The Native Commissioner entered the following judgment:—

> "The customary union subsisting between plaintiff and defendant is hereby disolved. It is further ordered that plaintiff shall be under the guardianship of Madovuyana Zulu (applicant) and shall reside at his kraal or where he directs and that Madovuyana Zulu (applicant) shall return to defendant twelve head of cattle. No order as to costs."

The applicant was not cited in the summons as a party and that part of the judgment ordering him to return twelve head of cattle is now being attacked on appeal. It is observed that he took no steps to have the order set aside until such time as the respondent caused a writ of execution to be issued against him and after five head of cattle had been attached by the Messenger of the Court.

No reasons for the delay in noting the appeal are given and the applicant seems to rely entirely on the question whether or not a manifest injustice has resulted from the order made by the Native Commissioner.

It is rather unfortunate that the Assistant Native Commissioner who tried the action should have seen fit to disregard the decision of this Court in the case of Xulu *v.* Mtetwa, 1947, N.A.C. (T & N) 32, in which it was definitely laid down that no effective order can be made against a person who is not a party to the action. The Assistant Native Commissioner tries to justify his decision by stating in his reasons for judgment that the decision in that case was not unanimous by all the members of the Appeal Court. The flouting of a majority judgment can only be called a flagrant disregard of the principles of judical decisions and of the *stare decisis* rule.

This Court is constrained to point out that the Assistant Native Commissioner would appear to have over-reached himself when he gave vent to the following unbridled expression after he had quoted from the judgment in Xulu's case:—

> "(it) inevitably points to a situation which can only be interpreted in the most favourable light as Gilbertian. What Native litigants who have to bear the expense of the additional actions necessary will think of this example of 'White man's justice and legal remedies', can best be left to the imagination."

Such language is most unbecoming when commenting on the judgments of a higher Court, and the Presiding Officer's attention is invited to the remarks by McLoughlin (P) in the case of Fuzile *v.* Ntloko, 1944, N.A.C. (C.O.) 2.

In the case of Makune *v.* Moletsane, 1941, N.A.C. (T & N) 127, this Court pointed out that in an application for condonation the applicant should first exhaust the remedy available to him in the Court below. Also in Mkize *v.* Mkize, 1942, N.A.C. (T & N) 7, the Court in dismissing the application for condonation, pointed out that applicant had not exhausted all remedies available to him. He could have applied for an order to stay execution of the writ.

In the present case, as no effective judgment had been given against applicant, as remarked above, this Court holds the view that if there is no effective judgment, a writ cannot be issued, and applicant could have applied to have the writ set aside. He had such redress in the Court below and should have explored that avenue before coming to this Court.

The application is dismissed with costs.

For Applicant/Appellant: Mr. H. L. Myburgh, of Messrs. Bennett & Myburgh, Vryheid.

For Respondent: In default.

Cases referred to:—

Fuzile *v.* Ntloko, 1944, N.A.C. (C.O) 2.
Makune *v.* Moletsane, 1941, N.A.C. (T & N) 127.
Mkize *v.* Mkize, 1942, N.A.C. (T & N) 7.
Xulu *v.* Mtetwa, 1947, N.A.C. (T & N) 32.

SELECTED DECISIONS

OF THE

NATIVE APPEAL COURT

(North-Eastern Division)

VOLUME I

Part IX

The Government Printer, Pretoria.

G.P.-S.6925—1950-1—500.

CASE No. 39 OF 1950.

ESAU MNCUBE (Plaintiff) *v.* CONSTANCE MNCUBE (Defendant).

(N.D.C. Case No. 82/50.)

VRYHEID: Thursday, 29th June, 1950: Before Steenkamp, President (North-eastern Division).

Law of Persons—Divorce on ground of adultery—Premature birth of child.

Held: That, as prematurity can only be definitely established by an x-ray of the centre of ossification in the lower end of the femur, the plaintiff in an action for a divorce on the ground of adultery, must bring very strong evidence to prove that a child was not born prematurely, but after the full period of gestation.

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

We have a case here where the husband of the woman is determined that he is not the father of the child his wife gave birth to on the 23rd September, last year. According to law, the husband of the mother of the child is presumed to be the father of the child. That is a presumption of law and if a party to a case wants us to take a different view, he has to convince the Court that he is not the father of that child. In this case we have no evidence, whatsoever, that the defendant (the woman) was ever seen in company of another man which, in such circumstances, might lead one to come to the conclusion or even suspect that she was unduly intimate with that man. The plaintiff bases his claim entirely on the fact that the child was born seven months after he last had intercourse with his wife.

There is a slight difference in the evidence between the husband and wife as to when intercourse took place. She says it started on the 13th February, until the 22nd February, whereas he states that he only had connection with her on the 22nd February, but for the purposes of this case I am prepared to base my judgment on the fact that intercourse took place on the 22nd February, 1949.

The child was born on the 23rd September, 1949, exactly seven months and one day after the date the last intercourse took place.

Plaintiff has handed in a certificate he received from the doctor at the Mission Hospital at Nongoma. In that certificate, which Counsel for defendant consented to being handed in, it is stated that the child weighed 8 lbs., and there was no sign of prematurity. The certificate goes on and states " the average time of conception would be about the middle of December, but there is no absolute evidence for this ".

It is on this certificate that the plaintiff depends and contends that the child was a full nine-months' child, and therefore he could not have been the father of it.

Against that we have the evidence of Dr. C. O. Brown, who gave evidence here on behalf of the defendant to-day. Dr. Brown has assured us, and he has quoted authorities for it (Medical Jurisprudence) that even a seven-months' baby can look as fully developed as a nine-months' child. He also tells us that the only way to decide whether it is a seven or nine-months' child, is by taking an x-ray of the centre of ossification in the lower end of the femur (thigh bone), and therefore it is absolutely impossible for anybody to say for certain, unless that x-ray has been taken.

I wish to point out to plaintiff that the Courts are very loath to say that a child is an illegitimate child, unless the evidence is very strong in that direction: In other words, we do not " bastardise " a child readily.

It is true the plaintiff did bring evidence here of a supposed conversation which took place between his wife and himself, at which his mother and sister-in-law were also present. In that conversation his wife is supposed to have denied the adultery, and then is alleged to have said: "I will not tell you the name of the father."

It is not necessary for me to dwell too long on that piece of evidence, because it is so obvious to me that this woman (the defendant) never mentioned that—after having denied emphatically that she ever committed adultery, and having persisted that the plaintiff was the father of the child.

I quite appreciate the plaintiff's difficulty in this case. He became suspicious. What he thought was a fully developed child was born to his wife, when it was only seven months previously that he had had intercourse with her, after having been absent from home for a considerable period. I can see that this suspicion has preyed on his mind to such an extent that he is prepared to believe anything unsavoury about his wife.

The plaintiff has heard the evidence of the doctor here to-day, and the doctor has told us that the plaintiff *could* have been the father of that child. He has not been able to prove that his wife has committed adultery, and therefore I enter a judgment of absolution from the instance with costs.

Plaintiff: In person.

For Defendant: Mr. Turton of Messrs. Guy, Turton and Hannah, of Vryheid.

CASE No. 40 OF 1950.

CONRAD KHATI (Appellant) *v.* **ALANUS MYENDE (Respondent).**

(N.A.C. CASE No. 41/50.)

PIETERMARITZBURG: Tuesday, 11th July, 1950. Before Steenkamp, President, O'Connell and van Schalkwyk, Members of the Court (North-eastern Division).

Law of Evidence—Witnesses, truthfulness of—Corroboration in adultery cases.

Held: That this Court is not prepared to hold that the woman's demeanour in the witness box should be sufficient reason to discard her evidence *in toto* as she might have been of a nervous disposition and this Court knows that the atmosphere of a Court does affect some people.

Held: That it has frequently been held by this Court and other Courts that in the absence of a denial on oath of the woman's evidence, her evidence should be accepted, and the mere fact that defendant has not given evidence, is proof *aliunde* that the woman is speaking the truth.

Appeal from the Court of the Native Commissioner, Himeville.

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

The plaintiff, now appellant, sued the defendant, now respondent, in the Chief's Court for two head of cattle or £10, their value, being damages suffered by plaintiff as a result of the adultery committed by his wife with defendant, and rendering her pregnant.

The Chief gave judgment for one beast and £1 per month maintenance for the child for the period of two years.

On appeal to the Native Commissioner the judgment was altered to one of "For defendant with costs". This was on the 4th April, 1950. An appeal dated the 26th April, 1950, was noted, and application is now being made for the condonation of the late noting of the appeal.

The application is supported by an affidavit signed by appellant's attorney. It is observed that appellant was unrepresented in the Court below. The affidavit is to the effect that while the attorney was on his farm on or about the 7th April, 1950, the appellant approached him. He promised the appellant that he would write to him on his return to office at Pietermaritzburg and explain to him what he would have to do. The attorney wrote on the 14th April, and on the 26th idem he received a reply from the appellant dated the 22nd April, enclosing £5 with the request to note the appeal. The appeal was immediately noted but was only received by the Native Commissioner at Himeville on the 28th April, 1950. The reason is also given that the letter written by the appellant did not reach the attorney until the 26th April.

The grounds for the late noting of the appeal are such that this Court would not normally grant condonation, but there are certain unsatisfactory aspects of the case that this Court feels, in the interests of justice, condonation should be granted, which is hereby done.

Plaintiff in his evidence states that when he returned from Johannesburg he found that his wife was pregnant and she reported to him the name of the defendant as being the responsible person. The wife gave evidence and she states that during the absence of her husband she and defendant became lovers and intercourse took place on many occasions. She states he used to come to her kraal sometimes in the daytime and sometimes at night. Her evidence is corroborated by a boy aged 10 years and a girl aged 12 years, who both state that defendant on many occasions visited plaintiff's wife at night time. They say they did not see him visit her in the day time, and the Native Commissioner has commented on this in his reasons for judgment, but this Court feels that this discrepency between the evidence of the woman and the evidence of the children is not such that the evidence can be discarded *in toto*. We therefore have the evidence of plaintiff's wife, which is corroborated by the fact that she gave birth to a child which was not her husband's child, and the evidence of the children that defendant was a frequent visitor to the kraal.

Defendant gave no evidence and at the conclusion of plaintiff's case his attorney contended: " There is no evidence *aliunde* of adultery " and applied to the Court for the appeal from the Chief's Court to be upheld with costs. The Native Commissioner thereupon entered the following judgment:—

" Appeal upheld with costs and the Chief's judgment altered to read: ' Judgment for defendant with costs '."

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

(1) The judgment was contrary to law and against the weight of evidence.

(2) Sufficient evidence was produced to prove the adultery of the defendant with plaintiff's wife and the learned Native Commissioner should have held accordingly.

(3) Plaintiff is in law entitled to damages and should have been awarded damages accordingly.

(4) The parties being natives a strict compliance with the statutory procedure should not have been required.

The Native Commissioner found proved (*a*) that plaintiff was absent from his home, working in Johannesburg from January, 1948, to the end of September, 1949; (*b*) that plaintiff's wife gave birth to a child in November, 1949; (*c*) that during the absence of plaintiff in Johannesburg the defendant visited the plaintiff's wife at her kraal in the evening. This happened over the weekends when he came from Donnybrook where he was then working, to visit his kraal.

The Native Commissioner's reasons for not accepting the evidence of plaintiff's wife are that she did not impress him as being a reliable witness. She kept on grinning and smiling whilst giving evidence and did not seem to realise the importance of her testimony. He gained the impression that she regarded the proceedings as a joke and that her only concern was to lay the blame for her pregnancy during the prolonged absence of her husband on somebody, and that she picked on the defendant as that person.

This Court is not prepared to hold that the woman's demeanour in the witness box should be sufficient reason to discard her evidence *in toto*. She might have been of a nervous disposition and this Court knows that in cases of this nature, the atmosphere of a Court does affect some people. It has frequently been held by this Court and other Courts that in the absence of a denial on oath of the woman's evidence, then her evidence should be accepted, and the mere fact that defendant has not given evidence, is proof *aliunde* that the woman is speaking the truth.

We have the evidence of the two children that the defendant was a frequent visitor and therefore her evidence is corroborated—in the absence of evidence on oath by the defendant.

It is observed the attorney for defendant did not close his case, but counsel for respondent has suggested that the judgment be altered to absolution from the instance, or that the record be returned to enable defendant to lead evidence if he so wishes.

The appeal is allowed with costs, and the Native Commissioner's judgment is set aside, and the record returned for defendant to adduce such evidence as he may wish, and for the plaintiff to adduce any rebutting evidence he might wish to lead, and thereafter the Native Commissioner to deliver a fresh judgment.

For Appellant: Mr. H. V. Kirby of Messrs. Tomlinson, Francis & Company, Pietermartizburg.

For Respondent: Adv. J. D. Stalker, i/b. Mr. H. L. Bulcock of Ixopo.

CASE No. 41 OF 1950.

SOLOMON BUTELEZI, d.a. (Appellant) *v.* **MUNTUMUNYE MTETWA (Respondent).**

(N.A.C. Case No. 43/50.)

PIETERMARITZBURG: Tuesday, 11th July, 1950: Before Steenkamp, President, O'Connell and Kruger, Members of the Court (North-eastern Division).

Law of Delicts—Assault—Quantum of damages—Damages awarded increased—Facts taken into consideration.

Held: That teeth are integral members of the human body, and their loss causes a deficiency which entails real inconvenience, and we hold the view that the plaintiff is entitled to damages for the loss of his teeth. Whether or not he will ever take steps to have dentures made for himself is not for this Court to decide, but the fact remains that the absence of teeth will certainly cause the plaintiff hardship, and he is entitled to be compensated therefor.

Appeal from the Court of the Native Commissioner, Escourt.

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

The plaintiff sued the defendant in the Native Commissioner's Court for the payment of the sum of £50 damages he alleged he suffered as the result of an unprovoked assault committed on him by the defendant. It is further alleged in the claim that

defendant struck plaintiff in the mouth with a loaded stick, knocking out five teeth and fracturing the upper and lower jaw.

Defendant in his plea denies that he assaulted plaintiff but admits that plaintiff did receive injuries in a fight in which both he and plaintiff and many others were involved.

After hearing evidence the Native Commissioner awarded the plaintiff £3 damages for pain and suffering only. An appeal has been noted against the quantum of damages awarded.

It was held in the case of Ntozini *v.* Katula, 1937, N.A.C. (C.O.), 212, quoted with approval in the case of Macheke *v.* Mkuma, 1946, N.A.C. (T & N), 96, that the Appeal Court will not interfere with the discretion of the judicial officer in assessing damages unless the award is grossly excessive or inadequate, or he has violated some principle in arriving at the assessment.

It is clear from the Native Commissioner's reasons for judgment that in assessing damages he only took into consideration the pain and suffering, and he has not taken into consideration the fracture of the upper jaw, and he states that whereas in the claim the plaintiff alleges both the upper and lower jaw were fractured, in the evidence plaintiff states that only his upper jaw was broken.

The evidence by plaintiff that the upper jaw was fractured is not disputed, and while medical evidence would have corroborated this evidence, this Court is not prepared to hold that in the absence of such evidence, the jaw has not been fractured. It cannot be overlooked that the plaintiff lost five teeth and it was necessary for him to remain in hospital for ten days.

The pain and suffering must have been considerable, and we are prepared to hold that damages of £3 assessed for pain and suffering are grossly inadequate, and furthermore the Native Commissioner has not taken into account the loss of five teeth and the broken jaw.

Teeth are integral members of the human body, and their loss causes a deficiency which entails real inconvenience, and we hold the view that the plaintiff is entitled to damages for the loss of his teeth. Whether or not he will ever take steps to have dentures made for himself is not for this Court to decide, but the fact remains that the absence of teeth will certainly cause the plaintiff hardships, and he is entitled to be compensated therefor.

In assessing damages in this case the Court has to take into consideration the following factors:—

1. Unprovoked attack with a dangerous weapon, viz: a nutted stick.
2. The injuries inflicted were extensive, causing the fracture of the upper jaw and the loss of five teeth.
3. Plaintiff was in hospital for ten days.
4. Pain and suffering, irrespective of what plaintiff's status or social position might be.
5. Plaintiff has been disfigured by the loss of five teeth.
6. Probable cost of replacement of teeth.

In our opinion an amount of £20 inclusive, is nearer the mark than the £3 allowed by the Native Commissioner.

The appeal is allowed with costs on the question of quantum of damages, and the Native Commissioner's judgment is altered to read:—

" For plaintiff for £20 and costs."

For Appellant: Adv. G. Caminsky, i/b. Mr. J. M. K. Chadwick of Estcourt.

Respondent: In default.

Cases referred to:—

Ntozini *v.* Katula, 1937, N.A.C. (C.O.) 212.

Macheke *v.* Mkuna, 1946, N.A.C. (T & N) 96.

CASE No. 42 OF 1950.

MZU'KELA NDHLOVU (Appellant) *v.* MPIYONKE SIBISI (Respondent).

N.A.C. CASE No. 50/50.

PIETERMARITZBURG: Thursday, 13th July, 1950. Before Steenkamp, President, O'Connell and van Schalkwyk, Members of the Court (North-eastern Division).

Native Law and Custom—Damages for seduction—"Mvimba' beast—Pregnancy—Miscarriage in third month—Interpretation of Section 137 *of Natal Code of Native Law,* 1932.

Held: That once the foetus shows a human-like form, then it can be said that the woman was with child, and what she got rid of was a child—beyond the clot stage as envisaged in Section 137 of Natal Code of Native Law, 1932.

Appeal from the Court of the Native Commissioner, Pietermaritzburg.

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

Plaintiff's son consorted with defendant's daughter, and he paid to defendant an Mvimba beast, as it had been reported that the girl was pregnant. The beast was delivered and became defendant's property. Thereafter, according to plaintiff's evidence, it was discovered that defendant's daughter was not pregnant. Defendant, however, maintains that she was pregnant, but had a miscarriage during the third month of pregnancy.

Plaintiff (now appellant) sued the defendant for the return of the beast. The Chief gave judgment in favour of plaintiff, but on appeal to the Native Commissioner this judgment was reversed and judgment was entered for defendant with costs.

An appeal has now been noted to this Court on the ground that the judgment was *entirely* contrary to and against the weight of evidence.

At the outset we wish to state that an embryo in the third month is treated as a human being [Mcunu *v.* Gumede, 1938, N.A.C. (T & N) 6, at page 9].

Counsel for appellant (plaintiff) has conceded that the evidence as adduced by respondent must be accepted as being the truth.

The evidence is that during the third month of pregnancy the girl, i.e. respondent's sister, had a miscarriage. Counsel has advanced the argument that according to Section 137 of the Code, the Mvimba beast is only payable in respect of every child which the woman bears to the seducer, and he has urged that a foetus is not a child until it is viable—which can only take place in the fifth month of pregnancy. This Court is unable to agree with counsel's contention, as it is clear from all authorities that a woman is with child as soon as it is established that she has conceived. We can quite understand that when a woman misses her menstruation, it does not follow that she is pregnant, as this might be due to a delayed menstruation and not necessarily a pregnancy—hence the decision in the case of Mcunu *v.* Gumede, *supra.* It would be wellnigh impossible to say with certainty, if a blood clot is passed before the third month, whether it was delayed menstruation or a foetus.

Counsel has also urged that by " month " is meant a calendar month. We cannot agree with this as it is apparent that every time a woman misses her menstruation, this must be interpreted as a month.

On page 345 of Forensic Medicine by Sydney Smith (8th Ed.), it is mentioned that at the end of six weeks, the fingers can be distinguished as slight projections from the spade-like hand, and the external ear can be seen.

We have no doubt that once the foetus shows a human-like form, then it can be said that the woman was with child, and what she got rid of was a child—beyond the clot stage as envisaged in the section of the Code already quoted.

In the case of Msonti *v.* Dingindawo, 1927, A.D. 531, at page 534, Solomon, C. J., accepted the expert evidence of Samuelson where he states that the seducer is liable to pay an Mvimba beast for each pregnancy, that being the measure of the loss or damage which the father has suffered by reason of each pregnancy, depreciating or diminishing the lobolo by one head of cattle.

The appeal is accordingly dismissed with costs.

For Appellant: Adv. O. A. Croft-Lever, i/b. Messrs. McGibbon & Brokensha, Pietermaritzburg.

For Respondent: Adv. J. Hershensohnn of Messrs. Hershensohnn & Company, Pietermaritzburg.

Statutes, etc., referred to:—

Section 137, Proclamation No. 168 of 1932 (Natal Code of Native Law).

Decided cases referred to:—

Mcunu *v.* Gumede, 1938, N.A.C. (T. & N.) 6.

Msonti *v.* Dingindawo, 1927, A.D. 531.

CASE No. 43 OF 1950.

THOMAS NGCOBO (Appellant) *v.* NOMPUNDU MZOBE (Respondent).

(N.A.C. Case No. 34/50.)

DURBAN: Monday, 24th July, 1950: Before Steenkamp, President, Maclear and Cowan, Members of the Court (North-eastern Division).

Law of Delicts—Defamation—Liability of kraalhead for defamation uttered by an "Inyanga" engaged by him and temporarily at his kraal.

Held: That kraalhead is not liable for defamation uttered by an "Inyanga" engaged by him, who is not an inmate of his kraal, and which defamation had not been repeated thereafter by the kraalhead.

Appeal from the Court of the Native Commissioner, Umbumbulu.

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

Plaintiff in his claim before the Chief alleges that defendant had attributed the death of his wife to plaintiff's witchcraft and also that defendant had taxed plaintiff of having stolen £40 from defendant, and as the allegations are false, plaintiff claims one beast as damages for defamation.

The Chief awarded plaintiff one beast with costs, and on appeal to the Native Commissioner this judgment was upheld. The judgment is now attacked on appeal to this Court on the following grounds:—

(1) That the decision is against the weight of evidence, and against law.

(2) That the Native Commissioner erred in finding that appellant was responsible personally for the utterances of an "Isanusi", the isanusi being an independant contractor and temporarily at the kraal of appellant.

When the case came before the Native Commissioner, the

Chief's reasons were filed. These read as follows:—

"Defendant admitted that he had said the defamatory statement but pleaded he took that information from an 'Inyanga'. The defendant uttered this statement long after Inyanga had left. Plaintiff did not have the chance of hearing the words of the "Inyanga".

Defendant in his plea before the Native Commissioner denied making an admission before the Chief's Court that he had uttered the words in question. Plaintiff in his reply to defendant's plea admitted that all defendant stated in the Chief's Court was that the Inyangas had uttered defamatory words and he further informed the Court that his claim against defendant is for having called Inyangas. Neither party made any reference to the allegation regarding the theft of £40. Defendant, before any evidence was called by plaintiff, again denied having uttered any of the statements alleged in the claim before the Chief's Court.

Plaintiff in his evidence states that defendant lost his wife some years ago and about three years ago he called in some Inyangas. A relative made a report to plaintiff. It is not stated what the report was, which in any case would be hearsay evidence. Plaintiff admits that he has no evidence to the effect that defendant personally ever issued or uttered a statement involving his good name.

In cross-examination plaintiff states he is suing defendant because his servant, the Inyanga, made the statement and because defendant is hiding the Inyangas and will not bring them to the authorities.

This is the only evidence plaintiff called and after he had closed his case defendant admitted the facts as given by the plaintiff and also closed his case.

In his reasons the Assistant Native Commissioner bases his judgment on vicarious responsibility of the defendant for the acts of the Inyanga and he seems to labour under the impression that it is unlawful for any person to consult a witchdoctor (Inyanga) and, if he does so, he is responsible for any utterance made by the Inyanga.

Nowhere is it stated in the record that defendant himself had accused plaintiff of being a witch or of practising witchcraft. The allegation is that he had sought the service of a witchdoctor to smell out the person responsible for the killing of his wife.

In the case of Tubela *v.* Roemesa, 1946, N.A.C. (C.O.) 24, the Court referred to various sections of the Transkeian Penal Code, Act No. 24 of 1886 (Cape), under which punishment is prescribed for certain acts of witchcraft.

The same applies in the Natal and Zululand Code. Section 129 makes it an offence for any person who for gain practises as a diviner (known to the Natives as Inyanga Yoku bula, isanusi or isangoma), etc., but nowhere is it prescribed as an offence to consult a diviner.

The Court has also referred to the case of Dhlamini *v.* Gwebu, 1944, N.A.C. (T &N) 7, quoted by Counsel for appellant, in which there was no evidence that defendant personally published the defamatory statement. The witchdoctor uttered the statements and defendant was held not liable.

The plaintiff seems to be under the impression that a kraal head may be sued alone for any tort committed at his kraal. This is not correct, as according to Section 141 (3) of the Code the kraal head must be sued jointly with the tort feasor for any tort committed by the latter whilst an inmate of the kraal. Moreover in the present case it cannot even be said that the Inyanga called in by a kraal head can be termed to be an inmate of that kraal.

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

"Appeal from Chief's Court is allowed with costs and the judgment altered to read:—

'For Defendant with costs'".

For Appellant: Mr. Mathias of Messrs. Cowley & Cowley, Durban.

Respondent in person.

Cases referred to:—

Tubela *v.* Roemesa, 1946, N.A.C. (C.O.) 24.

Dhlamini *v.* Gwebu, 1944, N.A.C. (T & N) 7.

Statutes, etc., referred to:—

Transkeian Penal Code, Act No. 24 of 1886 (Cape).

Section 141 (3), Proclamation No. 168 of 1932.

CASE No. 44 OF 1950.

GILBERT NXABA (Appellant) *v.* Estate late ALDEN NXABA (Respondent).

N.A.C. CASE No. 59/50.

DURBAN: Monday, 24th July, 1950. Before Steenkamp, President, Maclear and Cowan, Members of the Court (North-eastern Division).

Practice and Procedure—Enquiry Native Estates—Section 23 (4) *Act No.* 38 *of* 1927*—Jurisdiction of Native Commissioner.*

Held: That where there is a dispute arising out of the distribution of any native estate in which immovable property is involved, the Native Commissioner (or Magistrate, if there is no Native Commissioner) of the district where the immovable property is situate, shall hold the enquiry in terms of Section 23 (4) of Act No. 38 of 1927.

Appeal from the Court of the Native Commissioner, Stanger.

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

The Native Commissioner, Stanger, held an enquiry in terms of Section 23 (4) of Act No. 38 of 1927 to determine the heir or heirs in the estates of the late Alden Nxaba and Lee Nxaba.

The property involved is a half share of a plot of ground in extent one acre situate in the district of Melmoth, Zululand.

The Native Commissioner declared that Enoch Nxaba is the heir to the estate of the late Lee Nxaba and that Lee Nxaba was the heir of his late father, Alden Nxaba.

An appeal, noted late, was lodged to this Court.

Condonation for the late noting was granted.

This Court thereupon drew counsels' attention to Section 23 (4) of the Act concerning the question of jurisdictoin. This Section reads to the effect that when there is any dispute arising out of the distribution of any estate in which immovable property is involved, then the Native Commissioner (or Magistrate, if there is no Native Commissioner) of the district where the immovable property is situate, shall hold the enquiry.

Both counsel thereupon conceded that this being the provisions of the law, which they had overlooked, the Native Commissioner of Stanger had no jurisdiction or authority to hold the enquiry.

Both counsel submitted that costs in the Court below and costs of this appeal should be borne by the estate. This Court agrees with this contention.

The appeal is allowed and the enquiry held by the Native Commissioner is set aside.

Costs before the Native Commissioner and costs of appeal are ordered to be paid out of the estates concerned.

For Appellant: Adv. E. P. Fowle of Messrs. Fowle & Driman, Durban.

For Respondent: Mr. Darby, i/b. Messrs. Smithers & Smith, Stanger.

Statutes, etc. referred to:—

Section 23 (4) of Act No. 38 of 1927.

CASE No. 45 OF 1950.

SIMON GUMEDE (Appellant) *v.* ANNIE MNGADI, d.a. (Respondent).

(N.A.C. Case No. 67/50.)

DURBAN: Tuesday, 25th July, 1950: Before Steenkamp, President, Maclear and Cowan, Members of the Court (North-eastern Division).

Interpleader proceedings—Onus of proof—Claimant in possession of the house on ground not belonging to him—Claimant to disprove presumption that house belongs to the owner of the ground.

Held: That in interpleader proceedings where the claimant is not the owner of the ground, the onus is on the claimant to disprove the presumption that the house belongs to the owner of the ground on which it has been erected, and to prove that the house belongs to him.

Appeal from the Court of the Native Commissioner, Durban.

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

The execution creditor obtained a judgment against Maria Ndebele, duly assisted by Mbhobho Ndebele, as a result of which a six-roomed house at or near Mahone School, Ridge View, in the district of Durban, was attached by the Messenger of the Court.

The claimant alleges that the ground on which the house is situate belongs to an Indian by the name of Banda. It is therefore a presumption of law that the house belongs to Banda, a third party.

Claimant alleges that the house belongs to him. The onus is on him to prove this. His evidence in this respect is to the effect that he had leased the ground from Banda and that he had caused a house to be erected thereon. He did not call Banda as a witness, nor has he called Ngubane, the person whom he alleges erected the building—in fact plaintiff closed his case after he alone had given evidence. At that stage we only have the bald testimony of the claimant that the house belonged to him.

The judgment creditor (respondent) called the judgment debtor who states that she went and lived with the claimant about two years previously and that claimant is the owner of the house which he had caused to be erected three years ago. Her evidence in this respect can only be hearsay as she must have been informed by someone that claimant is the owner. Her evidence, therefore, only amounts to this—that she is not the owner. The issue before the Court is whether claimant is the owner, and her evidence, therefore, does not assist him in his allegation that he is the owner. He certainly occupied the building, but this does not prove ownership which, as remarked before, the law presumes vests in the *dominus* of the ground.

Respondent's guardian can only state that in so far as he knows, the house does not belong to the claimant, and that the judgment debtor had informed him that she was the owner.

In the opinion of this Court it does not follow that because the judgment debtor does not admit the property belongs to her, that it is sufficient corroboration of the claimant's evidence that he is the owner.

The onus is on the claimant and he has not discharged that onus. He could have called the Indian, Banda, and the person who erected the building. Counsel for appellant has argued that the appellant could not have called the Indian for the reason that this person could have refused to answer any questions that might incriminate him. The court does not agree with that contention as all that was required for the Indian to state was whether or not he is the owner of the house erected on his property and whether or not the claimant (appellant) is the owner.

This Court has considered the case of Hulumbe *v.* Jussob, 1927, T.P.D. 1008 and the principles laid down therein. Those principles are applicable to the present case.

The appeal is dismissed with costs.

For Appellant: Mr. Mathias of Messrs. Cowley & Cowley, Durban.

For Respondent: Mr. G. S. Naidu of Durban.

Cases referred to:—

Hulumbe *v.* Jussob, 1927, T.P.D. 1008.

CASE No. 46 OF 1950.

GRETA NZUZA (Paintiff) *v.* ABRAHAM NZUZA (Defendant).

N.D.C. CASE No. 21/4/49.

DURBAN: Friday, 28th July, 1950. Before Steenkamp, President.

Practice & Procedure—Husband and wife—Marriage—Nullity proceedings should be commenced by way of summons as provided in Section 28 of Government Notice No. 1227 of 1934 and not by petition.

Held: That in terms of the Native Divorce Court Rules (Section 28 of Government Notice No. 1227 of 1934), it is not competent to bring an action for declaring a marriage null and void *ab initio* by way of a petition, and that such proceedings should be commenced by way of a summons.

Steenkamp, President:—

In this case the applicant petitions the Court for a declaration annulling the marriage existing between herself and her husband, the respondent. The case is brought by way of an application, and the Court has to consider whether it is competent to bring a case of this nature in the way the applicant has done.

She alleges that since the day she got married to her husband he has never consummated the marriage—that is for a period of approximately nine years he had made no attempt to have intercourse with her. Since then she has had two children by other men.

According to the rules of the Native Divorce Court promulgated under Government Notice No. 1227 of 1934, I find that Section 28 lays down that a process of Court for commencing action shall be by way of summons.

In this case no summons was issued, but only an application is made, supported by an affidavit petitioning this Court for relief, and I have therefore come to the conclusion that it is not competent to bring action by way of petition, and that summons should have been issued against the defendant. The petition is accordingly dismissed.

For Applicant: Adv. J. S. Henning, i/b. Messrs. Bestall & Uys, of Kranskop.

Respondent in person.

Statutes, etc. referred to:—

Section 28 of Government Notice No. 1227 of 1934.

CASE No. 47 OF 1950.

JOHN LECHELELE (Paintiff) *v.* DINA LECHELELE (Defendant).

N.D.C. CASE No. 12/50.

PIETERSBURG: Tuesday, 15th August, 1950. Before Steenkamp, President.

Practice & Procedure—Native Divorce Court—Non-service of Restitution Order condoned where defendant has left address where summons had been served, and whereabouts unknown; and where the order of Court was explained to defendant personally at previous hearing.

Held: That when a defendant was fully aware of the terms of the order made by the Court and yet makes default to comply with the order, and her wehereabouts is unknown, the Court may condone the non-service if an attempt has been made to serve the order at her previous address.

Steenkamp, President:—

On the 23rd March, 1950, this Court ordered the defendant to restore conjugal rights on or before the 15th July, 1950. The defendant was present and defended the action. A final order is now applied for. Defendant is not present and according to the return of service by the Messenger of the Court, defendant had left her previous address and her present whereabouts is unknown.

There is filed of record an affidavit by the plaintiff that he has made extensive enquiries from defendant's mother, where she had been living, and also from other numerous people, but was unable to ascertain where defendant had gone to.

Viva voce evidence was also given by plaintiff that defendant was present when the Court made the order and the terms of the rule *nisi* were explained to her by the interpreter in Court at the time of the judgment.

In the case of Mgulwa *v.* Mgulwa, 1922, E.D.L. 152, Hutton, A.J.P. is reported to have stated as follows:—

> " As it is in my recollection that the terms of the rule *nisi* were explained to the defendant by the interpreter in Court at the time of judgment, the omission to serve the rule *nisi* on the defendant will be condoned and the rule made absolute as prayed."

In Afrika *v.* Afrika, 1944, C.P.D. 78, it was held that in matrimonial matters there should be personal service on the defendant of the rule *nisi* in cases of restitution of conjugal rights, except in exceptional circumstances, and except naturally in defended actions where the parties are before the Court. What " exceptional circumstances " are is difficult to define, and every case will have to be treated on its merits. In the case of Rood *v.* Rood, 1947, S.A.L.R. 722 (C.P.D.), it was held that the service of a rule *nisi* on defendant's attorney who holds a special power of attorney of the defendant " to receive and accept on my behalf service of any process of service in the divorce case " is not, in the absence of exceptional circumstances, a compliance with the rule laid down in Afrika *v.* Afrika.

It is not stated in Rood's case whether the defendant was present in Court when the restitution order was made.

The Sister Court in the Cape in the case of Mhlauli *v.* Mhlauli reported in P.H. 1950(2) R. 28 refused to make the rule absolute. An attempt was made to serve the restitution order on defendant but she was not known at the address at which service was to be made.

The present case can be distinguished from Mhlauli's case, as according to the return of service already referred to, the defendant has left her previous address and her whereabouts is unknown.

I hold the view that in a case of this nature, when defendant was fully aware of the terms of the order made by the Court and yet makes default to comply with the order and her whereabouts

is unknown, the Court may condone the non-service if an attempt has been made to serve the order at her previous address.

I am also of opinion that the circumstances are exceptional. There is of course the alternative—to apply to the Court for the order to be served by Edictal Citation, but I do not see the sense of this when the defendant already knows of the order and there seems to be no reason why plaintiff should be called upon to incur additional expense on a matter which, in the case of natives, is ony a formality.

The rule is made absolute as prayed.

For Plaintiff: Mr. P. W. Roos of Pietersburg.
Defendant: In default.

Cases referred to:—

Mgulwa *v.* Mgulwa, 1922, E.D.L. 152.
Afrika *v.* Afrika, 1944, C.P.D. 78.
Rood *v.* Rood, 1947, S.A.L.R. 722 (C.P.D.).
Mhlauli *v.* Mhlauli, P.H., 1950(2) R. 28.

CASE No. 48 OF 1950.

JANTJIE SEBEKO (Appellant) *v.* KOOS MAHLANGU (Respondent).

(N.A.C. Case No. 53/50.)

PRETORIA: Monday, 11th September, 1950: Before Steenkamp, President, Liefeldt and Garcia, Members of the Court (North-eastern Division).

Practice and Procedure—Native Commissioner's Courts—Dismissal of summons where there is no exception or plea filed.

Held: That there is no room in Native Commissioners' Courts for exceptions unless the exception is in the nature of a plea in bar, e.g. res judicata, and that, even then, the Court is not in a position to decide the issue in the absence of evidence, unless the wording of the summons makes it clear that plaintiff has no action, e.g. illegality, *contra bonos mores,* etc.

Held: That from the wording of the summons it looks as if the plaintiff might have a good cause, and for the defendant to escape liability he must plead a defence and establish that defence by evidence if the onus is on him to do so.

Appeal from the Court of the Native Commissioner, Pretoria.

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

Plaintiff (now appellant) sued the defendant (now respondent) in the Native Commissioner's Court, Pretoria, for the payment of £200, being for damages sustained by plaintiff in a collision which occurred at Silverton between a motor car driven by defendant and a horse-drawn trolley driven by plaintiff, as a result whereof plaintiff received divers injuries. It is also alleged in the summons that the accident was caused by the negligence of the defendant.

On the first day of the hearing and before a plea was taken by the Court, it was agreed by Counsel for the respective parties that medical evidence should be called and the case thereafter postponed as Dr. Scholtz was leaving Pretoria. Medical evidence, which is purely on the nature of the injury and plaintiff's condition, was adduced and the case postponed.

On the second day of the hearing no plea was taken but Counsel for defendant submitted the onus was on plaintiff to prove that he has no redress under the Third Party Insurance Act before he can proceed with his case against the defendant. Sections 11, 13 and 22 of Act No. 29 of 1942 were quoted and after argument had been concluded and a further postponement granted, the Native Commissioner dismissed the summons with costs. In his decision on the legal points raised, the Native Commissioner states that it is quite clear from the reading of Section 13 of Act No. 29 of 1942, that a person injured in a car accident shall not be entitled to claim compensation from the owner or driver of the car unless the Insurance Company is

unable to pay. He goes on and states that plaintiff does not aver in his summons that the Insurance Company cannot pay or that the defendant has failed to insure or that the claim is a balance over £2,000 in respect of damages sustained.

The plaintiff was not satisfied with the Native Commissioner's finding and has lodged an appeal to this Court on the following grounds:—

(*a*) Before the Court could hold that because of the provisions of Section 11 read with Section 13 of Act No. 29 of 1942, the plaintiff is not entitled to claim compensation in respect of loss or damage resulting from any bodily injury to the plaintiff arising out of the driving of a motor vehicle incurred under that Act by the owner thereof or by any other person with the consent of the owner, the onus was on defendant to prove that the provisions of the said Section 11 read with Section 13 were applicable.

(*b*) Before the Court was entitled to dismiss plaintiff's summons it should have given plaintiff an opportunity of leading evidence to establish his case which the Court failed to do.

(*c*) The defendant's application for dismissal of plaintiff's summons was premature and was not founded on any facts which could have entitled the Court to dismiss plaintiff's summons as it did.

The appeal was noted one day late, and application is also made to condone the late noting. This Court, in granting condonation, came to the conclusion that plaintiff has shown just cause, and for this reason the application is granted.

It seems to us that the case evolves round the question of procedure. Plaintiff's contention is that if the defendant wishes to escape liabilty he must plead the protection of the Third Party Insurance Act, whereas defendant avers plaintiff must allege in his summons that the provisions of this Act do not apply in the present case.

Counsel for plaintiff has argued forcibly that as Act No. 29 of 1942, only applies to bodily injuries, this Court should read into the claim that the amount of £200 includes any other damage that might have been suffered by plaintiff in respect of his vehicle or other injuries.

It is not possible for this Court, from the wording of the summons, to lay down definitely that the amount claimed is in respect of bodily injuries only, but the least we can say is that the wording of the summons leaves much to be desired. It is not necessary to labour this aspect of the case in view of what is being stated below.

The case of Rose's Car Hire *v.* Grant, 1948(2), S.A.L.R. 466, was quoted in the Court below as well as in this Court, and we agree that the principles decided in that case are applicable to the present case, provided we are satisfied that the motor car driven by defendant was his own property, and that the car was insured as laid down by the Act. It is not alleged in the summons that the defendant is the owner of the car. All that is stated is that defendant drove the motor car which caused the injuries or damages. Now a person is responsible for the natural consequences of his acts and we think that where a driver of a car has caused an injury, the person injured is entitled to sue him, and if that person wants to escape liability, he must plead firstly that he is the owner of the car or that he drove the car with the owner's permission and that the car is in fact insured in terms of the Act. Thereafter it must be established by evidence that the plea is in accordance with facts.

Counsel for respondent (defendant) has urged that according to Section 22 of the Act, there are certain responsibilities and duties placed on the driver of the car and under Sub-section (2) of that Section, the person injured may make a request for certain information. While this is true, we wish to emphasize that this

Section only applies in respect of a motor vehicle *insured under this Act,* and unless the Court has evidence before it that the vehicle is in fact insured, then the provisions of the Section are not applicable.

It was also contended that Act No. 29 of 1942 makes it compulsory that all motor vehicles shall be insured, and it must therefore be presumed that the car which caused the damage is so insured. This might be so, but at the same time, where a plea and evidence will remove any doubt that might exist, then it becomes the legal duty of the defendant to satisfy the Court that he enjoys a statutory protection.

It has been laid down by this Court on numerous occasions that there is no room in a Native Commissioner's Court for exceptions unless the exception is in the nature of a plea in bar, e.g. res judicata, and even then the Court is not in a position to decide the issue in the absence of some evidence or unless the wording of the summons makes it clear that plaintiff has no action, e.g. illegality, *contra bonos mores,* etc.

In the present case plaintiff might or might not have an action, but from the wording of the summons it looks as if he might have a good cause, and for defendant to escape liability he must plead a defence and establish that defence by evidence if the onus is on him to do so.

It is our considered opinion that the dismissal of the summons was premature.

It is accordingly ordered that the appeal be and is hereby allowed with costs and the judgment of the Native Commissioner is set aside. The record is returned for action to be taken in the light of the above remarks.

For Appellant: Mr. H. A. Jensen of Pretoria.

For Respondent: Adv. Moll, i/b. Messrs. Metelerkamp & Ritson, Pretoria.

Statutes, etc., referred to:—

Sections 11, 13 and 22 of Act No. 29 of 1942.

Decided cases referred to:—

Rose's Car Hire *v.* Grant, 1948 (2), S.A.L.R. 466.

CASE No. 49 OF 1950.

RAMOKANE MANGWANE (Appellant) *v.* Executor: Estate late SIXPENCE MANGWANE (Respondent).

N.A.C. CASE No. 58/50.

PRETORIA: Monday, 11th September, 1950. Before Steenkamp, President, Liefeldt and Garcia, Members of the Court (North-Eastern Division).

Practice and Procedure—Estate enquiry under Section 3 (2) *of Government Notice No.* 1664 *of* 1929. *Application to lead further evidence in Native Appeal Court or alternatively to remit record to Native Commissioner for further evidence—Requirements.*

Held: That the application to lead further evidence in the Native Appeal Court must be summarily dismissed as the Native Appeal Court is not a Court of record.

Held: That the party who makes the application for remittal must show that the fact that he had not brought forward the evidence was not owing to any remissness on his part; that he could not have got his evidence if he had used reasonable diligence; and the evidence to be tendered must be weighty and material and presumably to be believed and must be such that, if adduced, it would be practically conclusive.

Appeal from the Court of the Native Commissioner, Potgietersrust.

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

The appeal in this case is from the finding of the Assistant Native Commissioner of Potgietersrust, in an enquiry held under Section 3, sub-section (2) of the regulations published under Act No. 38 of 1927.

The Assistant Native Commissioner had three claimants before him: One Knife Mangwane, a brother of the deceased, who claimed the assets in the estate by virtue of the fact that deceased was his elder brother; a woman Mokgaitsi Tshabalala, whose claim is based on the allegation that she was the first wife of deceased and that therefore her eldest son by the union, one Frans Mangwane, was entitled to succeed; and thirdly a woman Ramokane Mangwane who alleged that 2nd claimant was not in fact married to the deceased but only a concubine and that therefore, she, for whom dowry had been paid, was entitled to the assets.

The statements by the claimants were extremely brief and none of them adduced any additional evidence in support of their claims.

From the record of the proceedings it would appear that the only assets in the estate in dispute were the cash assets and from the meagre evidence before him, the Assistant Native Commissioner found that the claim of the woman Mokgaitsi Tshabalala was the only one supported by way of admissions made in the statements of the other two claimants and he upheld her claim on behalf of her son Frans Mangwane, declaring him to be the universal heir and entitled to the cash assets which were to be paid to his mother for his maintenance and that of his younger brother.

The appeal is noted against this finding as a whole. There is also an application for condonation of late noting, permission to lead further evidence and alternatively for an order for the matter to be remitted to the Native Commissioner in order that further evidence may be taken.

In support of her application for condonation, the appellant filed her own affidavit and the affidavits of two other persons in support of her other applications.

The application for condonation was, after due consideration, granted. That for permission to lead further evidence was summarily dismissed, this Court not being one of record.

Counsel for defence then confined his address, not to the grounds of appeal as set out, but on the application for remittal; accordingly this Court will not at any length deal with the finding on its merits other than to say that it sees no reason why it should interfere with that finding on the evidence recorded and more so in view of the fact that the long union by second claimant with the deceased and which union is not disputed by the other parties, raises a very strong presumption that second claimant was in fact the wife of the deceased and not merely a concubine.

In the course of the argument on the application for remittal, counsel for respondent drew the Court's attention to the case of Colman *v.* Dunbar, No. 145, A.D. 1933, in which an application similar to the one before this Court was made. In that case it was held that to allow fresh evidence to be called after a case has been tried, would open the door to fraud and would offer a strong temptation to perjury. The Court ought only to exercise the power where special grounds exist and where it is clear that to do so would not unfairly prejudice the other side and would enable the Court to do justice between the parties. The party who makes the application must show that the fact that he had not brought it forward was not owing to any remissness on his part. He must satisfy the Court that he could not have got this evidence if he had used reasonable diligence.

The evidence to be tendered must be weighty and material and presumably to be believed and must be such that if adduced, it would be practically conclusive.

We have carefully considered the appellant's affidavit and those of the witnesses she proposes to call and we are of the opinion that the statements tendered do not satisfy the tests set out in the case quoted.

The appeal is therefore dismissed with costs.

For Appellant: Mr. Jones of Messrs. Lunnon & Tindall, Pretoria.

For Respondent: Adv. Trengove, i/b. Messrs. Peens & Jackson, Potgietersrust.

Statutes, etc. referred to:—

Section 3 (2) of Government Notice No. 1664 of 1929.

Decided cases referred to:—

Colman *v.* Dunbar, 1933, A.D.

CASE No. 50 OF 1950.

SCHEERKOP (Appellant) *v.* PICENIN UMBONI (Respondent).

(N.A.C. Case No. 88/50.)

PRETORIA: Tuesday, 12th September, 1950: Before Steenkamp, President, Liefeldt and Garcia, Members of the Court (North-eastern Division).

Practice and Procedure—Native Commissioner's Court—Rescission of judgment—Requirements—Section 30 (6), *Government Notice No.* 2253 *of* 1928—*Consent to jurisdiction must be in writing.*

Held: That an order for wasted costs is a judgment of the Court and can only be rescinded if the requirements of Section 30 (6) of Government Notice No. 2253 of 1928 have been complied with.

Held: That consent to jurisdiction must be in writing in terms of Section 10 (3) (*c*) of Act No. 38 of 1927.

Appeal from the Court of the Native Commissioner, Belfast.

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

The plaintiff in this case sued the defendant for the return of eight head of cattle and their increase, being lobolo paid by his brother for a daughter of the defendant who had died without issue.

When the case was heard before the Native Commissioner on the 6th July, 1950, the defendant pleaded as follows:—

> "Ek ken nie vir eiser Skeerkop nie. Ek ken sy broer wat nou oorlede is. Hy het my dogter getrou. Die dogter van my is gesterwe. Sy het sonder kind gesterwe. Ek handig in brief Bew. A. Bew. A is aan my gegee deur my oorl. skoonseun Friesland Mguni. Die eis is heeltemal verkeerd en ek versoek dat dit van die hand gewys word."

The plaintiff was then called and after giving evidence his Attorney closed the case for plaintiff.

Defendant then asked for a postponement to call certain witnesses and the Court granted plaintiff wasted costs, and postponed the case to a later date.

At the next hearing the defendant was represented by an Attorney who led evidence from defendant that he resided at Grootlaagte in the district of Middelburg.

The Court at the request of the Defence, on the grounds of no jurisdiction, set aside the summons and ordered that the wasted costs granted to the plaintiff at the previous hearing be rescinded.

The plaintiff, now appellant, has appealed against this judgment and gave the following grounds of appeal:—

"Ik teeken hierby appél aan tegen den uitspraak door dit Hof gisteren te Belfast gegeven en zulks op de volgende gronden:—

(1) Dit Hof gaf foutievelyk, en zonder in acht name van artikel 30 sub sectie (6) applicatie voor ter zyde zetting van haar eigen uitspraak op de 6de Juli 1950 gegeven, waarby vonnis voor de kosten gegeven waren aan eiser voor kosten van uitstel in overweging trots eisers objectie dat de kosten eerst betaald moeten worden voor de applicatie behandeld kan worden, de kosten rekening was voor de Hof ook in bezit van den verweerder. (De kosten rekening is getaxeerd.)

(2) Dat dit Hof zonder de beste getuigenis door verweerder was te berde gebracht, uitspraak gaf geen Jurisdictie te hebben omdat de Magistraat van Middelburg waarheen dit Hof hield de actie moest worden gebracht de zaak legde voor dit Hof te Belfast en niet de procureur van den eiser in deze zooals duidelyk blykt uit het origineel der dagvaarding in deze, ener daar door twyfel bestond wie al dan niet Jurisdictie had, en dit Hof niet recht handelde, zonder getuigenis uitspraak gaf. Het is niet genoegzaam, de verweerder, zelf verklaar dat hy woont in Middelburg district naby Wonderfontein zonder verder bewys dat dit zoo was omomstootelyk, door de beste getuigenis de voorgelegd kan worden, te meer omdat de verweerder in de eerste instantie, geen objectie gaf tegen de Jurisdictie objecteerende dat dit punt alleen werd opgebracht toen de agent voor verweerder op 29 Juli verscheen, en verweerder *toen* kosten van de Hof werden toegewezen, toen deze daarom vroeg.

(3) Het Hof zyn plicht is het, om zich te overtuigen voor deze de zaak neerzet voor verhoor al dan niet Jurisdictie te hebben zoals is neergelegd by sectie 22, 'en dat de zaak binnen zyn rechtsgebied is'. Het Hof heeft verzuimd sectie 22 voornoemd te volgen, en zette de zaak neer trots de kaart die aanwezig is, in bezit van het Hof. Het Hof kan niet bestraffen, de eiser in deze door de kosten van twee verschyning op hom te leggen. District kaarten zyn door deze onverkrygbaar en worden aan amptenaren verstrekt en tegen deze kosten toewyzing appelleert de eiser en ook die foutiewe procedure die gevolgt is."

In regard to the first ground of appeal, the regulations define a judgment as including a sentence, decree, rule or order of a Court, and there is therefore no doubt that the order of wasted costs granted to the appellant on the 6th July, 1950, is a judgment of the Court and it is therefore necessary, before a rescission of judgment can be considered by the Native Commissioner's Court, that the party should comply with rule 30 (6) of the Native Commissioners' Court Rules.

This Court therefore holds that the order of rescission of wasted costs was wrongly granted by the Native Commissioner.

In regard to the second ground of appeal, it is clear from the record that the only evidence of the place of residence of the defendant is the evidence given by the defendant, who was not cross-examined, and if the appellant considered that other better evidence could have been produced to prove the place of residence of the defendant, he was at liberty to produce such evidence. In the absence of such evidence the Court was bound by Section 10 (3) of the Native Administration Act, as the parties had not, in terms of Section 10 (3) (*e*) consented in writing to the Court's jurisdiction. This ground of appeal accordingly falls away.

The third ground of appeal refers to Section 22 of the Native Divorce Court Rules which are not applicable to Native Commissioners' Courts. This ground of appeal also falls away.

The decision of this Court is therefore that it upholds the Native Commissioner's judgment for the dismissal of the summons, but sets aside that portion dealing with the rescission of costs on the 6th July, 1950.

As it was necessary for the appellant to appeal to this Court to have the Native Commissioner's judgment set aside, he is entitled to costs of appeal.

It is noted that the attorney for the appellant in drawing up his bill of wasted costs has included travelling allowance of £6. 10s. for which no provision is made in the table of fees payable to an attorney, and he is not entitled to such costs.

Steenkamp (P.):—

I agree with my brother Garcia that the appeal in connection with the rescission of the order for costs on the first day's hearing should be allowed.

The summons was dismissed for lack of jurisdiction. The defendant could have raised the question of jurisdiction, as a special plea, on the first day of the hearing. He omitted to do so and I do not see how plaintiff can be deprived of his costs already awarded.

It is permissible to raise the question of jurisdiction at any stage of the proceedings, but if plaintiff has incurred costs which could have been avoided if defendant had raised the point timeously, then it seems inequitable for plaintiff to be deprived of costs already awarded and which could have been avoided.

It is observed that the Native Commissioner in setting aside the summons made no order as to costs. There is no cross-appeal against this order and therefore it is not incumbent on this Court to decide whether or not defendant should have been awarded costs. We are only concerned with the costs awarded on the one day and are of opinion that the Native Commissioner should not have rescinded the order previously made.

For Appellant: Mr. D. S. van Woudenberg of Hendrina.

For Respondent: Mr. de Villiers of Messrs. Findlay & Niemeyer, Pretoria.

Statutes, etc., referred to:—

Section 10 (3) (*c*) of Act No. 38 of 1927.

Section 30 (6) of Government Notice No. 2253 of 1928.