SELECTED DECISIONS

OF THE

NATIVE APPEAL COURT

(SOUTHERN DIVISION)
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CASE No. 136.

ROBERT SOSHANKANA *v.* EDWARD MAGQAZA.

BUTTERWORTH: 16th May, 1951. Before J. W. Sleigh Esq., President. Bowen and Crossman Members of the Court (Southern Division).

Native Appeal Case—Practice and Procedure—Defamation—Privileged occasion—Onus of proof of malice on plaintiff—What constitutes malice.

It is alleged in the particulars of claim that on 10/7/50 defendant made a false and defamatory statement concerning plaintiff to the Native Commissioner of Willowvale. Defendant admitted making the statement, but pleaded that it was made on a privileged occasion. He also pleads justification.

Absolution judgment was granted and plaintiff appeals.

Held:

(1) That the statement is clearly defamatory but was made on a privileged occasion.

(2) That the onus of proving malice was upon plaintiff.

(3) That plaintiff was entitled to rely on any evidence which tended to show that defendant was actuated by some improper or indirect motive, and was not confined to proving that the statement was false.

Appeal allowed.

Cases cited:—

Bezuidenhout *v.* Barnard, 1926, E.D.L. 354.

Basner *v.* Trigger, 1946, A.D. p.p. 94-96.

Perl v. Shapiro, 1926, A.D. 121.

Appeal from the Court of the Native Commissioner, Willowvale.

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

This is an appeal against a judgment of absolution in an action in which appellant, the headman of Nqabara location Willowvale district, sued respondent for £100 damages for defamation.

It is alleged in the particulars of claim that on 10th July, 1950, respondent made a false and defamatory statement concerning appellant to Arthur Murison Blakeway, Native Commissioner of Willowvale. The statement was made in Xosa, the English translation whereof is as follows:—

> "I applied for William Magqaza's land and the headman (plaintiff) informed me that Molose Mangwane had also applied for the land and that as the latter had paid him £5 I could not get it. I persuaded him and he said he would reject Molose's application if I paid him £2. 10s. I gave him the £2. 10s. After I paid him the headman (plaintiff) told me I could go and plough. In 1949 I went to get my certificate and he said I could not get it unless I paid the full amount of £5. When I refused to pay he prosecuted me."

Respondent in his plea admitted making the statement, but pleaded that it was made on a privileged occasion. He also pleaded justification.

The statement is clearly defamatory, but at the outset appellant's attorney admitted that it was made on a privileged occasion. On the question on the burden of proof in defamatory actions, Graham, J.P. in Bezuidenhout *v.* Barnard (1926, E.D.L. 354), said: "It is quite clear that before a plaintiff can succeed in an action for verbal injury, whether written or spoken, he must prove that the defendant was actuated by malice; in other words, he must prove that the words written or spoken by the defendant were so written or spoken *animo injuriandi.* If the words, on the face of them, are defamatory, then the law presumes *animus injuriandi,* because a person is taken to mean what he says or

writes, and the *onus* is then thrown upon the defendant to rebut the presumption of malice. If, on the other hand, the words were written or spoken upon a privileged occasion, then that fact also rebuts the presumption of malice, and then it lies upon the plaintiff to prove the existence of malice." Since in this case the occasion is admitted to have been privileged, the *onus* was on appellant to prove malice.

In Basner *v.* Trigger (1946, A.D. at pp. 94-96), Schreiner, J.A., pointed out that there is a difference in the meanings of the words *animus injuriandi* (intention to injure) and the word *malice*, which a plaintiff has to prove in order to defeat a defence of privilege. He points out that in order to establish malice a plaintiff is not confined to proving spite or ill-will, but may rely on any evidence which indicated that the defendant was actuated by improper or indirect motive. The learned Judge says:— " privileged occasions are recognised in order to enable persons to achieve certain purposes and when they use the occasion for other purposes they are actuated by improper or indirect motives, that is, by 'malice'. So understood, the word malice accurately states what is necessary to defeat the defence of qualified privilege in our law, as in the English law".

Now the Native Commissioner says in his reasons that the *only* way the appellant could prove *animus injuriandi* was to show that respondent's statement was false. This, as we have seen above, is not so. Naturally, if appellant could prove that the statement was to respondent's knowledge false, then the conclusion that he was actuated by spite or ill-will would be irrestible, but it is often difficult to prove the falsity of a defamatory statement (see e.g. Perl *v.* Shapiro, 1926, A.D. 121). When for example the evidence and the probabilities of the truth of the statement are evenly balanced. In such a case the Court is entitled to take into consideration other evidence tending to prove that the defendant in making the statement was actuated by some improper or indirect motive. That this is so, is clear from Bezuidenhout's case *supra* where the plaintiff was not required to prove that the defamatory statement was false.

Now it appears from the evidence that appellant was transferred from another location and appointed headman of Nqabara location. A section of the people, including respondent, did not like this. They made certain complaints against appellant which, upon investigation, were found to be groundless. It is clear that this section of the people wanted appellant dismissed and a man from their own location appointed. Respondent admitted as much. This fact, as will be seen later, has an important bearing on the case.

It is common cause that respondent applied for his brother's land to which he was entitled. Appellant states that this was towards the end of 1948 or the beginning of 1949. He then instructed respondent to produce his tax receipt. This, respondent admits, is the normal procedure. Respondent, however, states that appellant demanded from him £2. 10s. in the circumstances alleged in his statement to the Native Commissioner, that he subsequently paid the money in the presence of Dora who was at appellant's kraal to sell a coat, and that £1 of the amount paid by him was handed to Dora in payment of the coat. Dora denies that respondent was at appellant's kraal on the day she sold the coat, but the Native Commissioner found that respondent was present. The evidence, however, does not support this finding.

The Native Commissioner was unable to decide whether the money was actually handed to appellant. Respondent states that Dora was present when he handed the money to appellant. She however denies that any money was handed over in her presence. She is a disinterested witness and in our opinion, her denial should have been accepted, and further, it is improbable that appellant would have accepted a bribe in the presence of a third party who, it appears, was a comparative stranger.

It follows that if Dora's evidence were accepted and respondent's evidence rejected, then the onus of proving the statement to be false is discharged. But even assuming that the Native Commissioner was correct in holding that the evidence did not justify a finding that the statement was false, there is other evidence which shows that respondent was actuated by malice.

It is common cause that respondent ploughed the land at the end of 1949; that in May, 1950, he was convicted for ploughing the land without authority; that appellant, who gave evidence in the criminal case, stated that he was not opposed to respondent's claim to the land, and immediately after the case submitted respondent's application to the land office for approval; and that on 10th July, 1950, respondent made the alleged defamatory statement to the Native Commissioner.

Respondent knew that the selling of lands by headmen was regarded as a serious offence. He also knew or should have known, that he had a better claim to the land than Molose Manqwana and that if appellant recommended the latter he could have the recommendation set aside by mere complaint to the Native Commissioner. In such circumstances it is improbable that he would have paid any money but, if he did, his failure to complain to the Native Commissioner until after his conviction, indicates that he was actuated by an indirect motive. Moreover, he admits having assisted others, during the period from ploughing season 1949 to May, 1950, in making complaints against the appellant yet refrained from disclosing that he himself had been made to pay for a land. In my opinion the obvious inference to be drawn from his conduct is that the other complaints not having had the effect desired by him, and having been convicted at the instance of appellant, he made the report to the Native Commissioner, not in the interest of honest land administration, but to revenge himself upon appellant hoping that the latter would be dismissed. This view is supported by the fact, which the Native Commissioner found proved, that on 26th July, 1950, when appellant was being confronted with the charge against him in the Native Commissioner's office, respondent stated to other people on the verandah of the office that he would "get" appellant and would have him dismissed as headman by November. Further, it is clear from respondent's own evidence that he did not want the appellant appointed as a headman of the location, and admitted that he did not like him and would not care if he was discharged.

We are accordingly satisfied that in making the allegation contained in the summons the respondent was actuated by improper motives and that malice has thus been proved.

Having come to the conclusion that malice has been proved, it would ordinarily be necessary to remit the case to the Court below for an assessment of damages, but both counsel appearing in this case have requested that this Court assess the damages and thus save unnecessary delay and expense.

Besides being a headman, appellant is also a District and General Councillor and a member of the Executive Committee of the General Council. The fact that he was appointed to these posts indicates that he was regarded by the officials as a man of good character. To impute misconduct to him is a serious matter which would entitle him to substantial damages. On the other hand, according to his own evidence, the people of the location have not changed their attitude towards him, and he says that he was actually complimented by the officials for the manner in which he handled this land matter. In the circumstances an award of £15 as damages would meet the case.

The appeal is allowed with costs and the judgment of the Court below is altered to one for plaintiff for £15 and costs.

For Appellant: Mr. Dold, Willowvale.

For Respondent: Mr. Wigley, Willowvale.

MTETO MCITAKALI *v.* TULUTSA NKOSAYIBONI.

CASE No. 137.

BUTTERWORTH: 16th May, 1951. Before J. W. Sleigh, Esq., President. Bowen and Crossman, Members of the Court (Southern Division).

Native Appeal Case—Native Custom—Heir—Estate Stock—Practice and Procedure—Conflict of laws—Native Custom requires that a person having possession of estate property must consult heir before selling any property and must report death or loss of any estate stock—Court should apply common law where there is clear proof that stock have died or were stolen.

Plaintiff, a minor duly assisted, sued defendant for certain stock and property belonging to the estate of his late father N. of whom he is the heir. The property was left with defendant by the widow of N. for safe-keeping. Defendant had admitted that the 15 cattle had been in his possession, but he averred that one of these were stolen, three were taken by shops for the debts of the late N. and six had died. He tendered plaintiff the remaining five as well as small stock and other property in his possession. He denied that a saddle and bridle were left with him. The Native Commissioner entered judgment for plaintiff for 15 head of cattle, saddle and bridle and other property which defendant admitted were in his possession.

Held:

(1) That in Native Law a person in possession of estate: stock must consult the heir or his guardian before selling the stock. Claims against the estate must be referred to the heir for instructions.

(2) That defendant had no right to sell three of the cattle to meet estate debts without consulting the heir.

(3) That his own claim against the estate for expenses incurred has not been adequately canvassed.

(4) That in Native Law a person who is in possession of stock belonging to another must report to the owner, as soon as practicable, the loss of any stock by death, theft or by straying, and if he fails to do so he must replace the lost stock.

(5) That section 11 of Act No. 38 of 1927 confers on a judicial officer a discretion to decide a case according to native law provided such law is not opposed to natural justice.

(6) That if the evidence clearly showed that six of the cattle had died from natural causes and that one had been stolen, it would be opposed to natural justice to compel defendant to replace them merely because the losses had not been reported.

(7) That there is no satisfactory proof that six of the cattle had died and that the Native Commissioner was therefore correct in deciding this claim according to Native Law.

(8) That as it was not seriously disputed that one beast had been stolen the Native Commissioner erred in applying Native Law to the claim.

Appeal succeeds in part.

Cases cited:—

Qolo *v.* Ntshini 1 N.A.C. (S) 234.

Appeal from the Court of the Native Commissioner, Willowvale.

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

Plaintiff, a minor duly assisted, sued defendant for certain stock and other property belonging to the estate of his late Father Nkosayiboni of whom he claims to be the heir. It is alleged that this property was left with defendant by the widow of Nkosayiboni for safe-keeping.

Among the stock and property claimed are certain 15 cattle and a saddle and bridle. Defendant admitted in his plea that the 15 cattle had been in his possession, but he averred that one of these was stolen, three were taken by shops for the debts of the late Nkosayiboni and six had died. He tendered plaintiff the remaining five cattle as well as the small stock and other property in his possession. He denied that a saddle and bridle was left with him. The Acting Assistant Native Commissioner, however, entered judgment for plaintiff for the 15 cattle, the saddle and bridle and for the other property which defendant admits are in his possession. Defendant now appeals against that portion of the judgment awarding plaintiff 15 cattle and the saddle and bridle.

In regard to the saddle and bridle the Native Commissioner found on the evidence that Nkosayiboni owned a saddle and bridle at the time of his death and that these articles were left with defendant. We are not satisfied that these findings are wrong. The appeal in respect of these articles consequently fails.

It appears from the evidence that Nkosayiboni at one time lived in Idutywa district where his relatives also reside. Some years ago he moved to Willowvale district and lived at a place which was a full day's journey by horse-back from his previous home. He died two years later and his widow, who was by herself, then removed with the estate property to the kraal of defendant who is apparently a cousin of her husband. Thereafter she became ill and went to her own people leaving the estate property with defendant.

In the first place it is contended that the Native Commissioner erred in trying the case according to Native Law. It is urged that defendant should be regarded as a depositary and common law principles should be applied to the transaction between Notembile (the widow) and defendant; and, if these principles were applied, defendant would not be liable to replace the stock which had died and were stolen, and, as a *negotiorum gestor,* would be entitled to deduct from the sale price of the cattle sold the amounts paid to the shops on behalf of Nkosayiboni's estate.

Section *eleven* of Act No. 38 of 1927 confers a discretion on a Native Commissioner to decide a case, in which a question of Native Law is involved, according to that system of law. Clearly questions of Native Law are involved in the present case. When defendant accepted the property for safe-keeping he knew very well that Native Law required him to consult the heir of the deceased before selling estate property and to report the death or loss of estate stock. Defendant admits this. But the discretion conferred on a Native Commissioner is qualified by the proviso that the Native Law applicable shall not be opposed to natural justice. We therefore agree that if the evidence clearly shows that six of the cattle had died from natural causes and that the one beast was in fact lost or stolen then the Native Commissioner should have decided the case according to Common Law, because it would be unjust to compel defendant to replace stock merely because deaths and losses had not been reported.

In regard to the three cattle said to have been taken by shops for the debts of Nkosayiboni, defendant admits that he sold the three cattle for £28 when the shop keepers demanded payment. Notembile states that when she left defendant's kraal about 1947 she knew that her husband owed £3 at the Mgqaqini store and £12 at Mhlahlane, but she denies that she had authorised defendant to sell cattle to pay the debts. Defendant admits that no one authorised him to sell the cattle, but states that Notembile told him "to make some arrangements," presumably for the liquidation of the debts. Now it is quite clear that, according to Native Law, Notembile could not have disposed of the cattle without consulting her husband's male relatives [Qolo *v.* Ntshini 1 N.A.C. (S) 234], and consequently she could not authorise defendant to dispose of the cattle. Native Law required him to notify plaintiff or his guardian of the claims against the estate

and obtain instructions from him. His excuse that he was too ill to do so cannot be accepted. Moreover, even if we were to hold that under the special circumstances of the case he was justified in selling some of the cattle, the parties are not agreed as to the amounts of the debts. Notembile states that they amounted to £15 whereas defendant produced receipts for £20. 10s. 6d. There is no evidence how the amounts actually paid were arrived at and plaintiff, in view of the plea, had no opportunity of questioning their correctness. If defendant's position was that of a *negotiorum gestor* he should have advised plaintiff or Notembile of what he had done and tendered the balance of the purchase price. He did not do so nor did he claim a deduction in his plea. It is clear from the evidence that he is entitled to some deductions, but the matter was not adequately canvassed in the Court below and we are consequently not in a position to arrive at the amount of the deduction. The Native Commissioner's judgment in respect of the three cattle must, therefore, stand, leaving it to defendant to claim a refund of the amount paid by him on behalf of the estate.

In regard to the other seven cattle it is well established Native Custom that a person who has in his possession stock belonging to someone else must report to the owner, as soon as is practicable, the loss of any of the stock, whether such loss was occasioned by death, by theft or by straying. If he fails to do so Native Law requires him to replace the lost stock.

Now in regard to the six cattle which he alleges had died, there is no direct evidence of the causes of the deaths. Defendant merely states that the mortality among lifestock during the 1949 drought was great and that he himself had lost a number of cattle. We have only his bare word that the six cattle had died. He did not report the deaths nor did he produce the hides or tender the money received for the hides to plaintiff at the time of the deaths. He admits that he sold the hides and used the proceeds. Alternatively he did not call the men who skinned the dead animals. There is thus no satisfactory proof that the cattle did in fact die and that they died from natural causes. It does not necessarily follow that because Nkosayiboni's stock card reflects six deaths that the cattle so reflected belonged to the estate and that they died from natural causes. They might have been slaughtered or defendant's own dead cattle might have been reflected on Nkosayiboni's card, especially as defendant admits that one of his own cattle is reflected on Nkosayiboni's card. In the absence of clear proof that the cattle did in fact die from natural causes, the Native Commissioner was correct in deciding the case according to Native Law. The appeal in regard to these six cattle therefore also fails.

As to the stolen animal, it is not seriously disputed that a beast was stolen. Defendant reported the matter to the Police and a person (his name is not stated) was unsuccessfully prosecuted, but it is contended on behalf of plaintiff that at the criminal trial defendant claimed the beast as his own and that he is now estopped from saying that it belonged to the estate. But plaintiff's witnesses admit that a native would say that stock in his possession are his. The record of the criminal case was not put in. In the indictment the accused would be charged with stealing a beast the property of or in the lawful possession of defendant. The question whether the beast belonged to Nkosayiboni or defendant was therefore not in issue and there is nothing on record to indicate that defendant has, in the criminal case, denied that the beast belonged to Nkosayiboni. Defendant is not, therefore, now estopped from proving that the beast did in fact belong to Nkosayiboni.

Defendant should have reported the loss to Notembile or plaintiff's guardian, but even if he had done so, there is nothing on record to show that the search for it might have been more successful, since it was a red heifer calf born in November, 1948, and neither Notembile nor plaintiff's guardian had ever seen it. We are satisfied that this beast did belong to the estate and is shown on Nkosayiboni's stock card as being missing, a fact

which is not seriously disputed. It would be unjust to order defendant to replace this beast. The Native Commissioner, therefore, erred in applying Native Law to the claim for this beast, and at Common Law defendant is not liable to pay its value.

The appeal is therefore allowed with costs and the judgment of the Court below is amended by reducing the number of cattle to be paid to 14 head.

For Appellant Mr. Wigley, Willowvale.

For Respondent Mr. Dold, Willowvale.

CASE No. 138.

MPONTSHI TSHAKA *v.* CINGANI BETYI.

BUTTERWORTH: 18th May, 1951. Before J. W. Sleigh, Esq., President. Bowen and Crossman, Members of the Court (Southern Division).

Native Appeal Case—Native Custom—Estate—Heir to garden lot—Illegitimate son of widow succeed to its mother's house in absence of legitimate heir in that house provided illegitimate child was conceived and born while mother was resident at deceased's husband's kraal—Fingo custom—Onus—Heavy onus on respondent to prove that his mother had the necessary permission to reside at her father's kraal.

In an enquiry held in terms of section 3 (3) of G.N. 1664 of 1929 both parties in this case claim to be the heir of the late D., and entitled to succeed to Garden Lot No. 280, situate in Location No. 6, Tsomo District.

The late D. had three sons, namely Mkumbi, appellant and Mpompi. Mkumbi died in 1918 leaving surviving him his wife, N., who was pregnant. She, in due course, gave birth to a girl, T. Appellant would therefore be D.'s heir, but respondent claims the estate on the ground that he is the son of N. and was born while she was living at her father's kraal with the permission of D.

Held:

(1) That an illegitimate son of a widow succeeds to its mother's house in absence of a legitimate heir provided illegitimate child was conceived and born while its mother was resident at deceased husband's kraal or at a kraal approved of by her husband's male relatives.

(2) That there is a heavy onus on respondent to prove that his mother had the necessary permission to reside at her father's kraal and that he has not discharged this onus.

Appeal allowed.

Cases cited:—

Gade *v.* Gqagqeni, 1944 N.A.C. (C & O) 85.

Djerman *v.* Morris & Ano. 1 N.A.C. (S) 132.

Malinde & Ano *v.* Madzana 3 NA.C. 147.

Nbono *v.* Manoxoweni 6 E.D.C. 62.

Appeal from the Court of the Native Commissioner, Tsomo.

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

The late Dlangeva Tshaka is the registered holder of Garden Lot No. 280, situate in Location No. 6, Tsomo district. Both parties in this case claim to be his heir and entitled to succeed to the Lot in question. In an estate enquiry held in terms of section 3 (3) of G.N. No. 1664 of 1929 the Assistant Native Commissioner found in favour of respondent and appellant has appealed.

The late Dlangeva had three sons, namely Nkumbi, appellant and Mpompi. Nkumbi died in 1918 leaving surviving him his wife, Nomangcwaba, who was pregnant. She, in due course, gave birth to a girl, Tutelwe. Appellant would therefore be Dlangeva's heir, but respondent claims the estate on the ground that he is the son of Nomangcwaba and was born while she was living at her father's kraal with the permission of Dlangeva.

The parties to this case reside in Tsomo district which is predominantly occupied by Fingos. Fingo custom must therefore be applied to the dispute. Among the Fingos and certain other tribes which do not practise *ukungena,* the illegitimate son of a widow succeeds to its mother's house in the absence of a legitimate heir in that house, provided that the illegitimate child was conceived and born while its mother was resident at her deceased husband's kraal or at a kraal approved of by her husband's male relatives [see Gade *v.* Gqaggeni, 1944, N.A.C. (C. & O.) 85 and Djerman *v.* Morris and Ano. 1 N.A.C. (S) 132]. This statement of the law requires elaboration. The husband's kraal is obviously the kraal which the husband regarded as his permanent home prior to his death, and the "approved kraal" is the kraal where she is required to reside or was given permission to reside by her husband's male relatives. "Is resident" or "resides" contemplates residence of a permanent nature or at any rate for a lengthy period. Thus if a widow pays a casual visit to her relatives, with or without the consent of her husband's relatives, she does not cease to be resident at her husband's kraal; provided, of course, that the visit is not of such a protracted nature as to lead to the inference that she had deserted her husband's kraal. Where a widow takes up her abode at the kraal of a relative of her husband without objection from the head of the family, permission to do so may be implied; but if she wishes to reside at the kraal of her own people and retain the rights to which she, as a widow, is entitled she must obtain express permission to do so. Apart from casual visits such permission will be granted only for some compelling reason. The reason for this is that in Native Law the death of a husband does not dissolve the association which existed between her and her husband's family. She is still regarded as a wife of that family. Although they may not *ngena* her (if her husband belonged to a tribe which does not practise *ukungena*) children she may bear are regarded as the issue of her deceased husband. If, therefore, she returns to her own people without permission and fails to return when *putumaed* she is considered to have rejected her husband's family and she forfeits all her rights as a widow (Malinde and Ano *v.* Madzana 3 N.A.C. 147). In fact prior to the case of Nbono *v.* Manoxoweni (6 E.D.C. 62) her father could be compelled by legal action to return her to her husband's kraal or restore the dowry paid for her.

In the present case it is admitted that respondent was conceived and born after Nomangcwaba had left her husband's kraal. On the face of it, therefore, he is illegitimate and cannot succeed to Dlangeva's estate unless he can prove that his mother had been given permission by her husband's male relatives to reside at the kraal where he was born. The onus of proving this is a heavy one. The evidence in support of the allegation that permission had been granted must be conclusive so as to guard against fraudulent claim being made to an estate of a deceased person.

Dlangeva, his widow, and Nomangcwaba are all dead. There is thus no direct evidence that permission had been given to the latter to reside at her father's kraal. Respondent's witness Diyana did say at first that he was present when permission was granted but he corrected himself by saying that he was only told of this. Diyana has proved himself to be biassed and untruthful and no reliance whatsoever can be attached to his testimony. We are compelled, therefore, to rely entirely on circumstantial evidence.

The evidence for respondent is that after the child Tutelwa had been weaned, Nomangcwaba returned to her father's kraal on account of illness and returned to Dlangeva's kraal (where her late husband Nkumbi resided) when she was better. Later she returned to her father's kraal again and stayed about a year during which period she became pregnant and gave birth to respondent. According to the evidence of her brother, Mshushumba she was *putumaed* by Dlangeva when respondent was a baby. Later still she again returned to her father's kraal bringing respondent with her. She was then sickly and later became insane. She never returned to Dlangeva's kraal, but according to the evidence for respondent, the latter was fetched by Dlangeva at whose kraal he lived until he was bitten by a snake when he returned to the kraal of Mshushumba, his maternal uncle. It is clear that Nomangcwaba gave birth to another child, Nomfuzi. It is said that she also was born at Mshushumba's kraal. Bly Nkunkwane is the natural father of both respondent and Nomfuzi, and, when the latter was given in marriage, dowry for her was paid to Mshushumba on behalf of respondent. Dilika, the father of Tutelwa's husband, states that when his son *twalaed* Tutelwa he went to Dlangeva's kraal and was shown respondent, who was then about 13 years of age, by Dlangeva as the person entitled to Tutelwa's dowry; that later when respondent was about to marry he paid him a beast being the balance of Tutelwa's dowry, and that appellant knew about this but did not protest. Respondent admits that appellant refused to circumcise him.

The evidence for appellant is that Nomangcwaba left Dlangeva's kraal and when appellant was sent to *putuma* her, because she had outstayed her leave, he did not find her at her father's kraal. He states that he was told that she had married Bly Nkunkwane. He then reported to Dlangeva who called a family meeting which decided to discard Nomangcwaba. The reason was that they had her daughter, Tutelwa. Appellant and his witnesses deny that respondent ever lived at Dlangeva's kraal.

In my opinion the evidence for respondent does not justify the conclusion that Nomangcwaba had been given permission to live at her father's kraal during the period she gave birth to respondent. If she had been given such permission she would not have left behind her small child who had recently been weaned. Further there is no evidence why it was necessary for Nomangcwaba to live at her father's kraal. It is, however, contended that appellant has recognised respondent as Dlangeva's heir by his failure to claim Nomfuzi's dowry and by his failure to protest when Dilika paid part of Tutelwa's dowry to respondent. But I am not satisfied that a dowry beast was paid to respondent, or, if it had been paid, that appellant was aware of it. The latter had disowned respondent by refusing to circumcise him and it is therefore quite improbable that he would have agreed to the payment of this beast to respondent.

In regard to Nomfuzi's dowry, appellant states that he did not claim it as she belonged to Bly. In my opinion the statement that Dlangeva's family meeting decided to discard Nomangcwaba must be accepted. If they had rejected her they forfeited all rights they might have had to her dowry and her illegitimate issue. This will explain why no attempt was made to recover the dowry paid for Nomangcwaba, why appellant did not claim Nomfuzi's dowry and why he refused to circumcise respondent. If they had not rejected her, respondent, although illegitimate, would belong to Dlangeva's family and it was appellant's duty to circumcise respondent even if the latter was not the heir.

Dilika's statement that respondent was introduced to him as Dlangeva's heir can hardly be accepted, as respondent was then only about 13 years of age and there was no necessity to indicate him as the person entitled to receive the balance of the dowry, especially as Dlangeva had sons living at his kraal whose duty it was to protect the minor's rights.

Respondent states that he was fetched by Dlangeva and his witnesses Bly, Dilika, Mshushumba and Diyana support his evidence that he lived at Dlangeva's kraal. I have already stated that Diyana is an unreliable witness. Bly states that he cohabited with Nomangcwaba both at Dlangeva's and at Mshushumba's kraals. He should therefore have known Mpontshi but he denies that he does. Mpontshi also says that he has never seen Bly. The latter's statement that he cohabited with the widow at Dlangeva's kraal must, therefore, be false, and for this and other reasons his evidence must also be rejected. Mshushumba is obviously an interested party and he contradicts himself as to whether or not his sister was ever *putumaed*. Dilika's statement that a dowry beast was paid to respondent and that appellant agreed to the payment is so improbable that it must also be false. He is therefore not the impartial witness that he pretends to be. On the other hand appellant's witnesses Xala and Sigwinta, who appear to be impartial, state that respondent never lived at Dlangeva's kraal. There is no good reason for rejecting their evidence. But even if Dlangeva did fetch respondent it would be proof that he recognised respondent as a member of his family but not proof that he recognised him as heir.

Appellant's witnesses do say that Nomangcwaba was *putumaed* because she over-stayed her leave. This presupposes that she obtained permission to go to her father's kraal, but appellant also says that she was not at that kraal when he went to fetch her and she clearly had no permission to leave that kraal.

There is no evidence that either Nkumbi or Dlangeva left an estate. Presumably there is none, otherwise the record would have disclosed the reason why respondent did not claim it. But appellant's refusal to circumcise him was a clear indication to him that appellant did not recognise him as a member of Dlangeva's family or as having any right to Dlangeva's estate. The fact that he took no legal action at that time to establish his right must count against him.

As I have said at the outset, there was a heavy onus upon respondent to prove that his mother had the necessary permission to reside at her father's kraal. The facts he has placed before the Court do not lead to that conclusion. The only evidence that might lead to that conclusion is the statement by Dilika in regard to the payment of the dowry beast to respondent, and, in view of appellant's previous attitude towards respondent, I am unable to accept Dilika's testimony on this point. His claim to the land must consequently fail.

The appeal is consequently allowed with costs and the judgment of the Court below is altered to read "Mpontshi Tshaka is declared to be the heir of the late Dlangeva Tshaka and is entitled to succeed to Garden Lot No. 280, Location No. 6. Tsomo district.

Bowen (Member): I concur.

Crossman (Member), dissenting:—

It is true that there are some discrepancies in the evidence for respondent, but in my opinion the evidence of Mpontshi contains so many denials and vague statements that it should be rejected *in toto*.

The evidence of Mpontshi's witnesses is very little more than a mere statement that Cingani was never seen by them at Dlangeva's kraal. Two of them do, however, support the respondent in that they say that the widow was *putumaed* because she overstayed her leave which presupposes that permission had been given. There is also a big difference between Mpontshi's statement that he was sent to *putuma* the widow four weeks after she left the kraal and that of his witness and brother Mpompi who states that "widow had left kraal just less than a year when she was *putumaed* by Mpontshi". Mpompi goes so far as even to deny that he knew that the widow had given birth to a boy (Cingani) and a girl after she left. Surely this denial cannot be honest!

For the respondent there is the witness Bly whose evidence is, in my opinion, truthful. He states that he met the widow and fell in love with her; that he thereafter cohabited with her at Dlangeva's kraal and at that of Mshushumba; and that as a result of their relationship Cingani and a girl Nomfuzi were born.

The evidence of the old man Dilika, who is an impartial witness, gives the impression that he knows what he is talking about. He mentions the damage to utensils when his son *twalaed* the eldest daughter of Cingani's mother, and also states that a dun cow was lent to Tutelwa by Diyana and Mpontshi, for milking purposes. These facts are denied by Mpontshi, but there is no reason for this additional "padding" if it is not true. Dilika also states that he was told by Dlangeva that Cingani was the person to receive the balance of dowry due and that he, in fact, did pay that dowry to Cingani, after consulting Diyana in terms of instruction from Dlangeva, without protest on the part of Mpontshi.

I think the story of the other witnesses for the respondent, viz; Diyana and Mshushumba should also be accepted. It is a fact that the widow eventually became mentally defective and this is consistent with their statements that the widow was ill and used to go backwards and forwards between her people's kraal and that of her late husband.

Taking all the facts into consideration I consider that the true position is that Cingani spent a substantial part of his youth at Dlangeva's kraal, that his mother used to stay at both her parents' and Dlangeva's kraals; and this being so, the respondent should be regarded as having satisfactorily discharged the onus on him to prove that he is the rightful heir to his late father Nkumbi.

For Appellant: Mr. Mahoud, Butterworth.

For Respondent: Mr. Wigley, Willowvale.

CASE No. 139.

SIMON GENGE *v.* **LINDHORST NOAH.**

PORT ST. JOHNS: 28th May, 1951. Before J. W. Sleigh Esquire, President. Wilbraham and Grant Members of the Court (Southern Division).

Native Appeal Case—Native Custom—Nqoma *custom—Practice and Procedure—Evidence—Stock card hearsay evidence—Under* nqoma *custom defendant bound to replace missing sheep not accounted for.*

Plaintiff alleges that in 1939 he *nqomaed* 75 sheep to defendant, that in November 1949 the sheep had increased to 212 and that defendant refuses to deliver the sheep to plaintiff. Defendant pleads that plaintiff *nqomaed* 15 sheep to him in 1935, these increased and plaintiff removed some from time to time and that when delivery of the balance was demanded there were 9 sheep left which were delivered to plaintiff.

Held:

(1) That the weight of evidence supports the Native Commissioner's finding that 75 sheep were delivered to defendant.

(2) That the stock card written up by the stock inspector, who was not called, infringes the best evidence rule and should have been rejected as evidence even if no objection had been taken.

(3) That under the contract of *nqoma* defendant was bound to account to plaintiff for the latter's sheep in his possession.

The appeal fails.

Cases cited:—

Gibson *v.* Arnold & Co. (Pty.), Ltd., 1951 (2) S.A. 139 (T).

Kirchner *v.* Ross & Heard, 1931, C.P.D. 55.

Mapoloba *v.* Gazi, 1945, N.A.C. (C. & O.) 71.

Appeal from the Court of the Native Commissioner, Ngqeleni.

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

It is alleged in the particulars of claim that plaintiff *nqomaed* 75 sheep to defendant in 1939, that in November, 1949, the sheep had increased to 212 and that defendant refuses to deliver the sheep to plaintiff. He values the sheep at £1 each but, in order to bring the claim within the jurisdiction of the Native Commissioner's Court, plaintiff reduced his claim to delivery of 200 sheep or payment of their value £200. This was, of course, unneccessary as the jurisdiction of a Native Commissioner's Court is unlimited as to the value of the claim.

The defence is that plaintiff *nqomaed* 15 sheep to defendant in 1935, that these increased and plaintiff removed some from time to time and that when delivery of the balance was demanded there were 9 sheep left which were delivered to plaintiff.

The Assistant Native Commissioner entered judgment for plaintiff in terms of his claim and defendant has appealed.

It is not disputed that plaintiff *nqomaed* sheep to one Edmund. Plaintiff states that after Edmund's death his widow requested him to remove the sheep, and she and plaintiff and his witnesses, Aaron and Diko, say that 75 sheep were removed from her kraal. Aaron and Diko state that they drove the 75 sheep and delivered them to defendant. The latter admits that the sheep *nqomaed* to him came from Edmund's kraal, but he says that he received 15 only and that these were delivered to him by plaintiff personally. In our opinion the weight of the evidence supports the Native Commissioner's finding that 75 sheep were delivered to defendant.

It is common cause that plaintiff inspected the sheep at defendant's kraal periodically. Plaintiff says, and his evidence is supported by Diko, that when the sheep were counted in 1946 there were 180 and that when they were counted again about November, 1949, there were 212. They admit that defendant had sheep of his own mixed with plaintiff's sheep.

Defendant denies the evidence for plaintiff. He produced his stock card which shows that in June, 1949, he had 116 sheep registered in his name, that in February, 1950 (that is after the issue of the summons) there were 81 and that in October, 1950, there were 66. Presumably these all belonged to defendant, because there is no suggestion that any of the sheep at the time of the trial bore plaintiff's earmark. If the lambs were not included in the June, 1949 count, then it is possible that there might have been, including lambs, 212 in November that year, but if defendant had only one stock card his own sheep would have been included in this number. Plaintiff and Diko, however, deny that defendant's sheep were included. They say that the sheep were counted after defendant had sorted out his own sheep. If this were so then defendant must have had between 270 and 300 sheep in his possession in November, 1949, and the sheep reflected on the stock card could not have increased from 116 to 270 during the period from June to November, 1949.

Counsel for plaintiff informs the Court that from enquiries made by him he has found that it is not the practice of Stock Inspectors to make an actual count of the sheep in the possession of every owner; that the Stock Inspector merely records the number of sheep declared by various owners. We are not entitled to take judicial cognisance of an alleged practice in respect of

which there is no evidence whatsoever. On the contrary the assumption is that the Stock Inspector carried out his duties and made an actual count.

The Native Commissioner, however, suggests that defendant might have had another card. This possibility cannot be entirely excluded, but it was not for defendant to prove the negative. It was for plaintiff in the first instance to prove the actual or approximate number of sheep belonging to him in the possession of defendant. His evidence that there were 212 sheep is not supported by the stock card. But is the stock card admissible evidence? In our opinion it is not. It infringes the best evidence rule. The card was presumably written up by the Stock Inspector. This officer should, therefore, have been called or, if he were not available, his records should have been produced [see Gibson *v.* Arnold & Co. (Pty.), Ltd., 1951 (2) S.A. 139 (T)].

It is, however, contended that the card should be accepted as reflecting the true position because it was admitted as evidence without objection. It is true that plaintiff's attorney did not object to the admission of the card, but nevertheless it was the duty of the Court to rule out inadmissible evidence, even though no objection had been taken (see Kirchner *v.* Ross and Heard, 1931, C.P.D. 55). It might have been different if the card had been put in as evidence by consent [see Mapoloba *v.* Gazi, 1945, N.A.C. (C. & O.) 71].

The result is then that defendant's evidence that he had 9 sheep only belonging to plaintiff at the end of 1949 stands alone against the evidence of plaintiff and Diko that there were 212. The Native Commissioner has accepted the evidence of the latter and we sitting as a Court of Appeal can find no grounds for holding that he erred.

Under the contract of *nqoma* defendant was bound to account to plaintiff for the latter's sheep in his possession. He has not accounted for all the sheep and, as he denied that any sheep had died, he must according to Native Custom replace the missing sheep or pay their value.

The appeal is dismissed with costs.

For Appellant: Mr. Birkett, Port St. Johns.

For Respondent: Mr. White, Umtata.

CASE No. 140.

BAKI MTOTI *v.* DANI ZIYENDANI.

KOKSTAD: 6th June, 1951. Before J. W. Sleigh Esquire, President. Wakeford and Van Aswegen, Members of the Court (Southern Division).

Native Appeal Case—Practice and Procedure—A compensatory fine under the Stock Theft Act—An award under section three hundred and sixty-three (1) *of Act No.* 31 *of* 1917, *distinguished—A stock owner who has standing in his favour a compensatory fine under section* 10 *of the Stock Theft Act is not debarred from instituting civil proceedings for the recovery of damage he has suffered—Costs—Respondent deliberately raised a defence which this Court found untenable and consequently he must bear the costs of appeal.*

First defendant pleaded guilty to a charge of theft of an ox alleged to be the property of one B. The Native Commissioner convicted the accused sentenced him to imprisonment and made an order awarding B. £25 as compensation. The compensatory fine was not paid. During the trial of the criminal case appellant was employed in the Transvaal. On his return he sued accused

and second defendant (now respondent) jointly and severally for £25 the value of the ox. Respondent averred that the ox had been paid to his wife by the accused as *nqutu* and that it was slaughtered according to custom. During the hearing of the case the Native Commissioner raised the point *mero motu* whether the proceedings were not barred by the compensatory order in the criminal case. Respondent then filed a special plea that the present action was barred. This plea was upheld and the summons was dismissed.

On appeal:—

Held:

(1) That since joint tort feasors are liable in *solidum* respondent could be sued as long as the claim against the accused remained unsatisfied.

(2) That a Court convincing an accused of stock theft under Act No. 26 of 1923 is obliged to impose a compensatory fine if no application for compensation is made under section *three hundred and sixty-three* of Act No. 31 of 1917.

(3) That a compensatory fine imposed in terms of section *ten* of Act No. 26 of 1923 may at the discretion of the Court be recovered in the manner prescribed by section *three hundred and forty-six* of Act No. 31 of 1917, but if it is desired to join other persons who were not convicted section *three hundred and forty-six* is inapplicable.

(4) That there is nothing in the Stock Theft Act to indicate an intention to restrict the legal rights of a stock owner, and that the Native Commissioner's ruling that the action was barred is consequently wrong.

(5) That the respondent deliberately raised a defence which this Court has found to be untenable and consequently he must bear the costs of appeal.

Appeal allowed.

Cases cited:—

Natal T. & M. Co. Ltd. *v.* Inglis, 1925, T.P.D. 724.

Gangela *v.* Ganca, 1907, E.D.C. 351.

Appeal from the Court of the Native Commissioner, Umzimkulu.

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

First defendant, Silenkeni Ngcobo (herein referred to as the accused) pleaded guilty to a charge of theft of an ox alleged to be the property of, or in the lawful possession of Bangizwe Zuka. After the latter had given evidence of his ownership and of the value of the ox, the Assistant Magistrate convicted the accused, sentenced him to imprisonment and made the following order viz: "To compensate Bangizwe Zuka in sum of £25 failing which to undergo a further period of three months I.H.L.". The judgment and sentence were confirmed on review. There is nothing on the papers before us to indicate that the compensatory fine has been paid.

During the hearing of the criminal case plaintiff (now appellant) was employed in the Transvaal. On his return home he sued the accused and second defendant (now respondent) jointly and severally, the one paying the other to be absolved, for £25, the value of the same ox, and in his particulars of claim, as amended, he alleged as follows:—

> "Plaintiff owned a black ox which he values at £25. First defendant (Silenkeni Ngcobo) wrongfully and unlawfully removed the said ox from plaintiff's possession and handed the said ox to the second defendant (Bani Ziyendani) who knowing that it was plaintiff's property slaughtered it and later promised to replace it."

Appearance was entered by respondent only. He delivered a plea in which he averred that the ox was paid to his wife by the accused as *nqutu* and that it was slaughtered according to

custom. He denied that he knew that the beast belonged to appellant. There is on record no plea to the amendment, viz: "and later promised to replace it".

While appellant was giving evidence and before cross-examination the Assistant Native Commissioner raised the point *mero motu* whether the proceedings were not barred by the compensatory order in the criminal case. Respondent's attorney then obtained leave to plead specially as follows:—

> "Second defendant further pleads that at the criminal action against first defendant, referred to in paragraph 3 of the summons, one Bangizwe Zuka testified on oath that the ox in question was his property, and that on first defendant being found guilty of the theft thereof, a compensatory fine of £25 was awarded to the said Bangizwe Zuka in respect of the said ox. In view of these facts defendant pleads that plaintiff is debarred from recovering damages from him, or from first defendant, while the compensatory award in favour of the said Bangizwe Zuka remains in force."

After the Clerk of the Court had been called to put in the record of the criminal case the Native Commissioner upheld the special plea and dismissed the summons, ruling that during the subsistence of the sentence and compensatory fine in the criminal case, no civil action for damages in respect of the ox in question may be instituted.

From this ruling appellant now appeals on the following ground:—

> "That a compensatory fine imposed against the first defendant (for stock theft) in favour of one Bangizwe Zuka is not a bar to plaintiff's (the owner's) action against second defendant based on the grounds that second defendant deliberately and unlawfully slaughtered the beast stolen."

The Native Commissioner in his written reasons says:—

1. I considered that it was not competent to institute an action for the recovery of damages from second defendant when a compensatory fine for the full value of the same beast had already been imposed on first defendant.
2. The purpose of section *ten*, Act No. 26 of 1923, is to compensate the owner. See decision concerning similar enactment in Act No. 7 of 1905 (Rex *v.* Zwart and Another 1920, C.P.D. 572). This being so, a compensatory fine imposed in terms of Act No. 26 of 1923 should have an effect similar to an award of compensation under section *three hundred and sixty-seven* of Act No. 31 of 1917, and should be a bar to subsequent civil proceedings.
3. Plaintiff was not without a remedy as he could have excussed Bangizwe Zuka (who had stated in the criminal proceedings that he was the owner), and then obtained a writ against the property of first defendant.

In terms of section *three hundred and sixty-three* (1) of Act No. 31 of 1917 (not section *three hundred and sixty-seven*), a court convicting any person of an offence which has caused loss of property belonging to another person, may, upon *application*, award the injured party compensation for the loss he has sustained. Such order has the effect of a civil judgment [section *three hundred and sixty-three* (4), as amended], and the person in whose favour such order has been made may not thereafter institute civil proceedings against the offender in respect of the injury for which compensation has been awarded [section *three hundred and sixty-three* (7)]. In other words, an award under section *three hundred and sixty-three* renders the claim by the injured party against the offender *res judicata*. If, in the present case, the award had been made under section *three hundred and sixty-three*, and assuming that the Assistant Magisttrate had jurisdiction to make such an award where both the offender and the injured party are natives, then an action by Bangizwe Zuka against the accused would have been barred, and, if Bangizwe was the agent of appellant, presumably

appellant would also be barred. But since joint fort feasors are liable in *solidium,* neither Bangizwe nor appellant is barred from suing respondent as long as the claim against the accused remains unsatisfied (Natal T. & M. Co. Ltd. *v.* Inglis, 1925, T.P.D. 724). For this reason alone the Native Commissioner's ruling is wrong.

There is nothing in the criminal record to indicate that application for compensation in terms of section *three hundred and sixty-three* was made on behalf of Bangizwe Zuka. In any case an award under this section or under section *seventeen* of Act No. 24 of 1886, cannot be coupled with an alternative sentence of imprisonment. It is clear, therefore, that the compensatory order was made under section *ten* of the Stock Theft Act (No. 26 of 1923). In terms of this section a Court convicting an accused of stock theft is (subject to certain restrictions not applicable here) obliged to impose upon the accused a compensatory fine, not exceeding the market value of the stock lost, with an alternative sentence of imprisonment; but only if no application for compensation is made under section *three hundred and sixty-three* of Act No. 31 of 1917 [see section *ten* (1) (*c*) of Act No. 26 of 1923]. Sub-section (2) of section *ten* provides that a compensatory fine may be recovered in the manner provided by section *three hundred and forty-six* of Act No. 31 of 1917, and any amount so recovered shall be paid to the owner of the stock. Section *three hundred and forty-six* authorises the Court which sentenced an offender to the payment of a fine to recover such fine by attachment of the property of the offender. But the Court is not obliged to do so. Under this section the warrant is issued in the name of and at the discretion of the Court, whereas under section *three hundred and sixty three,* it is issued at the instance of the injured person. An owner, who has in his favour a compensatory fine under the Stock Theft Act and who knows that the accused has attachable property, would be wise to request the Court to issue a warrant under section *three hundred and forty-six.* But he is not obliged to do so, moreover, if he desires to join other persons, who were not convicted, as co-defendants, the procedure prescribed by section *three hundred and forty-six* is obviously inapplicable.

The purpose of section *ten* of the Stock Theft Act is to compel, if possible, payment of compensation to the stock owner. Apart from making provision for the recovery of the fine by way of attachment, it also provides a penal sanction. There is nothing in the Act to indicate an intention to restrict the legal rights of the stock owner. If it were the intention that a compensatory fine under section *ten* should have the same effect as an award under section *three hundred and sixty-three* of Act No. 31 of 1917, and thus to deprive the stock owner of his legal right then surely the legislature would have said so.

The complainant in a stock theft case is not a party to the action. In other words if the accused is acquitted a plea of *res judicata* to a subsequent claim for damages would be unsuccessful. Likewise, if the compensatory fine is less than the actual value of the stock lost, the complainant has no right of appeal. His only redress is to sue the accused for the true value of the stock. A complainant who has accepted a fine awarded to him in terms of section *seventeen* of Act No. 24 of 1886, is not debarred from suing the accused person for additional compensation (see Gangela *v.* Ganca, 1907, E.D.C. 351, and other cases quoted in Jones and Buckle, 5th Ed. at page 327). Likewise a stock owner who has standing in his avour a compensatory fine under section *ten* of the Stock Theft Act is not debarred from instituting civil proceedings for the recovery of the damage he has suffered.

I do not understand what the Native Commissioner means by saying that appellant "could have excussed Bangizwe Zuka". There is no judgment against the latter and since he has not received the fine, appellant has no cause of action against him.

It is urged that the Court should make the costs of appeal costs in the cause on the ground that appellant had made certain allegations against respondent which might turn out to be false. Assuming that these allegations are false they were not the cause of the matter coming before this Court. Respondent deliberately raised a defence which this Court has found to be untenable and consequently he must bear the costs of appeal.

The appeal is allowed with costs, the judgment of the Assistant Native Commissioner is altered to read "The special plea is dismissed", and the record of proceedings is returned to the Court below for further hearing.

Wakeford and van Aswegen (Members) concur.

For Appellant: Mr. Walker, Kokstad.

For Respondent: Mr. W. Zietsman, Kokstad.

CASE No. 141.

KWEKWE WATA *v.* JONGA MFONO.

UMTATA: 15th June, 1951. Before J. W. Sleigh, Esq., President. Bates and Kelly, Members of the Court (Southern Division).

Native Appeal Case—Animal—Death of—In possession of thief—Loss falls on thief whether animal died before or after litis contestatio.

Appellant stole a cow belonging to respondent. While in his possession it had a calf, which dies before *litis constetatio.* The cow itself died during the hearing of the case. On an appeal against a judgment for respondent (plaintiff) for the cow and its increase or payment of their value.

Held: That appellant had stolen the animal and that he is liable for the value of the calf as well as for the value of the cow even if the latter had died from natural causes.

The appeal fails.

Case cited:—

Tsotswana *v.* Totonci 1 N.A.C. (S) 218.

Referred to:—

Voet (6.1.34).

Appeal from the Court of the Native Commissioner, Tsolo.

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

Plaintiff (now respondent) sued defendant (now appellant) for a certain black and white cow and its three increase or payment of their value at £10 each, and obtained judgment for "3 head of cattle or their value, £10 each and costs.". Appellant appeals.

The evidence goes to show that in September, 1944, respondent lent one, De Wet, a black and white heifer earmarked stump right ear with slit behind. Two months later the heifer was lost. Towards the end of 1948 De Wet's son saw a black and white cow with respondent's ear marks among appellant's herd and claimed it. The beast was identified as the one lost in 1944 by respondent, De Wet, the latter's son and by respondent's neighbours, Khanu Fegoni and Valiko Nyanda.

Appellant's case is that the beast is the calf of a black cow, the progeny of a grey cow which his father bought, and that the beast now in dispute was earmarked by his father for his son, Mfano. His witnesses Veneruti, Kaizer, who say that he herded it when it was earmarked, and Nototo who says that he was present when it was earmarked, identify the beast as appellant's property. Nototo, however, says that the grandmother of the beast was black.

The Assistant Native Commissioner has, in our opinion, correctly rejected the evidence for the defence. According to the headman, appellant stated, at the time the beast was claimed by De Wet's son, that he had bought it. De Wet's son, who was present, says that appellant stated that he had bought it from Soldati who works on a farm for a Mr. Dallas. Although the headman states that appellant did not say from whom he had bought it, there is no reason to doubt the headman's testimony. Appellant admits that this beast is the only one among his cattle numbering about 80, which is earmarked. This, to some extent, supports the view that this beast formerly belonged to someone else. Moreover, as will be seen presently, appellant is an unreliable witness.

In regard to the increase, respondent alleged in his summons that the beast was in calf when it was lost, but no evidence to this effect was adduced. It is common cause that the beast has had a calf after it was discovered. The headman states that appellant told him that it had had two increase and that it was again in calf. Appellant denies that he made this statement to the headman. He first stated that he told his attorney that the beast had had no increase. This is inconsistent with his plea in which he admits having informed the headman that the beast had had two increase. On being pressed appellant stated that when he went to see his attorney he told him that the cow had had an abortion and that it had a calf recently. This after he had previously stated that the cow was in calf when he first went to see his attorney. It is obvious that the last calf was born after he had instructed his attorney, because in the plea it is averred that the increase had died, whereas appellant admitted that the last calf was still alive. He is also contradicted by Kaiser who states that while he was herding the stock the cow had an abortion and thereafter it had a calf which died. There is thus overwhelming evidence that the cow gave birth at least three times.

The Native Commissioner accepted that one birth was a miscarriage. He did not find that the second calf was still alive, but held that appellant had failed to prove that it would have died in any case had it been in the possession of respondent.

Although the evidence for the defence as a whole is most unsatisfactory, there is no evidence to rebut the testimony that the second calf had died. The cause of the death is not stated. Kaiser merely says that it was born at the beginning of summer and died the following winter. This was, of course, before *litis contestatio.* Now Voet (6.1.34) says.: "But if a possessor, has, without fraud or fault lost possession through pure accident if this has happened before *litis contestatio,* neither *bona fide* nor *mala fide* possessor is liable, but only a thief or robber, whenever he has not tendered restitution of the thing to the owner. But if after *litis contestatio;* it is clear that a *mala fide* possessor who is a robber, is not less liable after than before it, but if he is a *mala fide* possessor, but not a thief, he ought only to make good the loss of the thing, if it would not have been a loss to the owner in the same manner, had it been in his possession." [See also Tsotswana *v.* Totonci. 1 N.A.C. (S) 218]. From this it is clear that appellant would be liable for the value of the calf if he had stolen its mother. There is little doubt that he did. He is found in possession of an animal which bears respondent's earmark, and which the Court found is the latter's property. It was for appellant to explain his possession. His explanation that he bred it is of course false. The obvious conclusion is that he himself had stolen the animal or that he knew that it had been stolen. He is therefore liable for the value of the calf as well as for the value of the cow which he says is also now dead, even if the latter had died from natural causes.

The appeal is dismissed with costs.

For Appellant: Mr. Airey, Umtata.

For Respondent: Mr. Muggleston, Umtata.

CASE No. 142.

CEBETU NYAMEKWANGI *v.* BULESELA MADUNTSWANA.

UMTATA: 15th June, 1951. Before J. W. Sleigh, Esq., President, Bates and Kelly, Members of the Court (Southern Division).

Native Appeal Case—Witchcraft—Dowry—Refund of on marriage of woman smelt out—Child—Right to child born after mother was rejected and driven away.

N. the sister of defendant was married to T. according to Native Custom. T. caused her to be smelt out and drove her from his kraal. After T.'s death she gave birth to an illegitimate child and thereafter married M. Plaintiff, the heir of T., sued respondent for refund of the dowry paid for N. less deductions as well as delivery of the dowry for N.'s illegitimate daughter. Respondent contended that the union between T. and N. was dissolved when N. was "smelt out" and driven away, consequently the dowry paid by T. for N. was forfeited and T.'s heir was not entitled to the dowry of the girl born after the dissolution of the union. The Native Commissioner upheld this contention.

On appeal:—

Held:

(1) That if the husband causes his wife to be smelt out and drives her away on an accusation of witchcraft, the union is dissolved as from the time she was driven away, and the husband not only forfeits the dowry paid for her but also loses all rights to children born to her thereafter.

(2) That the authorities support the view that the husband would be entitled to a child with which the wife was pregnant at the time she was rejected.

(3) That appellant failed to prove that the wife was pregnant at the time she was rejected.

The Appeal is dismissed with costs.

Cases cited:—

Lequoa *v.* Sipamla, 1944, N.A.C. (C & O) 85.

Juleka *v.* Sihlahla 1 N.A.C. 88.

Mhlanganiso *v.* Mhlanganyekwa 2 N.A.C. 141.

Appeal from the Court of the Native Commissioner, Elliotdale.

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

It is common cause that Nosampula, the sister of defendant (now respondent) was married to Twalikulu according to Native Custom, that after his death she married Ntwakumbana, that she had a daughter, Nontsontsoyi, and that this girl was given in marriage by respondent who received 8 cattle as dowry for her. Plaintiff (now appellant), who claims to be the heir of Twalikulu, sued respondent (1) for refund of the dowry paid for Nosampula less the customary deductions and (2) for delivery of the eight cattle paid as dowry for Nontsontsoyi or payment of their value at £10 each.

In the plea appellant was put to the proof that he is the heir of Twalikulu. In regard to claim (1) respondent pleaded that the union between Twalikulu and Nosampula was dissolved more than 20 years ago when the former caused Nosampula to be "smelt out" and drove her from his kraal. Consequently the dowry paid for her was forfeited. In regard to the second claim respondent pleaded that even if appellant is the heir of Twalikulu he would not be the "dowry eater" of Nontsontsoyi as she was born some years after Nosampula had been rejected and driven away by Twalikulu.

The Assistant Native Commissioner found in favour of respondent and entered judgment for him with costs. This judgment is attacked on appeal on the ground that it is against the weight of evidence and the probabilities of the case.

There are three questions in issue. The first is whether appellant is the heir of Twalikulu. There is conclusive evidence that he is, he being the eldest son of the first *qadi* to his late father's great house in which house Twalikulu, who left no male issue, was the only son.

The second question for decision is whether the union between Twalikulu and Nosampula was dissolved by the former without just cause. The onus of proving this is on respondent. Nolayiti, the mother of Nosampula, respondent and Vikilahle state that about 20 years ago Twalikulu became very ill and Nosampula was accused with causing his illness. She was assaulted and driven away naked. They state that Twalikulu died about two months later. Appellant was too young to remember what took place and the evidence of his witness, Hohlo, is all hearsay. But his other witness, Pumelo, denies that she was "smelt out". He says that she was at Twalikulu's kraal when he died. Appellant and his witnesses, however, admit that she was never *putumaed*, and although she remarried about 17 years ago no claim was made for refund of the dowry paid for her by Twalikulu until now.

It is contended that the evidence does not support the finding that Nosampula was in fact driven away with the view to dissolving the marriage because she was not given her clothes and taken to her people's kraal. According to Native Custom a wife who is driven away should insist that her clothes be given to her and that a man escort her to her own people's kraal. But it often happens that the husband refuses to comply with her demand, hoping to fasten on her the blame for the trouble between them. In such a case, and if in addition the woman had been assaulted, as in the present case, she might complain to the headman or to the Police, but she can hardly be blamed for seeking the protection of her own people. In the present case, however, there is little doubt that Twalikulu did drive her away on the ground of causing his illness by witchcraft. She arrived at her kraal in borrowed clothes with weals and scratches on her body. She was never *putumaed* and it is only now after she had died and about 17 years after her re-marriage that refund of the dowry paid for her is demanded. This delay has resulted in serious prejudice to respondent and consequently the conflict between the versions of appellant and respondent must be decided in favour of the latter [Lequoa *v.* Sipamla, 1944, N.A.C. (C. & O.) 85]. In the circumstances the Native Commissioner was correct in accepting the evidence for respondent. It is well established Native Custom that if a husband causes his wife to be "smelt out" and drives her away the union is automatically dissolved as from the time she was driven away, and the husband not only forfeits the dowry paid for her but also loses all rights to children born to her thereafter (see Juleka *v.* Sihlahla 1 N.A.C. 88, where the facts are very similar to those in the present case, and Mhlanganiso *v.* Mhlanganyelwa 2 N.A.C. 141). The claim for refund of the dowry paid for Nosampula by Twalikulu consequently fails.

The final question for decision is whether Nosampula was pregnant with Nontsontsoyi when she left Twalikulu's kraal as appellant's witnesses assert. It is quite clear that in Native Law the children of a wife born before she is "smelt out" belong to her husband. Does the child with which she was pregnant at the time of the smelling out also belong to her husband? We have been unable to find any decisions directly in point. The question was therefore put to the native assessors. Their answer, as will be seen from the annexure hereto, is in the affirmative. In *Mhlanganiso's* case (*supra*) the wife was "smelt out" while she was pregnant with the respondent and his claim that he was the heir of her husband was not disputed. Although the question was not in issue in that case the decision seems to support the

assessors. Appellant's right to Nontsontsoyi's dowry therefore depends upon whether or not Nosampula was pregnant with the girl at the time she left Twalikulu's kraal. The onus of proving the affirmative is upon appellant.

Appellant and Hohlo say that Nosampula was pregnant when she left Twalikulu's kraal. Their evidence is hearsay but they obtained their information from appellant's other witness, Pumelo. The latter, however, tells a different story. He says that Nosampula was in an advanced sta e of pregnancy when Twalikulu died and that the child was born before she left the kraal. But later on he says that the child was born more than a year after the death of Twalikulu. If this were so then the latter cannot be the father of the child. No reliance can thus be placed on the evidence of Pumelo. Moreover, the fact that they never went to see the child when it was born nor evinced the slightest interest in it and delayed three years before claiming the dowry, indicates that they knew they had no right to Nontsontsoyi.

Respondent and his witnesses say that Nontsontsoyi was the first issue of the union between Nosampula and Ntwakumbana. If this were so, then Nontsontsoyi could not have been more than 15 years of age when she married in 1947, unless Ntwakumbana rendered Nosampula pregnant before he married her. Moreover, the fact that Nontsontsoyi was brought up at the kraal of respondent who gave her in marriage and that Ntwakumbana never claimed her dowry nor intervened when this action was instituted, supports the contention that he is not the father of the girl. It is also significant that it was not alleged in the plea that he is her father.

However, as I have indicated, the onus was upon appellant of proving that Nosampula was pregnant when her union with Twalikulu was dissolved. He has not proved this and there is no indication that he has other evidence that could be called. His claim for the delivery of the dowry paid for Nontsontsoyi, therefore, also fails.

The appeal is dismissed with costs.

OPINION OF THE NATIVE ASSESSORS.

Names of Assessors: E. C. Bam, Tsolo. Charlie Mananga, Qumbu, Bazindlovu Dolomisa, Mqanduli.

Question: A man smells out his wife and she returns to her people where she subsequently remarries. When she was driven away the women was pregnant. To whom does this child belong?

Answer: We say that the child belongs to the first kraal to which the woman was married.

In the first place the driving away was not complete. When a woman is driven away her clothes are bundled and put in front of her and she is told to go.

Secondly we say so because when the woman left her husband she was already pregnant.

According to Native Custom if a woman leaves her kraal and returns to her people and has children there, the children belong to her husband as long as the dowry has not been *ketaed*.

Even if this woman, when she left her husband's kraal was not pregnant, and became pregnant while at her people's kraal, that child would belong to her husband as the dowry was not *ketaed*.

Question: If the husband refuses to give his wife her clothes what must she do?

Answer: If she is smelt out, there would be no reason why she should claim her clothes, because her clothes would be bundled up and given to her.

Question: The evidence here is that she was driven away naked and she had to borrow a blanket. She arrived at her people's kraal with scratches and weals on her body.

Answer: That is the usual treatment to the woman, but if the woman has been smelt out her clothes are made into a bundle and must be given to her.

Question: If she is not given her clothes, what then?

Answer: We are not able to give a reply because that is not usual.

Question: What would be the position if her husband's people never go to *putuma* her?

Answer: That would not count for anything.

For Appellant: Mr. Knopf, Umtata.

For Respondent: Mr. Muggleston, Umtata.

CASE No. 143.

ALBERT MAPIKANE *v.* COLIWEYO MNYENDEKI.

UMTATA: 19th June, 1951. Before J. W. Sleigh Esquire, President. Bates and Kelly, Members of the Court (Southern Division).

Native Appeal Case—Practice and Procedure—Onus on defendant—Absolution judgment incompetent.

The late N. left no children in his great house. Plaintiff, the son of his third wife, sued defendant, the son of his second wife, for the wool, sheep, goats and a horse, which stock belong to N.'s great house. Defendant alleged that his mother was appointed seed-bearer to N.'s great wife and therefore claims to be N.'s heir in the great house. The Native Commissioner found that defendant had not proved that his mother had been appointed seedbearer but entered an absolution judgment so as to afford defendant an opportunity of calling further evidence.

Held: That an absolution judgment was incompetent in view of fact that onus was on defendant and he had failed to discharge such onus.

The appeal is allowed.

Cases cited:—

Gcanqa *v.* Gcanqa and Ano., 1 N.A.C. (S) 137.

Sibogo *v.* Raath, 1947 (2) S.A. (T) 624.

Appeal from the Court of the Native Commissioner, Mqanduli.

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

This is an appeal against an absolution judgment in which plaintiff (now appellant) duly assisted sued defendant (now respondent) for certain stock belonging to the great house of their late father, Ndevuzenja, and for £30 the value of four bags of wool.

It appears from the record that the late Ndevuzenja married five wives in the following order, viz.: (1) Nofayile, (2) Mabedla the mother of respondent, (3) Manyawuza the mother of appellant, (4) Mabedla II, and (5) Manxesibe.

It is common cause that Nofayile's children all died. Appellant claims to be the heir in the great house of the late Mdevuzenja and sued respondent for the wool and the sheep, goats and a

horse, which stock, it is common cause, belong to Ndevuzenja's great house. Respondent alleges that his mother was appointed seed-bearer to Notayile and he therefore claims to be Ndevuzenja's heir in the great house.

Among commoners the wives take their rank from the order in which they were married. That is, the first wife married is the great wife, the second the right hand wife, the third is the *qadi* to the great wife, the fourth is the *qadi* to the right hand wife, and so on. As Nofayile, the great wife, left no male issue, the son of the wife affiliated to her house, that is appellant, will be the heir in the great house, and respondent, being the son of the second wife married, will be heir in the right hand house, unless he can prove that his mother was appointed seed-bearer to Nofayile. The evidence of such appointment must be clear and convincing (see Gcanqa *v.* Gcanqa and Ano., 1 N.A.C. (S) 137].

The Assistant Native Commissioner found that respondent had not established his case, but granted an absolution judgment in order to afford him an opportunity of bringing further direct evidence in relation to the meeting at which his mother was declared seed-bearer of the great house.

We agree with the Native Commissioner that respondent has not proved his case. The institution of a seed-bearer is an important affair and is attended with some formality. In consultation with the husband's relatives the bride's rank is publicly declared at the wedding ceremony so that in case of dispute at a later date there would be little room for doubt as to her status. Respondent's witnesses not only contradict each other, but some of them, who ought to know, have no knowledge into which house Mabedla was married.

The Native Commissioner states further that appellant also has not proved his case. We do not agree with him. The parties are agreed that the sheep, goats and the horse appearing on Ndevuzenja's stock card belong to his great house, the values appellant places on the animals and the wool are not contradicted in any way; respondent admits that he is in possession of the stock, and according to the ordinary rules of succession appellant is the heir in the great house of the deceased. There was, therefore, nothing further for appellant to prove.

Appellant has established a very strong case. It was for respondent who wished to oust him to prove the appointment of Mabedla as seed-bearer. He has failed to do so. Why then should appellant be put to the expense of bringing a fresh action. Seeing that the alleged appointment took place about 40 years ago, it is unlikely that many of the people who attended the wedding are still alive. We must assume that respondent, who was represented in the Court below, has called all the available witnesses who could testify in his favour, otherwise application would have been made for a postponement, or the Court would have been requested to call, in terms of Rule 5 (6) of Order XVII of Proclamation No. 145 of 1923, witnesses who might be hostile to respondent. If appellant institutes a fresh action, what would be the position if respondent is unable to produce further evidence? Must appellant be kept out of his inheritance indefinitely? Since appellant has proved his case and respondent has not, the only competent judgment in terms of section 38 of the Proclamation was one for appellant. An absolution judgment was, in any case, incompetent in view of the fact that the burden of proof was on respondent [see Sebogo *v.* Raath 1947 (2) S.A.·(T) 624].

On the 9th November, 1950, and during the course of the hearing of the case the attorneys of the parties agreed to accept, for the purpose of judgment, the number of stock reflected on the stock card of the late Ndevuzenja as the number of stock in existence, but the number of stock is not stated in the record

nor has the card been put in. We are informed that respondent now claims that some of the stock shown on the card are his own property, but he is bound by the admission and appellant is consequently entitled to judgment for the stock so reflected.

The appeal is allowed with costs, the judgment of the Assistant Native Commissioner is set aside and the record is returned to the Court below with the direction to enter judgment for plaintiff with costs for the horse and the wool as claimed in the summons and for the number of small stock reflected on the stock card of the late Ndevuzenja as at the 9th November, 1950, or payment of their value as claimed in the summons.

For Appellant: Mr. Muggleston, Umtata.

For Respondent: Mr. Airey, Umtata.