved. In this he is correct. There is nothing to indicate that the absence of first defendant from plaintiff's kraal—he himself was on the Reef at the relevant time—was in any way malicious; and no attempt at all was made by plaintiff to seek out his wife and to induce her to return to his kraal. The Native Commissioner placed reliance on a certain letter alleged to have been written by first defendant to plaintiff. This was handed in. It is in the vernacular. Extracts from it were read to the Court by the plaintiff. This is irregular, as Mr. Pretorius pointed out. There should have been a proper written translation of the complete letter so that the Native Commissioner and this Court could have been in a position to study the latter as a whole, and not only the portions if any, which were favourable to plaintiff's case.

This disposes of the appeal, but it is desirable to point out another irregularity which Mr. Pretorius rightly claimed was fatal to the plaintiff's case—mention has already been made of the appointment at the resumed hearing of a curator *ad litem* to defendant No. 1. Not only was this appointment not at all necessary, but it was made without reference to the defence and the person appointed was a nominee, according to the record, of the plaintiff's attorney. This situation was frought with possibilities of grave prejudice, because the plaintiff had virtually been constituted the *dominus litis* of the defendant's case.

The appeal is upheld with costs and the judgment of the Native Commissioner is altered to one of absolution from the instance with costs.

For Appellant: Adv. S. T. Pretorius, i/b Messrs. van Rooyen and Forder.

For Respondent: Adv. J. Talbot, i/b Messrs. Nel and Stevens.

NORTH-EASTERN NATIVE APPEAL COURT.

ZULU CONGREGATIONAL CHURCH *v.* MASEKO AND ANOTHER.

N.A.C. CASE No. 42 OF 1957.

DURBAN, 31st July, 1957. Before Menge, President, Ashton and Oftebro, Members of the Court.

PRACTICE AND PROCEDURE.

Definition of "Native"—Native suing as trustee of a corporate body—Jurisdiction of Court of Native Commissioner.

Summary: A native, who was one of three co-trustees of a church which on the pleadings and in terms of the registered constitution of the latter was a corporate body, sued on behalf of the church in his capacity as trustee. The Native Commissioner having granted absolution from the instance, on appeal—

Held: That the party suing was nevertheless the church, which, being a purely legal *persona,* is not a Native for the purposes of the Court's jurisdiction.

Held further: That in any case the summons disclosed no cause of action in that there was no allegation that the trustee who instituted the proceedings was empowered to do so on his own.

Cases referred to:

Gumede *v.* Bandhla Vukani Bakithi Ltd., 1950 (4) S.A. 560.

Appeal from the Court of the Native Commissioner, Durban.

Menge (President) delivering the judgment of the Court.

In the Native Commissioner's Court, Durban, the Zulu Congregational Church applied for an interdict against the respondents restraining them from "using the name of the said Body and holding a meeting at Pietermaritzburg, under its auspices on the 8th to the 10th February, 1957, or for any other date or place". A rule *nisi* was granted. The affidavit in support of the application was made by one Joshua Jacob Twala. He alone is acting in the matter.

As against the second respondent the rule was discharged by reason of facts which do not affect the present proceedings; but the first respondent opposed confirmation of the rule *inter alia* on the following two grounds, namely: That the Church being a corporate body, was not a Native for the purposes of the Court's jurisdiction; and that the aforesaid Twala, had no *locus standi* to act for the Church. In this connection the applicant had filed a Supreme Court Order dated 31st July, 1950, from which it appears that the constitution of the Church had been filed with the Registrar of Deeds for Natal and that this same Twala together with two others, Aaron Dongeni Mpanza and Robert Mdhluli are its trustees and "the proper person to manage the affairs temporal of the Zulu Congregational Church".

At the hearing of the matter on the return day, after a copy of the original registered constitution had been handed in, application was made to substitute for the applicant Church the names of the deponent, Twala, and his co-trustee, Robert Mdhluli in their capacities as trustees of the Church. The Court was informed that the third trustee named in the Court order, i.e. Aaron Dongeni Mpanza, had died. The application was granted. Robert Mdhluli took no part in the proceedings, but Twala handed in a document alleged to have been signed by him reading as follows:

"Table Mountain
Mission Station,
Camperdown.
NATAL.

I, the undersigned, Robert Mdhluli, hereby state that Joshua Jacob Twala has been authorised to institute proceedings against Elias P. Maseko and W. Maphalala.
(Sgd.) Robert Mdhluli.

Dated this 9th day of March, 1957."

This document is not, of course, evidence of a participation by Robert Mdhluli in the proceedings. The position was, therefore, at the close of the pleadings, that Twala was the applicant and that he acted as the Church's sole trustee.

The Assistant Native Commissioner heard evidence and thereupon discharged the rule *nisi* without calling upon the defence. An appeal has now been brought on various grounds; but it is clear that the appeal cannot succeed, because the Court still did not have the right to hear the case. The Church is still the plaintiff no less than it was originally. Being an artificial person it does not fall within the definition of "native" for the purposes of section *ten* of the Native Administration Act, 1927 [Gumede *v.* Bandhla Vukani Bakithi Ltd., 1950 (4) S.A. 560].

Only a person who is a Native in fact can sue or be sued in a Court of a Native Commissioner. The fact that certain persons who are Natives have now been cited as plaintiffs "in their capacities as trustees of the Zulu Congregational Church" does not alter the position. Even if these persons had not been cited, the Church, which in itself is inarticulate and lacking in the characteristics of a human being, would still have had to be represented by them or by whoever is in fact charged with the management of its affairs. The applicant, Twala, seems to have been acutely aware of this because the appeal has, notwithstanding the amendment granted by the Native Commissioner, been brought in the name of the Church.

Apart from this the application does not disclose a cause of action. It is an essential element of the cause of action that Twala should have the right to act as sole trustee. But if the constitution provides as in this instance for a committee of three persons to exercise this power then one of them cannot exercise it on his own. However, it is not necessary to deal further with this or the other aspects of the case as the jurisdiction issue is fundamental.

The appeal is dismissed with costs.

Ashton (Permanent Member): In this case it is necessary to consider only the *locus standi* of the plaintiff. The constitution of the Church at paragraph No. 82 provides that the Church shall sue and be sued in the names of the trustees for the time being; paragraph No. 13 provides for the appointment of three trustees while Exhibit "B" to the record shows them to be Joshua Jacob Twala, Aaron Dongeni Mpanza and Robert Mdhluli.

The only persons appearing as plaintiffs or applicants are "Joshua Jacob Twala and Robert Mdhluli in their capacities as trustees of the Zulu Congregational Church". This was the result of an amendment granted by the Assistant Native Commissioner but no mention was made of the third trustee who in fact is dead. .

Until a third trustee is properly appointed and registered in terms of the constitution and all three are joined as applicants the matter cannot be regarded as being properly before the Court and the appeal against the judgment of Assistant Native Commissioner which was the discharge of the rule nisi cannot succeed.

It might here be mentioned that although Robert Mdhluli's authority for Joshua Jacob Twala to proceed in the action was sought to be proved it was shown in evidence that he had in fact resigned. It should also be mentioned that according to the evidence two trustees not figuring in the proceedings namely Peter Ntombela and Samuel Mzolo were appointed to fill two vacancies.

I agree that the appeal be dismissed with costs.

Oftebro (Member): I concur in the learned President's judgment.

For Appellant: A. H. Mulla.

For Respondent: Arenstein and Fehler.

SOUTHERN NATIVE APPEAL COURT.

MAQEKELANA *v.* HONCWANA.

N.A.C. CASE No. 17 OF 1957.

BUTTERWORTH: 10th September, 1957. Before Balk (President) Warner and Botha, Members of the Court.

PRACTICE AND PROCEDURE.

Res judicata—non-intervention in action not binding on party—elements of estoppel by tacit acquiescience—when estoppel should be specially pleaded—irregularity of basing judgment on culpa *not pleaded or relied upon.*

Summary: Plaintiff unsuccessfully sued defendant for a certain ox or its value by way of vindicatory action, the ox having been sold to defendant by one Tada, who had it in his care on behalf of a person to whom it had been pledged by plaintiff. Defendant had obtained delivery only after successfully instituting an action against Tada.

On appeal the questions of *res judicata,* and estoppel by tacit acquiescience were considered, as was that of *culpa* on which the Court *a quo* had based its judgment.

Held: That mere non-intervention by the plaintiff in the action between defendant and Tada did not make judgment therein binding on him as *res judicata.*

Held further: That the defence of tacit acquiescience which was not covered by defendant's plea, should have been specially pleaded in order that that aspect of the matter might be properly canvassed and also to apprise plaintiff of the case he had to meet.

Held further: That the elements of estoppel by tacit acquiescience are (*a*) that the defendant made a mistake as to his legal rights, (*b*) that the defendant must have expended some money or done some act on the faith of the mistaken belief, (*c*) that the plaintiff knew of the existence of his own right, which was inconsistent with the right claimed by the defendant, (*d*) that the plaintiff knew of the defendant's mistaken belief of his rights, and (*e*) that the plaintiff encouraged the defendant in the acts referred to in (*b*) either directly or by abstaining from his legal rights.

Held further: That the principle of estoppel by *culpa* imputable to plaintiff, as enunciated in Grosvenor Motors (Potchefstroom) Limited *v.* Douglas, 1956 (3) S.A. 420 (A.D.), has no application as, *inter alia,* it was not relied upon nor pleaded by the defendant.

Cases referred to:

Amalgamated Engineering Union *v.* Minister of Labour, 1949 (3) S.A. 637 (A.D.).

Osman *v.* Jhavary and Others, 1940 N.P.D. 417.
Union Government *v.* Landau and Co., 1918 A.D., 388.
Grosvenor Motors (Potchefstroom) Ltd., *v.* Douglas, 1956 (3) S.A. 420 (A.D.).

Appeal from the Court of the Native Commissioner: Willowvale.

Balk (President):

This is an appeal from the judgment of a Native Commissioner's Court for defendant (now respondent), with costs, in an action in which he was sued by the plaintiff (present appellant) for a certain *Nco* ox or its value, £25.

In the particulars of his claim plaintiff averred:—

" 1. That the parties to this action are Natives as defined by Act No. 38 of 1927.

2. That some four years ago or thereabouts the plaintiff pledged a certain nco ox his property at the shop of Mr. A. T. Wood of Wellshot, Idutywa District, as security for the due payment of a shop account there incurred by him.

3. That by arrangement between the plaintiff and the said Mr. A. T. Wood the said nco ox was placed in the custody of safe-keeping of one Tada Mziwenkuku who agreed to hold the same as agent for the said Mr. A. T. Wood until released by plaintiff upon payment of the said shop account.

4. That the said shopkeeper has agreed to release plaintiff's said ox from the operation of the said pledge and plaintiff's said ox is now in the possession of the defendant who wrongfully and unlawfully neglects or refuses to deliver the same to plaintiff despite demand and defendant apparently contends that he purchased the said ox from the said Tada during the year 1952.

5. That plaintiff has always remained the owner of the said ox and has never disposed of the same to the said Tada or to any other person nor was the said Tada authorised to dispose of the said ox to the plaintiff or to any other person and plaintiff is entitled to delivery to him thereof or to payment of its value which plaintiff estimates in the sum of £25."

The defendant pleaded:—

" 1. That defendant admits being in possession of a certain nco ox which defendant lawfully purchased from the said Tada Mziwenkuku during or about May, 1952, which the said Tada failed duly to deliver and for which defendant obtained a judgment against the said Tada in civil Case No. 159/1952 and which animal was duly delivered to defendant in terms of the said judgment.

2. That by reason of the knowledge of his said agent Tada, the said shopkeeper legally knew of the said civil action Case No. 159/1952 and the plaintiff personally knew of the said action and the judgment therein granted and acted upon. Wherefore defendant specially pleads—

(*a*) plaintiff is on the premises estopped from claiming the said animal; and

(*b*) plaintiff's claim correctly brought is to have the said judgment in Case No. 159/52 set aside and to apply to intervene therein, but such claim is now prescribed.

3. That defendant denies that the animal purchased by him was the property of plaintiff or that same was legally and lawfully pledged as alleged and puts plaintiff to the proof thereof.

4. That, save legal demand and refusal to deliver up, defendant denies the remaining allegations of fact in so far as they are within defendant's knowledge and, in either event, puts plaintiff to the proof thereof.

Whereof defendant prays that judgment may be for defendant with costs."

The appeal is brought on the following grounds:—

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

2. That plaintiff having proved ownership of the beast in question the burden of proving the existence of circumstances which would disentitle plaintiff to exercise his right of vindication arising from such ownership passed to the defendant, and on the evidence the defendant failed to establish the existence of such circumstances and the Court therefore erred in holding that he had done so."

It is manifest from the evidence as a whole, and was in fact found by the Assistant Native Commissioner *a quo,* that the *inco* ox purchased by the defendant from Tada Mziwenkuku, is the one that was pledged by the plaintiff to the trader concerned and placed by the latter in Tada's custody with the consent of the plaintiff. It is equally clear from the evidence that Tada had no authority to sell the ox and that the plaintiff, before instituting the instant action, redeemed the ox from pledge by paying the trader the debt in respect of which it had been given as security.

In the course of argument on behalf of the appellant, it was stated that the defence of estoppel by record i.e. *res judicata,* was not relied upon; and properly so, for the plaintiff was not only not a party to the action (Case No. 159 of 1952) in which the defendant obtained judgment against Tada for the ox but, as admitted by the defendant in the course of his evidence, the plaintiff was unaware of that action and mere non-intervention by the plaintiff in that action did not make the judgment therein binding on him as *res judicata,* see Amalgamated Engineering Union *v.* Minister of Labour, 1949 (3) S.A. 637 (A.D.), at page 660. It was further stated in the argument on behalf of the respondent that paragraph 2 (*b*) of the defendant's plea was not relied upon, but only the defence of estoppel by tacit acquiescience. Consequently, whatever may have been intended by that paragraph—to my mind its meaning is obscure to say the least—there is no necessity to consider it. Turning to the defence of estoppel by tacit acquiescience, it was contended for the respondent that all the elements necessary to establish such a defence, as set out in Osman *v.* Jhavary and Others, 1940, N.P.D. 417, were present here, viz.: (1) that the defendant purchased the ox from Tada in the mistaken belief that the latter was the owner thereof; (2) that the defendant paid Tada £20 for the ox; (3) that the plaintiff was aware that it was his ox that had been sold by Tada to the defendant; (4) that the plaintiff knew of the defendant's mistaken belief that Tada was the owner of the ox and therefore entitled to sell it to him; and (5) that the plaintiff's lengthy delay in bringing the instant action prejudiced the defendant in that in the interim Tada became a man of straw and the defendant cannot now recover the £20 paid to him for the ox.

In the first place, the defence of estoppel by tacit acquiescience is not covered by the defendant's plea and, whilst there is no rule requiring the defence of estoppel to be especially pleaded in every instance, it was necessary for this to be done in the instant case not only to ensure that that aspect would be properly canvassed but also to apprise the plaintiff of the case he had to meet, see Union Government *v.* Landau and Co.,

1918 A.D. 388, at page 391. However that may be, it seems to me to be clear from the evidence that at least one of the elements necessary to establish this defence is wanting here. These elements are set out in *Osman's* case (supra) as follows:—

"(*a*) that the defendants made a mistake as to their legal rights, (*b*) that the defendants must have expended some money or done some act on the faith of the mistaken belief, (*c*) that the plaintiff knew of the existence of his own right, which was inconsistent with the right claimed by the defendants, (*d*) that the plaintiff knew of the defendant's mistaken belief of their rights, and (*e*) that the plaintiff encouraged the defendants in the acts referred to in (*b*) either directly or by abstaining from his legal rights."

The plaintiff stated in his testimony that he only became aware that Tada had sold the ox to the defendant shortly before instituting the instant action. The only evidence in rebuttal calling for consideration is that given by the defendant to the effect that three weeks after the ox had been delivered to him in April, 1953, the plaintiff, after looking at his (defendant's) cattle at the dipping tank, pointed out the ox to the defendant, said that he had heard that he (defendant) had bought it and added that he (plaintiff) wanted to buy it back for £20. But this evidence by the defendant cannot be regarded as carrying any weight as his attorney had not cross-examined the plaintiff in regard thereto and, in any event, it is most improbable that the plaintiff would offer the defendant £20 for the ox when he could redeem it by paying the debt due to the trader, which only amounted to £6. 15s. Admittedly, as pointed out in argument on behalf of the respondent, there are inconsistencies in the plaintiff's evidence but these are largely confined to time and cannot properly be held against plaintiff who, according to his uncontroverted evidence, is illiterate; and the remaining inconsistencies, viewed in their proper perspective, are more apparent than real. It follows that the evidence does not support the defence of estoppel by tacit acquiescience.

It may be as well to mention that the Assistant Native Commissioner, according to his reasons, gave judgment for the defendant as he found that the plaintiff was estopped from vindicating the ox because, by the *culpa* imputable to him (plaintiff), the defendant was misled into the belief that Tada was entitled to dispose of the ox to him. This principle which is enunciated in Grosvenor Motors (Potchefstroom) Ltd. *v.* Douglas, 1956 (3) S.A. 420 (A.D.), at page 427, however, has no application here as not only was it not pleaded nor relied upon by the defendant, but it is quite clear from the evidence as a whole that there was no such *culpa* on the plaintiff's part.

In the result the appeal falls to be allowed, with costs, and the judgment of the Court *a quo* altered to one for plaintiff as prayed, with costs.

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

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

For Appellant: Mr. Brian Shelver, Idutywa.

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

NORTH-EASTERN NATIVE APPEAL COURT.

NYATHI *v.* SILUBANE.

N.A.C. CASE No. 93 OF 1957.

PRETORIA: 5th December, 1957. Before Menge, President, Nel and O'Connell, Members of the Court.

PRACTICE AND PROCEDURE.

Review—Native Appeal Court Rule 22—*Meaning of words "irregularity or illegality."*

Summary: Applicant had failed in an action in the Court below, where he was not represented. Two months later he consulted an attorney who pointed out to him that the proceedings had been irregular. Applicant thereupon brought review proceedings.

Held: The words "irregularity and illegality" refer to the act or omission itself and not to the quality thereof.

Held further: Review proceedings cannot be used to cure an omission to appeal within the prescribed time.

Statutes cited:

Native Appeal Court Rule 22.

Review case from the Court of the Native Commissioner, Bushbuckridge.

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

This is an application for review. The plaintiff's claim in the Native Commissioner's Court was dismissed and he was mulcted in the amount of "five head of cattle or their value" on a counterclaim. This was on the 25th February, 1957. The plaintiff was not represented in the Native Commissioner's Court. He did not appeal, but it appears that on 24th April, 1957, by which time the period for lodging an appeal had expired, he consulted an attorney who informed him that the proceedings had been irregular. Through his attorney he accordingly filed the present application on 9th May, 1957, on the grounds that no written counterclaim was ever before the Court; that there had been no plea to the verbal counterclaim made by the attorney of the defendant, and that the plaintiff was not granted a postponement to consider the counterclaim. As to the postponement it does not appear from the record that the plaintiff asked for or wanted a postponement; but otherwise these irregularities did take place. The only question to decide at this stage is whether review proceedings are competent.

For two months after the judgment the plaintiff was apparently quite satisfied with the conduct of the proceedings; so far from complaining he even agreed to an alternative counterclaim—also verbal—being added. As is so often the case, plaintiff only felt he had a grievance when he was told that he had one. But that cannot avail him now. That is not the purpose of review proceedings. Such proceedings must, in terms of Rule 22 of this Court, be brought "within 14 days after the irregularity or illegality complained of has come to the notice of the applicant." This does not mean within 14 days of being informed that there is an irregularity in proceedings which were fully acquiesced in. Counsel asked us in effect to give this meaning to the rule; but it is clear that the words "irregularity or illegality" refer to the

act or omission itself and not to its quality. To hold otherwise—to give these words and adjectival meaning—it would be necessary to insert after them some such words as "in the act or omission". That is quite unwarranted.

Had the plaintiff decided to appeal, it would not have availed him to seek condonation for the late noting on the ground that he had no idea at first that the judgment was wrong. No. more can be do so now, for review proceedings cannot be used to cure an omission to appeal within the prescribed time.

The application is dismissed.

For Applicant: Adv. F. Sutton instructed by Janover & Swartzberg.

No appearance for respondent.

NORTH-EASTERN NATIVE APPEAL COURT.

ZULU *v.* **NDWANDWE.**

ZULU *v.* **KUMALO.**

N.A.C. CASES No. 65 AND 71 OF 1957.

VRYHEID: 1st October, 1957. Before Menge, President, Ashton and Malherbe, Members of the Court.

PRACTICE AND PROCEDURE.

Interpleader—Onus of proof in vindicatory action—Joinder of parties—Joint appeal in respect of two actions.

Summary: Certain stock was attached by the Messenger of the Court and the execution finalised before the attached animals were claimed by third parties in ownership. The latter instituted interpleader proceedings and had the animals declared not executable. There were two such actions by different claimants, but on the same facts and causes. The judgments were, however, appealed against by the judgment creditor in one notice of appeal, although a double security for costs was lodged.

Held: That a remedy by way of interpleader was not open to the claimants.

Held further: That the appellant was within his rights in combining the two actions for the purposes of the appeal.

Held lastly: That considered as vindicatory actions against the judgment creditor as defendant, which, in the premises they were intended to be, the claims must fail on the merits.

Statutes referred to:

Rules 35 and 70 and form 39 (N.A. 140) of the Native Commissioner's Court's Rules.

Appeal from the Court of the Native Commissioner, Nongoma.

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

This is an appeal against two judgments. The appellant has treated the two cases as one and lodged only one notice of appeal. The first question which arises is whether he is entitled to do

so considering that the lower court dealt with them as two separate cases. Incidentally, the security bond covers the costs of both respondents. Both actions (No. 49 and 50 of 1957) were by way of interpleader. The appellant was the defendant in each case. The parties were not represented. Appellant had obtained judgment against one Makhahleleka Zulu and certain stock was attached by the Messenger on the 14th May, 1957, and handed to him in satisfaction of his judgment. Each of the respondents claimed some of this stock on the ground that it had been *sisaed* to the judgment debtor. Both interpleader summonses were issued on the 20th June, 1957, and the actions were tried and the judgments were given on the same day, that is the 11th July, 1957. The same judicial officer presided. In both cases the defence was merely that the defendant had no knowledge of the allegations made.

The two cases could conveniently have been dealt with as one under Rule 35 had the correct procedure been observed. It would have been desirable. In view of this there appears to be no reason why they should not at this stage be combined on appeal.

The Assistant Native Commissioner in these cases upheld the claims and declared the stock " not executable ". This is somewhat strange because execution had long since become an accomplished fact. The difficulty arises out of a basic error in procedure, namely that in neither case was the remedy of interpleader open to the applicants. It is clear from Rule 70 that interpleader proceedings are only available in a Court of Native Commissioner in the following instances:—

(*a*) Where a person expects to be sued by two parties for some thing in which he himself has no interest save as to costs and charges.

(*b*) Where property is attached by the Messenger and the latter is confronted with a third-party claim thereto which the execution creditor refuses to admit.

In the former case the stakeholder issues the interpleader summons and in the latter case the Clerk of the Court. Where neither of these circumstances are in point a person who lays claim to goods which have been attached must proceed by way of ordinary summons against whomsoever he holds responsible.

In the present instances the provisions of Rule 70 are clearly not applicable. The stock was attached and delivered to the judgment creditor on the 14th May, 1957, apparently without protest by anyone. The very way in which the form N.A. 140 has been completed in both its parts (1) and (2) indicates that the Clerk of the Court did not have the slightest idea of what the appropriate procedure is. He took it that an interpleader form must somehow be completed, regardless of whether it makes sense or not. This is partly due to the fact that the setting out of form N.A. 140 is very confusing. Parts (1) and (2) should be printed in full, each with its conclusion, preferably as separate forms. As it is, part (1) is meaningless. The registrar will be asked to bring this matter to the notice of the authorities.

This Court must and will insist upon parties observing the correct law of procedure; but in these cases it is evident that the wrong procedure was not the fault of the parties and it did not occasion any prejudice. It is possible to consider these actions as ordinary vindicatory actions—as indeed they were intended to be—and to weigh the merits on the evidence. Incidentally, the conclusions to which we have come would be the same even if one were to consider the respondents as claimants in interpleader proceedings.

The Assistant Native Commissioner believed the applicants' averment of a *sisa* contract because there was no evidence to the contrary. That is a misdirection, because it is in the nature of things that the judgment creditor cannot give evidence in refutation of averments of which he cannot be expected to have any knowledge.

The legal position in these matters is well known. Possession raises a presumption of ownership (Zandberg *v.* van Zyl, 1910, A.D. 302). Consequently the owner must make reasonably sure that third parties do not gain the impression, to their detriment, that the goods claimed belong to the possessor. Natives normally earmark *sisa* stock so that there should be no dispute as to ownership. Also, in vindicating his property the owner is expected to act without delay. Bearing in mind these principles it does not seem that the applicants in these cases have discharged the onus of proving ownership. In neither case is there an indication that the stock was earmarked or otherwise identifiable. There is not even evidence to show that the Messenger of the Court was advised of the alleged *sisa* contracts at the time of attachment. Surely he should have been so advised. Moreover five weeks elapsed from the time of attachment to the issue of interpleader summonses. That is quite long enough for the judgment debtor to devise plans to defeat the ends of justice, if he is so disposed. This undue delay should have been explained.

In case No. 49 of 1957 the applicant alleges that he *sisaed* the stock with the judgment debtor until such time as the latter obtained stock of his own. But the judgment debtor apparently has stock of his own, for he says: "I have cattle with my brothers." Consequently even if there ever was a contract of *sisa* between the applicant and the judgment debtor, it is difficult to see how it can still be in existence, having regard to the circumstances in which, according to the applicant, it was to terminate.

In case No. 50 of 1957 only the applicant gave evidence. This is contained in ten brief lines and amounts to this: The cattle were *sisaed* about 3 years ago; they were attached by the Messenger, and they were registered in the dipping book of Mahlinza Kumalo, the applicant in Case No. 49 of 1957 (why this was so is not explained).

It is clear that neither of the applicants has discharged the onus resting upon him. In each case the appeal is upheld with no order as to costs (in as much as Mr. Uys did not see his way clear to ask for costs) and the judgment of the Assistant Native Commissioner is altered to read: "Application dismissed with costs."

It should perhaps be added that this judgment will not act as a bar to such action as the claimants may have to remedy their position if the cattle could, by further evidence, be shown to belong to them.

For Appellant: Messrs. Uys & Bestall.

Respondents in person.

NORTH-EASTERN NATIVE APPEAL COURT.

GWALA *v.* **MTSHALI.**

N.A.C. CASE No. 53 OF 1957.

VRYHEID: 2nd October, 1957: Before Menge, President, Ashton and Malherbe, Members of the Court.

NATIVE CUSTOM OF LOBOLO.

Lobolo *as damages in respect of civil marriage of widow without guardian's consent*—res judicata—*cause of action.*

Summary: Plaintiff had claimed dowry from defendant in respect of the latter's civil marriage to the daughter-in-law of plaintiff, the widow of his deceased son by a civil marriage. It was common cause that there had been no agreement prior to the marriage to pay *lobolo* and therefore the defendant was absolved from the instance.

Thereupon plaintiff brought a second action, again claiming *lobolo* but claiming damages in the alternative in the same premises. A plea of *res judicata* was upheld in this case, and the plaintiff thereupon appealed on the ground that the plea had been wrongly upheld.

Held: (Menge, President, dissentiente) that—

(i) a sufficient cause of action had been disclosed for the Court to entertain the appeal;

(ii) a judgment of *res judicata* was not competent in the circumstances.

Cases referred to:

Bhengu *v.* Mazibuko, 1955, N.A.C. 1.

Tsautsi *v.* Nene & Another, 1952, N.A.C. 73.

Statutes, etc., referred to:

Section 11 (3), Act No. 38 of 1927.

Sections 27 (2), 130 and 140 of the Natal Code of Native Law.

Appeal from the Court of the Native Commissioner, Vryheid.

MENGE: (President), dissentiente:

This is an appeal against a judgment upholding a plea of *res judicata.* In his summons the plaintiff claims dowry in respect of his late son's wife who is now married to defendant by civil rites. The woman was formerly married to plaintiff's son by civil rites. The relevant portions of the claim read as follows:—

'2. During or about July, 1949, the late Isaac Gwala, the son of plaintiff married Irene Malanda at Umzimkulu according to Christian Rites, and excluding community of property. £107. 10s. was paid by plaintiff as *lobolo* to Joseph Malanda father of Irene.

3. The said Isaac Gwala died during January, 1951, leaving plaintiff as heir to the said late Gwala's Estate and guardian over his widow, the said Irene. At the time of the late Isaac's death there was one issue.

4. Subsequently, during or about April, 1955, and at Clydesdale, Umzimkulu, defendant married the said Irene Gwala by Christian Rites without his (plaintiff's) consent or knowledge.
5. Only after defendant's marriage did plaintiff become aware of it Plaintiff therefore demanded *lobolo* as is customary in the amount of nine head of cattle, but defendant has refused to pay and persists in his refusal.
6. By reason of the above plaintiff avers that defendant is liable to pay nine head of cattle (or their value £45) as *lobolo* to him.
7. Wherefore plaintiff claim nine head of cattle or £45. Alternatively plaintiff claims the nine head of cattle or their value £45 as damages."

Certain further particulars were asked for and furnished, but these are of no material importance.

The defendant pleaded *res judicata* and, in the alternative, he denied liability on a basis which actually amounts to an exception in that he denies being liable "to pay any *lobolo* or damages on the facts alleged or relied upon in the summons."

No evidence was led but a previous case between the parties was handed in by consent. In this case the pleadings were substantially the same. The judgment was absolution from the instance. This judgment was granted, according to the Native Commissioner's reasons, because in that case plaintiff had stated in evidence that there never was any agreement that dowry should be paid.

In the present case the Native Commissioner upheld the plea of *res judicata* with costs. Against this decision the plaintiff now appeals.

The attitude of the plaintiff is, apparently, that as he provided the dowry for his son's former marriage to defendant's wife, and as he is the heir of his son, nobody can carry the woman unless a portion at least of his dowry payment has been refunded. However that may be, the claim of the plaintiff does not disclose any cause of action. A person who marries a woman who is, as in this case, a major, by civil rites without the consent of her kraalhead in Native law, is not liable to the latter either in dowry or in damages, in the absence of a breach of a contract to pay dowry. That also seems to have been the attitude of the Native Commissioner.

Mr. Myburgh, who appeared before us on behalf of the appellant, was unable to establish any cause of action. He confessed that he had felt this difficulty all along; but he contended that the only question before the Court was the issue of *res judicata*. If there was no cause of action *ex facie* the summons then the appellant should be given an opportunity to have his summons amended. Mr. Uys, for respondent, supported Mr. Myburgh on this point. He said one may even content that evidence, if it could be led, may yet disclose that there is a Native custom whereby *lobolo* is payable without an agreement to pay it.

Neither of these contentions are sound. No court of law *can* try a case which discloses no cause of action. Courts of law are there to decide on legal rights, and where no legal right is established there is no case to consider. Mr. Uys's further contention fails because the existence and applicability to the parties of a particular custom contrary to the accepted *lobola* contract would have to be specifically alleged. In any case, even if alleged, such a custom would be *contra bonos mores*. It would be contrary to public policy which does not favour putting obstacles in the way of major persons who wish to contract civil marriages.

There is no question of abduction (Section 140 of the Code) for that has not been alleged. In fact, it is difficult to see how it could have been alleged, for the woman is not the "wife, child or ward" of the plaintiff. Whatever Section 27 (2) of the Code may mean—and it does seem to contain a contradiction in terms—it certainly does not alter the position that the woman can, by virtue of the provisions of Section 11 (3) of the Native Administration Act, 1927, contract a civil marriage without the consent of the plaintiff. In so far as that contract is concerned she is not a ward of the plaintiff; the matter is personal to herself and that being so there cannot be abduction in terms of the Code. It is not alleged that the marriage is invalid; nor is there any provision requiring the woman to obtain plaintiff's consent to her marriage.

In Native law the defendant would probably have been liable in damages for seduction; but Native law cannot be resorted to in deciding this case because of the civil marriage—notwithstanding the discretion which section *eleven* of the Native Administration Act, 1927, allows to Native Commissioners. To admit the application of Native law would be tantamount to denying the efficacy of the civil law of marriage. Native law can never be applied to an action, even if under the ordinary law of the land there is no remedy, if that would necessarily involve a negation of rights accrued under the ordinary law of the land. The plaintiff, then, cannot claim the nine head of cattle he is asking for as *dowry* because he does not aver that there was an agreement to pay dowry. He cannot claim the cattle *as damages* otherwise than on the basis of seduction; and to do that they must rely on Native law and custom. But that necessarily involves acceptance of the proposition that a person married by civil law can seduce his wife, which is, of course, absurd.

The appeal must fail because the pleadings do not disclose a cause of action. The question of *res judicata* does not arise.

In my opinion the appeal should be dismissed with costs; but in view of the majority decision it is ordered that the appeal be allowed with costs and the judgment of the Native Commissioner is set aside.

Ashton (Permanent Member):—

Plaintiff sued defendant in the Court of the Native Commissioner, Vryheid, for nine head of cattle or their value £45 being the *lobolo* due by defendant on his marriage to Irene Gwala the widow of his late son to whom plaintiff claimed to be the heir. Plaintiff lodged an alternative claim for nine head of cattle (or £45) as damages.

Defendant pleaded that the claim was *res judicata* in that a similar previous claim had been decided by the same Court between the same parties and alternatively pleaded that he was not liable to pay *lobolo* or damages on the facts related in the summons and that there was no Native custom applicable entitling plaintiff to claim *lobolo* or damages.

When the matter came before the Native Commissioner certain facts were admitted and the record of the previous case referred to was put in "for the purpose of enabling the Court to decide the question of *res judicata* and for no other purpose."

Then without either party calling any evidence the attorneys for the parties address the Court and the Native Commissioner pronounced judgment in these terms "Plea of *res judicata* upheld with costs."

Against that judgment plaintiff has appealed to this Court on the grounds that it is against the weight of evidence and bad in law and that the Native Commissioner erred in upholding the plea of *res judicata*.

There is no dispute that the parties and the claims in both the cases in the lower Court were the same except that in the second case there was added a claim for damages which the Native Commissioner in his reasons for judgment said was only the use of " different terminology " to describe the same cause of action—a conclusion with which I am not in agreement.

Further on in his reasons for judgment the Native Commissioner states that " it was definitely decided by the Court (in the earlier case) that no agreement to pay *lobolo* to the plaintiff was ever entered into between the parties and plaintiff's claim could therefore not succeed."

This conclusion of the Native Commissioner must be examined by reference to the previous case in so far as reference can be made to it and in this connection the Court must be guided by the judgment in the case Bhengu *v.* Mazibuko, N.A.C. 1955, 1 (N.E.) in which it was held that in certain circumstances a plea of *res judicata* could be upheld on an absolution judgment. In that judgment it was held that—

> " every judgment is conclusive proof as against the parties of facts directly in issue in the case decided by the Court and appearing from the judgment itself to be the ground upon which it is based."

Applying that reasoning to the earlier decision in the case now on appeal it is necessary to ascertain what the Court found as the proved facts upon which it based its absolution judgment (couched in the terms " summons dismissed with costs.")

The Additional Native Commissioner said in his reasons for judgment in the first case that he based his judgment on the fact that plaintiff had not proved that he was the heir which was essential to entitle him to sue and he added that no such contract or agreement for the payment of *lobolo* as was necessary to make his claim valid had been proved. This makes it quite clear that he did not in fact find that plaintiff was not the heir and that there was no agreement to pay *lobolo*. Had he done so he would necessarily have had to give judgment for defendant. He dismissed the summons only because he found that what he regarded as necessary for the success of plaintiff's claim had not been proved (even though earlier in his judgment he said that plaintiff made a relevant admission).

In the circumstances the finding of the Native Commissioner in the case now on appeal, namely that " defendant's plea of *res judicata* is upheld with costs " was not based on facts in issue decided by the court which gave the earlier judgment and so, in my opinion, the plea of *res judicata* should not have been upheld.

In any event the claim for damages, which as has been explained *supra* is not accepted as a claim for *lobolo* in " different terminology ", is certainly not *res judicata* as damages was not claimed in the earlier action.

The learned President has of his own accord taken the point that plaintiff's summons discloses no cause of action—this despite the fact that Counsel for appellant as well as Counsel for respondent both argued strongly against the Court's right to do so. It is my view that it is not necessary or desirable that this Court should of its own motion go further into the matter than the appeal and the grounds on which it is based. A point is only taken by a Court *mero motu* when it is in the public interest or in the interests of justice to do so [Tsautsi *v.* Nene and Another, 1952, N.A.C. 73 (S)] and I do not think that is the position here.

There is no evidence as to the circumstances under which defendant took plaintiff's ward from his custody and control and married her without his permission. Sections 130 and 140 of the Code of Natal Native law are sufficiently wide in their terms to

cover the action of removing a woman from her guardian's control and marrying her (even should it be not necessaary, as it may be outside Natal, for a widow to have her guardian's consent).

In the circumstances of this case so far as the record discloses there was no question of a request by the defendant for the consent and agreement of plaintiff to the women's marriage prior to that event taking place nor is it disclosed where she was when defendant took and married her; but it would seem that plaintiff did make his demand as soon at it came to his notice what defendant had done.

Before it can be decided in this case whether there is a cause of action or not it is necessary to have the full facts and without them it is not for this Court to say that the claims were not founded on Native custom.

Because of what I have said above it is my opinion that the judgment of this Court should be "the appeal is allowed with costs and the judgment of the Native Commissioner is set aside."

Malherbe (Member):—

I agree with the learned Permanent Member. It seems to me that the judgment in the previous case, though in form one of absolution from the instance, was in substance one in favour of the defendant. However, I cannot agree with the Native Commissioner in this case that the alternative claim for damages is the same as the one for *lobolo*. To my mind, therefore, the plea of *res judicata* should not have succeeded and in my judgment the appeal is allowed with costs.

For Appellant: Mr. H. L. Myburgh.

For Respondent: Messrs. Bestall & Uys.

SOUTHERN NATIVE APPEAL COURT.

GECELO *v.* **GELECO.**

N.A.C. CASE No. 12 OF 1957.

UMTATA: 2nd October, 1957. Before Balk, President, Warner and Brownlee, Members of the Court.

TEMBU CUSTOM.

Status of Chiefs' wives conferred by himself—Never indefinite—Seed-bearer not appointed provisionally—right of succession of seed-bearer's son.

PRACTICE AND PROCEDURE.

Preponderance of probability is basis of all decision in civil matters—Meaning of "conclusively proved".

Summary: The late Gecelo, Chief of the Amagcina clan of the Tembu tribe, conferred status on certain of his wives. The son of the Great House, died while unmarried. The Native Commissioner held an enquiry in terms of Section 3 (3) of the Native Estates Regulations published under Government Notice No. 1664 of 1929, as amended, to determine the heir entitled to succeed to the late Gecelo's farm.

Appellant, who is the son and heir of late Mzamo, the only son born to Gecelo's wife, Noqwanti, upon whom no status had been conferred, claims that Noqwanti was appointed "seed-bearer" to the late Gecelo's Great House and that he is, therefore, the heir to that house. Respondent who is the son and heir of late Malangeni, the only son of the *qadi* to the deceased Gecelo's Great House, denied the appointment as "seed-bearer" and disputed the claim.

The Native Commissioner found in favour of respondent, holding that there was only a provisional appointment of the seed-bearer.

Appellant thereupon appealed to this Court on the ground *inter alia,* that it was Tembu custom that the eldest son of a "seed-bearer" to a House, takes precedence over the son of a *qadi* to that house, in the absence of a son and heir to the Great wife herself.

Held: That a chief to a Tembu clan is entitled to confer status on certain of his wives.

Held further: After consultation of Native assessors, that a seed-bearer is not appointed provisionally.

Held further: That the status conferred by a Chief on any of his wives is never indefinite.

Held further: That the basis of decision in all civil matters is preponderance of probability.

Held further: That the words "conclusively proved" used in Dumalisile *v.* Dumalisile, 1 N.A.C. (S.D.) 7, fall to be construed as meaning no more than proof on a balance of probabilities.

Cases referred to:

Ngwenya *v.* Gungubele, 1 N.A.C. (S.D.), 198.

Dumalisile *v.* Dumalisile, 1 N.A.C. (S.D.), 7.

Mcimbi *v.* Mpondweni, 1956. N.A.C. 20 (S.)

Habe *v.* Nokayiloti, 1941, N.A.C. (C. & O.), 115.

Appeal from the Court of the Native Commissioner, Cala.

Balk (President):—

This is an appeal from a Native Commissioner's finding in favour of the present respondent in an inquiry held in terms of section 3 (3) of the regulations for the administration and distribution of Native estates, published under Government Notice No. 1664 of 1929, as amended, to determine the heir to the farm, Mbenge, situate in the district of Xalanga.

The appeal is brought on the following grounds:—

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

2. That the finding and judgment are bad in law in that it is Tembu custom that the eldest son of a seedbearer woman proceeds (*sic*) in succession to the eldest son and heir of the *qadi* to the Great House when there is no son and heir in the Great House.

3. That it has been proved that the grandmother of the applicant (now appellant), was the seedbearer of the Great House and that the grandmother of the respondent was the *qadi* of the Great House."

It is common cause that the late Gecelo (hereinafter referred to as "the deceased"), was a Chief, having been the head of a Tembu clan, viz: the amaGcina, and that, as such, he conferred status on certain of his wives as he was entitled to do, see Ngwenya

v. Gungubele, 1 N.A.C. (S.D.) 198, at page 199. He made Nogcuwa his Great wife, Norini his Right Hand wife, Noseki *qadi* to his Great House, Nohalisi *qadi* to his Right Hand House and Nohem *ixhiba*. It is also common cause that the only son of the deceased's Great House, Ruxeshe, died unmarried, that the only son of the *qadi* to the deceased's Great House, viz: Malangeni, is also dead, that the respondent is the late Malangeni's son and heir and that the appellant is the son and heir of the late Mzamo who was the deceased's only son by his customary wife, Noqwanti.

The appellant claims that Noqwanti was appointed by the deceased as "seed-bearer" to his Great House and that he is, therefore, the heir of that house. The respondent disputed this claim denying in his testimony that Noqwanti had been so appointed. The only admissible evidence probative of the appellant's claim is that of the late Nogcuwa's daughter, Nositwayi, that Noqwanti was appointed as "seed-bearer" to the deceased's Great House prior to Ruxeshe's birth because before then Nogcuwa had daughters only. The Native Commissioner accepted Nositwayi's first statement, in this respect, viz: that Noqwanti had been appointed "seed-bearer" provisionally, i.e. on the understanding that if Nogcuwa bore no sons, Noqwanti was to be regarded as a "seed-bearer" to the deceased's Great House. The Native Commissioner rejected Nositwayi's subsequent statement in the course of her testimony that Noqwanti's appointment as "seed-bearer" had not in fact been provisonal and he found that Ruxeshe's birth, therefore, nullified Noqwanti's appointment as "seed-bearer" to the deceased's Great House and that the respondent as heir of the *qadi* to that house was also heir to the deceased's Great House. The Native Commissioner mentions in his reasons for judgment that he rejected Nositwayi's subsequent statement because he thought that she was no longer truthful at that stage. He does not, however, state specifically why he came to this conclusion, but in dealing with this aspect he says that Nositwayi's evidence that Noqwanti's appointment as "seed-bearer" had been provisional appears to accord with custom in that, as laid down in Dumalisile *v.* Dumalisile, 1 N.A.C. (S.D.), 7, at page 8, a "seed-bearer" can only be appointed when the principal wife is barren or past child-bearing age except possibly in the case of a Chief, but then such an appointment must be conclusively proved which had not been done in the instant case. But, as is clear from the judgment in Mcimbi *v.* Mpondweni, 1956, N.A.C. 20 (S.), at page 23, and the authorities there cited, the basis of decision in all civil matters is preponderance of probability with due regard to the onus or burden of proof, so that the words "conclusively proved" used in Dumalisile's case (*supra*) fall to be construed as meaning no more than proof on a balance of probabilities. Proceeding to a consideration of the evidence in the instant case on this basis, not only am I unaware of any other instance of a "seed-bearer" having been appointed provisionally, but in my experience any provisional appointment of this nature would run counter to established custom since the status conferred by a Chief on any of his wives is never indefinite as would be the case were it provisional.

The Tembu assessors were consulted in regard to this and other aspects of this case involving Native law and custom. It will be seen from their replies, which are appended, that a "seed-bearer" is not appointed provisionally. It follows that Nositwayi's initial statement that Noqwanti's appointment as "seed-bearer" had been provisional constitutes an improbability. Another improbability in the appellant's case arises from his contention that the deceased's customary wife, Norafu, had been appointed as "seed-bearer" to the *qadi* to his Right Hand House which emerges from his evidence and his cross-examination of the respondent; for Native law and custom only sanctions the appointment of a "seed-bearer" to one of the principle houses, i.e. the Great House or Right Hand House, and not to a *qadi* wife, see Dumalisile's case (*supra*), at the foot of page 7, and the assessor's

replies in the instant case. It is true that Nositwayi stated that Norafu had been appointed as "seed-bearer" to the deceased's Right Hand House, but this evidence does not advance the appellant's claim as there is nothing to indicate that the circumstances in the case of the deceased's Right Hand House were the same as those pertaining to his Great House. Likewise, the undisputed fact that the deceased allotted another of his farms, viz: Malangeni, to the *qadi* to his Great House, does not assist the appellant as there is nothing in the evidence indicating that the deceased did so because Noqwanti had been appointed "seed-bearer" to his Great House and her son would, therefore, oust the son of the *qadi* to that house from the heirship thereto, see Hahe *v.* Nokayiloti, 1941, N.A.C. (C. & O.), 115, at page 117. and the assessors' replies in the instant case. There is a further improbability in the appellant's case which, in my view, definitely turns the scales in the respondent's favour and that is the admission by Nositwayi that the appellant's father, Mozamo, made no claim to the heirship in question notwithstanding that there was occasion for him to do so; and Nositwayi's explanation that Mozamo made no claim, "because he was expecting to hear from the person who was acting for his mother", is singularly unconvincing to say the least of it. The appellant offered no explanation in this respect, beyond saying that he did not know "why Mozamo was not given his kingdom and chieftainship".

It follows that the Native Commissioner cannot be said to be wrong in finding for the respondent and the appeal accordingly falls to be dismissed with costs.

STATEMENT BY NATIVE ASSESSORS.

Assessors in Attendance:

(1) Jackson Nkosiyane, Tembu assessor from Umtata District.

(2) Nongxeke Maqandine, Tembu assessor from Umtata District.

(3) Bokleni Dalasile, Tembu assessor from Engcobo District.

(4) Bungane Mgudlwa, Tembu assessor from Engcobo District.

(5) Aaron Mgudlwa, Tembu assessor from St. Marks District.

Question by President.

It has been laid down by this Court that a "seed-bearer" may only be appointed to one of the principal houses, i.e. to the Great House or Right Hand House, and not to a *qadi* wife. Is the position the same in Tembu law and custom?

Reply by Jackson Nkosiyane:

The position is the same in Tembu law and custom.

All other assessors agree.

Question by President:

Can a "seed-bearer" be appointed provisionally, or must the appointment be a permanent one?

Reply by Jackson Nkosiyane:

The appointment of a "seed-bearer" is made when no children are born to the wife of a principal house, but if the principal wife gives birth to a male child after the "seed-bearer" has been appointed, then such male child becomes the heir of the principal house, and should the "seed-bearer" bear a male child, it becomes the younger brother of the principal wife's male child and next entitled to suceed to the principal house. The appointment of a "seed-bearer" is a permanent one and never provisional.

All the other assessors agree.

Question by President:

Is it permissible for the Chief of a Tembu clan to appoint a "seed-bearer" to a principal wife who is neither barren nor past child-bearing age.

Reply by Jackson Nkosiyane:

It is open both to a Chief and a commoner to appoint a "seed-bearer" to a principal house once he has given up hope that the wife of such principal house will bear a male child, not otherwise.

All the other assessors agree.

Question by President:

Where a principal house has no male issue and the "seed-bearer" appointed thereto has a son and the *qadi* wife to such principal house also has a son, which if the two sons is the heir to the Principal House?

Reply by Jackson Nkosiyane:

The son of the "seed-bearer" takes precedence over the son of the *qadi* wife and succeeds to the principal house.

All the other assessors agree.

Question by Permanent Member:

If a principal wife has daughters only, but is not past child-bearing age, can a "seed-bearer" to her be appointed?

Reply by Jackson Nkosiyane:

If the husband has given up hope of male children by the principal wife he may appoint a "seed-bearer" to her.

All the other assessors agree.

Bnngane Mgudlwa adds:

We have a belief that where a principal wife has given birth to daughters only, the birth to a "seed-bearer" of a male child induces the birth of a male child by the principal wife. In the case of a Chief with no male issue in one of his principal houses contracting a customary union with a woman of higher rank by virtue of her parentage than the *qadi* wife to such principal house, such woman of superior rank will be appointed "seed-bearer" to the principal house.

All the other assessors agree.

For Appellant: J. G. S. Vabaza, Libode.

For Respondent: G. M. M. Matanzima, Engcobo.

SOUTHERN NATIVE APPEAL COURT.

SIHLUKU, d.a. *v.* VANQA, d.a.

N.A.C. CASE No. 37 OF 1957.

KING WILLIAM'S TOWN: 23rd October, 1957. Before Warner, Acting President, Louw and Schaffer, Members of the Court.

LAW OF CONTRACT.

Lease—Land in Municipal Location—Site permit holder entitled to possession—Privity of contract between such holder and Municipality—Removal of improvements—Heir of late site permit holder—Rights of ejectment.

Summary: Plaintiff, the heir to the late holder of a site permit in respect of a stand in Queenstown Municipal Location, successfully sued defendant, the present holder of a site permit in respect of this stand for a declaration of rights in the stand and buildings thereon, and for ejectment. Defendant had bought the improvements and stand rights from another member of the family, who had obtained a site permit therefor after the death of the late holder to whom plaintiff was heir, and he (defendant) had been granted a site permit in respect of this stand by the Queenstown Municipality.

Defendant appealed.

Held: That the land in a Municipal Location is owned by the municipality concerned.

Held further: That the legal position of the site permit holder *vis-á-vis* the municipality is that of lessee.

Held further: That, as lessee, he may break down structures and remove materials from the site only during the currency of his lease, failing which they remain the property of the lessor, to whose land they have acceded.

Held further: That plaintiff (heir to the deceased site permit holder) cannot claim a declaration of rights or an order of ejectment in respect of the stand.

Cases referred to:

Madikane *v.* Masoka, 1 N.A.C. 113 (S.D.), 114.

Mkwali *v.* Mkwali, 1943, N.A.C. (C. & O.), 64.

Lusiti *v.* Goniwe, 1947, N.A.C. (C. & O.), 121.

Appeal from the Court of the Native Commissioner, Queenstown.

Warner (Acting President):

A site permit in respect of Stand No. 746, Queenstown Municipal Location, was issued jointly in the names of Alexander Vanqa and his customary wife, Sophia Vanqa. Alexander died on 28th October, 1935, and after that a site permit in respect of the stand was granted in the name of Sophia Vanqa who died in 1954. A site permit was granted to Nightingale Vanqa in respect of the stand on 19th February, 1954. Nightingale, in consideration of the payment of a sum of £150 made by defendant's husband to him, requested the municipal authorities to transfer the site permit and one was then issued in the name of defendant on 8th December, 1954. Nightingale claimed to be the heir of Alexander Vanqa but, as the result of an enquiry held

to determine the person entitled to succeed to Lot No. 140, Kundula Location, Glen Grey District, the Native Commissioner, Lady Frere, declared plaintiff to be the heir to the late Alexander Vanqa. Defendant is in occupation of Stand No. 746, Queenstown Municipal Location.

Plaintiff, by virtue of his heirship to the late Alexander Vanqa, sued defendant in a Native Commissioner's Court for:—

(*a*) A declaration of rights in regard to Stand No. 746 and the buildings thereon;

(*b*) an order of ejectment on defendant;

(*c*) alternative relief; and

(*d*) costs of suit.

Defendant pleaded that he was in lawful occupation of the said Stand No. 746 which he bought in good faith from the registered owner, Nightingale Vanqa, with the approval and consent of the Municipality of Queenstown. He also pleaded that plaintiff's particulars of claim disclosed no cause of action against defendant.

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

"1. The appellant bona fide purchased and paid for stand 746 from Nightingale Vanqa prior to 8th December, 1954, which stand was duly transferred into her name on 8th December, 1954, with the consent of the Municipality of Queenstown.

2. The said Nightingale Vanqa was the registered owner of the said Stand No. 746 at the time of sale and transfer to the appellant and as such was legally entitled to sell the said Stand No. 746 to the appellant.

3. The Native Commissioner erred in law in finding that the evidence disclosed that the said Nightingale Vanqa committed a fraudulent act in selling the said Stand No. 746 to the appellant.

4. The judgment is against the weight of evidence and against the probabilities of the evidence."

At the hearing of the appeal defendant, after giving notice, was granted leave to file the following additional grounds of appeal:—

"5. That the learned Native Commissioner erred in law in finding that because respondent had been declared the heir to Lot No. 140, Kundula Location at the enquiry held at Lady Frere that respondent is also the heir to Stand No. 746, Location, Queenstown as such enquiry was only concerned with Lot No. 140, Kundula Location.

6. That as respondent has never been declared heir to Stand No. 746 Location, Queenstown he has no *locus standi in judicio* to claim a declaration of rights and ejectment against appellant.

7. That the action was premature in that an enquiry in terms of Government Notice No. 1664 of 1929, as amended, should have first been held to ascertain who the rightful heir is to Stand No. 746 Location, Queenstown and as such the learned Native Commissioner should have granted absolution from the instance."

The parties and their attorneys in the Court *a quo*, as well as the Native Commissioner, appear to have misconceived the position. They mention site permit holders as being "registered owners" of the stand. This is incorrect. The position in regard to a stand in a municipal location is set out in the following extract from the judgment given in the case of Madikane *v.* Masoka 1 N.A.C. 113 (S.D.) on page 114:—

"It was pointed out in Mkwali *v.* Mkwali [1943, N.A.C. C. & O.) 64] and in Lusiti *v.* Goniwe [1947, N.A.C. (C. & O.), 121], that the land in a municipal location is owned by the municipality concerned and consequently buildings erected thereon also belong to the municipality, that the legal position of the site permit holder *vis-á-vis* the municipality is that of lessee and lessor, and that as lessee the site permit holder can acquire ownership of the immovable improvements erected or purchased by him by breaking down the structures and removing the materials from the site, but that this right must be exercised during the currency of the lease."

The Queenstown Municipality is the owner of Stand No. 746 in the municipal location together with the buildings thereon. By issuing a site permit in favour of defendant, it granted her permission to occupy the stand and buildings as its lessee. Plaintiff, therefore, cannot claim against defendant a declaration of rights or an order for ejectment in respect of the stand and the Native Commissioner should have upheld defendant's plea that plaintiff's particulars of claim disclosed no cause of action against defendant.

The appeal is upheld with costs and the judgment of the Court *a quo* is altered to one for defendant with costs.

For Appellant: Mr. Heathcote, King William's Town.

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

SOUTHERN NATIVE APPEAL COURT.

MATENGJANE *v.* **NGOWA.**

N.A.C. CASE No. 35 OF 1956.

KING WILLIAM'S TOWN: 16th November, 1956. Before Balk, President, Yates and Warner, Members of the Court.

PRACTICE AND PROCEDURE.

Defect in pleadings cannot be relied upon on appeal in absence of prejudice.

CUSTOM.

It is contrary to custom for the alleged adulterer to call a further meeting after denying the charge at the initial meeting at which he had a witness.

Summary: In a summons for damages for adultery committed by defendant with plaintiff's wife, the former alleged adultery in 1952, whereas evidence showed that it occurred in 1953. Defendant admitted in cross-examination that he was taxed with adultery in 1954 and not in 1953. He was aware that the plaintiff's claim referred to adultery in 1953.

He admitted that at the initial meeting where he was accompanied by a witness, when he was taxed with adultery in plaintiff's wife's presence, he had said he would call people and had asked the plaintiff's people to return at a later date notwithstanding his alleged denial of the adultery at that initial meeting.

Held: That defendant could not rely on the defect in the pleadings as it was manifest from his admission that he was aware of the true position and was, therefore, not in any way prejudiced by the defect.

Held further: That the defendant, after denying the adultery charge, should have asked the plaintiff's people to attend a further meeting in connection therewith, is wholly contrary to custom, bearing in mind that at the initial meeting defendant had a witness called by himself.

Cases referred to:

Ex parte Minister of Native Affairs, 1941, A.D. 53.

Status referred to:

Act No. 38 of 1927, as amended.

Government Notice No. 2886 of 1951, as amended.

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

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

The appeal is from the judgment of a Native Commissioner's Court for plaintiff (now respondent) as prayed, with costs, in an action in which he sued the defendant (present appellant) for five head of cattle or their value, £50, as damages for adultery, averring in the particulars of his claim that:—

"1. Plaintiff is married to one Nomanit by Native law and custom, his marriage to her being valid and subsisting.

2. During or about September 1952, and at Haga Haga in the District of Komga, the defendant wrongfully and unlawfully committed adultery with plaintiff's said wife as the result whereof the said Nomanit gave birth to a male child during or about June, 1953.

3. Plaintiff has suffered damages in the premises to the extent of 5 head of cattle or their value £50, Native-owned cattle in the Komga District at all times material hereto being of the value of £10 a head.

4. Defendant despite demand made on him neglects or refuses to pay."

The defendant pleaded as follows:—

"1. Paragraph 1 of summons is admitted.

2. Defendant denies all plaintiff's allegations as contained in paragraphs 2 and 3 of summons and states that if the said Nomanit gave birth to a male child that such occurrence is no responsibility of his.

Defendant admits that the customary value of Native-owned cattle in the Komga District is £10 per head.

3. Defendant accordingly admits his refusal to pay damages in the premises."

The appeal is brought on the following grounds:—

"1. That the learned Native Commissioner erred in believing plaintiff's witnesses whose testimony was so contradictory as to be not worthy of credence.

2. That there was no corroboration of plaintiff's allegation that the defendant was the adulterer, save an alleged admission of adultery of which the learned Native Commissioner should not have taken cognisance, regard being had for the contradictions and general unreliability of plaintiff and his witnesses.

3. That there was no reason why defendant's evidence should not have been believed.

4. That the learned Native Commissioner erred in not having regard for the fact that the defendant was greatly prejudiced in his defence as a result of plaintiff not having timeously taken action against defendant, so much so, that defendant's only witness, Wilson, could not be traced and was accordingly not available at the hearing of the case on the stated date which was almost four years after the date on which the adultery is alleged to have taken place.
5. That generally, the learned Native Commissioner's judgment was against the weight of evidence and bad in law."

According to the evidence for the plaintiff, his case is that about five to six years ago he sent his wife, Nomanit, from the Cathcart District where they were living, to her people in the Komga District, owing to her illness. About three years thereafter during the ploughing season, whilst Nomanit was still with her people in the Komga District, the defendant committed adultery with her as a result of which she gave birth to a child during the following reaping season. Her brother, Zula, made a report to the plaintiff at whose instance Zula and the plaintiff's elder brother, Mzimeli, took her with the child, which was then two months old, to the defendant's kraal where they taxed him with the adultery and the latter, after first denying the charge, admitted it. Thereupon Mzimeli demanded the customary damages of five head of cattle for the adultery from the defendant who asked them to return on the following Wednesday as he had to consult his uncle about the cattle. They returned to the defendant's kraal on the Wednesday and once again, at his instance, but he did not pay the cattle and kept on putting them off. On their arrival at the defendant's kraal the first time, he called one Wilson.

The defence was a denial by the defendant of the alleged adultery coupled with an alibi that he had been away at work at East London from February to November, 1952. The defendant admitted that Zula and Mzimeli, accompanied by Nomanit and one Zibanzi, had come to see him and had charged him with the alleged adultery but he denied that he had admitted this charge. He went on to say that Wilson had been present at this meeting on his side but that he had since been unable to ascertain Wilson's address. He further stated that four weeks after this meeting, Mzimeli and Zibanzi again came to his kraal and that thereafter they did not come to see him. At the second meeting he also did not admit the adultery. In cross-examination he admitted that immediately after these meetings he had gone to Cape Town, that he had done so during the ploughing season of the year before last, i.e., during the 1954 ploughing season and that he had only returned from that centre during Christmas, 1955.

As pointed out by counsel for appellant, there are discrepancies in the evidence for the plaintiff. The plaintiff stated that from the time he sent Nomanit to the Komga District, he did not visit her until after the birth of the child; whereas she stated that he had visited her during the hoeing season two years after she had come to Komga, this visit having taken place before the year in which she fell pregnant by the defendant. Again, both Nomanit and Zula stated that the defendant had never come to Zula's kraal and the latter also said that one Guy Fex had not come to his kraal either whereas Mzimeli stated that before this case the defendant used to visit Zula's kraal and that he had seen Guy Fex there when there was a beer gathering. But it seems to me that these discrepancies are of little moment viewed in the light of the improbabilities in the defendant's evidence coupled with his admission in cross-examination that the meeting at which Nomanit accused him of having rendered her pregnant, took place shortly before or during the 1954 ploughing season, i.e., in the second half of that year. The significance of this admission becomes apparent if it be borne in mind that it is implicit

in Nomanit's, Zula's and Mzimeli's evidence for the plaintiff, which in this respect has not in any way been challenged by the defendant, that at the meeting in question the defendant was accused of having rendered Nomanit pregnant during the ploughing season of the previous year, i.e., therefore during the 1953 ploughing season. It is true that Nomanit stated in the course of her evidence given on the 22nd May, 1956, that four Christmases had passed since she had conceived but this statement is obviously erroneous in the light of her earlier and later testimony from which it is manifest that she in fact conceived in the year 1953 and not in the year 1952. I refer to her earlier statement that the defendant had started making love to her three years after she had gone to her people in Komga District where, as is common cause, she had gone five to six years prior to the hearing of the case, i.e. in 1950 at the earliest; and also to her later statement that the plaintiff had visited her in Komga District two years after she had come there and that this visit had taken place before the year in which she became pregnant. In any event the defendant's admission in cross-examination, referred to above, confirms that Nomanit conceived in the year 1953 so that the Native Commissioner *a quo* rightly found accordingly. It is also true that in the particulars of his claim the plaintiff stated that Nomanit had been rendered pregnant in the year 1952. But it seems to me that the defendant cannot rely on this defect in the pleadings as it is manifest from his admission in cross-examination, mentioned above, that he was aware of the true postioin and was, therefore, not in any way prejudiced by the defect, see the proviso to section *fifteen* of of the Native Administration Act, 1927. In addition, this admission by the defendant not only renders his alibi nugatory since it pertains to the year 1952, but also has as a consequence that the evidence by Nomanit and Zula for the plaintiff that the defendant remained at home the whole of the year in which Nomanit conceived, stands uncontroverted. Here it should be mentioned that the defendant, in connection with his alibi, handed in a contract of service (Exhibit "B") apparently issued in terms of section *five* of the Regulations for the Proclaimed Area of East London, published under Government Notice No. 735 of 1939, as amended, and indicating that he was employed at that centre from February to July, 1952. No objection was taken in the Court below to the admission of that document in evidence and it is not really material in the light of what has been stated above, so that the question whether it was rightly admitted does not call for consideration.

Turning to the improbabilities in the defendant's evidence, he stated that at the meeting at which he was charged with the alleged adultery, and at which Nomanit was present, he had, after saying "I don't know what you are speaking about", said "I will go and call some people to come and listen to your lies" and asked the plaintiff's people to return on Saturday. That the defendant should, in the circumstances, i.e., after denying the charge, have asked the plaintiff's people to return is wholly contrary to custom bearing in mind that the defendant, at this meeting, had a witness called by him, viz., Wilson, and his version in this respect is, therefore, most improbable. Again, the defendant's statement that the later service contract, i.e., the one which he stated had replaced Exhibit "B", had got lost in his clothes but that he did not try and search for it is, on the face of it, improbable.

In the circumstances it seems to me that the probabilities, as were disclosed by the evidence to have been material, clearly favour the plaintiff's case and that the Native Commissioner cannot, therefore, be said to be wrong in having accepted the evidence for the plaintiff and in finding that Nomanit's testimony that the defendant and committed adultery with her, was sufficiently corroborated by Zula's and Mzimeli's evidence that the

defendant had admitted the adultery. Here it should be mentioned that the inference adverse to the defendant drawn by the Native Commissioner owing to the defendant's failure to call Wilson does not appear to be justified as the defendant's evidence indicates that he did ask Wilson's people for his address and they could not give it; and the fact that the defendant added that he did not ask all of Wilson's people does not necessarily imply that he did not ask those that mattered. However this factor does not militate against the success of the plaintiff's case as the other factors mentioned above, standing by themselves, suffice to establish it. It follows that the first, second, third and fifth grounds of appeal fail.

Turning to the remaining ground, i.e. the fourth, the plaintiff was not cross-examined in regard to the delay in his taking action. From the evidence for the plaintiff, it is manifest that there was no appreciable delay in having the defendant charged with the adultery after the adultery had come to the plaintiff's knowledge and, from the defendant's evidence, it would appear that he and not the plaintiff may well be responsible for the delay in the issue of the summons in this case; for the defendant admitted in cross-examination that immediately after his final meeting with the plaintiff's people in connection with the adultery, he left for Cape Town where he remained for about a year, and there is nothing to indicate that his address there was known to, or could be ascertained by the plaintiff. It follows that the plaintiff may well not have been in a position to have issued and had the summons in this case served on the defendant until the latter's return home, see Rule 31 (3) of the rules for Native Commissioners' Courts, published under Government Notice No. 2886 of 1951, as amended, and *ex parte* Minister of Native Affairs, 1941, A.D. 53, at pages 58 and 59; and from the summons and the defendant's evidence, it is manifest that the plaintiff issued the summons and had it served on the defendant without delay after the latter's return from Cape Town. Moreover, the defendant's evidence under cross-examination indicates that he may well not have taken all the necessaary steps to ascertain Wilson's address. It follows that it has not been shown that the defendant was prejudiced in his defence as a result of the plaintiff's not having taken action against him timeously and the fourth ground of appeal, therefore, also fails.

Accordingly the appeal should be dismissed with costs.

For Appellant: Mr. Heathcote, King William's Town.

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

REPORTS

OF THE

NATIVE APPEAL COURTS

1958

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