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VERSLAE

VAN DIE

BANTOE-APPÈLHOWE

1971

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OFFICERS OF THE BANTU APPEAL COURTS, 1971

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CENTRAL BANTU APPEAL COURT

VOORSITTER/PRESIDENT: H. J. POTGIETER: 1/1/71—31/3/71

VOORSITTER/PRESIDENT: C. J. CRONJE: 1/4/71—31/12/71

PERMANENTE LEDE/PERMANENT MEMBERS:
J. R. THORPE, D. O. BOWEN

NOORD-OOSTELIKE BANTOE-APPÈLHOF
NORTH EASTERN BANTU APPEAL COURT

VOORSITTER/PRESIDENT: C. J. CRONJE: 1/1/71—31/3/71

VOORSITTER/PRESIDENT: T. F. COERTZE: 1/4/71—31/12/71

PERMANENTE LID/PERMANENT MEMBER: W. VAN DER MERWE

SUIDELIKE BANTOE-APPÈLHOF
SOUTHERN BANTU APPEAL COURT

VOORSITTER/PRESIDENT: E. J. H. YATES

PERMANENTE LID/PERMANENT MEMBER: A. J. ADENDORFF

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CENTRAL BANTU APPEAL COURT

MIRRIAM MEFANE versus Mr LETSWEYO

JOHANNESBURG: 2 February 1971. Before Potgieter, President, Thorpe and Bowen, Members.

Summary: Unstamped summons signed and issued by Clerk of Court. Dismissal of summons. Costs *de bonis propriis* by Plaintiff's attorney.

Held: Neither a Clerk of Court nor a Judicial Officer is entitled to allow an unstamped document on which a penalty is payable, to be stamped and acted upon until duly validated. An unstamped summons may be dismissed with costs.

Cases and authorities referred to:

Butelezi v. Butelezi, 1953, N.A.C. (N.E.) 158.
Elliott Manqome v. Winati Tole, 1950, N.A.C. (S.D.) 222.
Mtiyane v. Mtiyane, 1960, N.A.C. 46.
Makatini v. Makatini, 1955, N.A.C. 69.
Mahlatsi v. Majola, 1959, N.A.C. 78.
Ochse v. Prinsloo, 1946, O.P.D. 14.
Mteto v. Matomela, 1916, T.P.D. 82.
Warrington & Ano. v. Lucy, 1916, T.P.D. 445.
Badat v. Corindimas, 1947 (2), S.A. 170.
Dick Kuzwayo v. Lawrence Gule, 1950, N.A.C. (C.D.) 25.
Njama v. Mvubu, 1957, N.A.C. 143.
Freeman Kunene v. Cynthia Njokwana Roll, 10/70.
Stamp Duties and Fees Act Sections 8, 9, 12 and 13.
Rules of Court of Bantu Affairs Commissioner, Rules 54, 57, 74 and 90.
Jones and Buckle, Pages 608, 771, 749-750.

Potgieter, President delivering the judgment of the Court.

On 21 October 1969, a summons was sued out by the Plaintiff, (Appellant) against the Defendant (Respondent) and after being signed by the Clerk of the Court, was served on the Defendant's wife on 6 November 1969.

No appearance to defend was entered nor was any plea lodged and nothing further transpired until 2 October 1970. On that date a note appears on the record by the Clerk of the Court that he attempted without success to contact Plaintiff's attorney, telephonically, to ask him to furnish a 50 cent revenue stamp as the summons did not bear any revenue stamp. According to the note, the telephone remained engaged, on 5 October 1970, a further note by the Clerk of the Court appears in the record that he contacted Plaintiff's attorney on that day who intimated that he would bring a 50 cent stamp on 8 October 1970, when the trial would take place.

On 8 October 1970 the summons was before Court the Plaintiff being represented by Mr Mia while Mr Bhoolia appeared for the Defendant. Apparently the date of trial had been fixed by consent of parties as there is no Notice of Set Down nor any request for default judgment in the record.

The whole proceedings were recorded as follows:

"The Court draws attention of Plaintiff's attorney to the fact that the summons was not stamped at all. Plaintiff's attorney informs the Court that he had a 50 cent stamp with him and that he has forgotten to put it on the document. He was aware of the fact that the Clerk of the Court phoned the office that the summons was not stamped.

Mr Bhoolia for Defendant replies that it is not just putting a stamp on the document. The summons was issued a year ago and there is a heavy penalty due to the document. Mr Bhoolia applies for the dismissal of the summons. Mr Mia objects to the dismissal and applies for a postponement and tendering costs.

P. van Wyk, Bantu Affairs Commissioner, Vereeniging, 8 October 1970."

The Commissioner must then have summarily dismissed the summons with costs, the front cover of the record bearing this endorsement and his signature.

Against this judgment, an appeal was noted on the following grounds:

"1. The judgment delivered by the Court is contrary to law.

2. The learned Commissioner erred in dismissing the Plaintiff's summons with costs, and should have at the most, struck the matter off the Roll in view of the fact that the original summons had not been properly stamped, alternatively the learned Commissioner erred in refusing to accept the stamp tendered by the Plaintiff."

The first ground of appeal to the effect that the judgment is contrary to law, is not a valid ground of appeal unless it is stated in what respect it is contrary to law. This principle has been laid down in the case of *Butlelezi v. Butelezi*, 1953, N.A.C. (N.E.) 158 at page 159 as well as in numerous other cases. While this ground of appeal will be disregarded it will not be out of place to comment on an order or judgment dismissing a summons or action. In a matter which goes to trial and is brought to a conclusion, the judgment should be in one of the forms laid down in Rule 57 of the Rules for Courts of Bantu Affairs Commissioners, Government Notice 2083 of 1967. In such a case a judgment "Summons dismissed with costs" may cause confusion and may not correctly express the Court's intention. Such a judgment is equivalent to an absolution judgment, which though a final judgment, still leaves the door open to the unsuccessful party to reopen the matter, vide the cases of *Elliott Mangome v. Winate Tole*, 1950, N.A.C. (S.D.) 222, *Mtiyane v. Mtiyane*, 1960, N.A.C. 46 (N.E.), vide also *Jones & Buckle*, 6th Edition, pages 608 and 771. From these cases it seems that a practice of dismissing an action has developed when the judgment should be one of judgment for Plaintiff. Judicial Officers should therefore be careful to observe the provisions of Rule 57 when delivering judgments at the conclusion of contested cases. A judgment or order dismissing a summons is, however, a lawful judgement but should be reserved

for matters in which there is a flaw or defect in the summons, which cannot normally be cured by an amendment or for some other reason which necessitates the issue of a fresh summons. Dismissal is also competent in terms of Rules 54 and 90 of the Rules.

The second ground of appeal comprises two separate grounds of appeal and will be treated as such viz:

(a) That the matter should have been struck off the roll and not dismissed;

(b) that the Commissioner erred in refusing to accept the stamp tendered by the Palintiff.

In dismissing the summons the Commissioner's action amounted to a complete rejection of the summons. Plaintiff was however not without a remedy viz. the issuing of a fresh summons duly stamped. The question of certain unstamped documents arose in the cases of:

Makatini v. Makatini, 1955, N.A.C. 69.

Mtiyane v. Mtiyane, 1960, N.A.C. 46.

Mahlatsi v. Majola, 1959, N.A.C. 78.

Ochse v. Prinsloo, 1946, O.P.D. 14.

In these cases the actions were merely struck off the Roll. The cases are however distinguishable from the present issue (dealing with applications or notices of appeal) and not with a summons which had been issued and signed by the Clerk of the Court.

In terms of Rule 34 a summons is a document calling upon the Defendant to answer the claim of the Plaintiff and shall be signed and dated by the Clerk of the Court. It is still a summons irrespective of whether it is or is not stamped, if it complies with the requirements of Rule 34. In terms of Rule 79 read with Table C of the second Annexure, a 50 cent duty in the form of Revenue Stamps is payable in respect of every summons in terms of section 8 of the Stamp Duties Act 77 of 1968 (hereinafter referred to as the Act), either at the time of execution or within 21 days thereafter. Certain penalties are prescribed for non-payment of the duty.

In terms of section 12 of the Act no instrument which is required to be stamped shall be made available for any purpose unless it is duly stamped and shall not (except in criminal proceedings or State proceedings for the recovery of a penalty) be produced or given in evidence. The Court may however direct that the instrument be stamped and admitted *provided the penalty incurred is also paid.*

Section 13 of the Act further provides that it is the duty of every public officer to take cognisance of the requirements of the Act and no instrument on which duty is payable may be received, issued, lodged, filed, enrolled or registered unless duly stamped.

There is however nothing in the Act or the Rules for Courts of Bantu Affairs Commissioners which lays down that an unstamped document is a nullity or is void *ab initio*. If such were the case, it would not be possible for any unstamped instrument to be validated. All that the law states is that an unstamped document may not be put to any use whatsoever, subject to the reservation that the State may always call for its production in terms of section 12 (b) of the Act.

In the case of *Badat v. Corondinas*, 1947 (2), S.A. 170 it was held that where an unstamped document is later correctly stamped with validating penalties, the consequences which flow from want of proper stamping are removed with retroactive effect and the document then assumes the status it would have had, had it been properly stamped in the first place. In the case of *Kirt v. Bevern and Co.*, 1907, T.S. 395, referred to in *Mteto v. Matomela,* 1916, T.P.D. 82, an indication is given that an unstamped document may through inadvertence be acted upon, but the court did not find it necessary to decide what result would flow from such inadvertent action. On the authority of *Mteto v. Matomela* (supra) it is clear that the Clerk of the Court should not act on a unstamped document. From the case of *Warrington &Another v. Lucy,* 1916, T.P.D. 445 and the authorities quoted therein, it is evident that an unstamped summons is none the less a valid document but it cannot be put to any use until it is correctly stamped (and validated where necessary).

In the case before us, a summons in correct form was issued and signed by the Clerk of the Court and thereafter served upon the Defendant. Except to brief an attorney no action was taken by the Defendant. Almost a year later the Clerk of the Court drew the attention of the Plaintiff's attorney to the fact that the summons was unstamped. The attorney undertook to rectify the matter but did nothing further and three days later the summons was before Court, presumably for trial. As already indicated there is no indication on the record to indicate how this matter came to be before the Court or on the roll. Be that as it may, both Plaintiff and Defendant were legally represented and there is no record of any initial requests being made by either of them. The Commissioner, then, *mero motu,* drew the attention of Plaintiff's attorney to the fact that the summons had not been stamped. The reply by Plaintiff's attorney was that he had a 50 cent stamp with him but had forgotten to put it on the document. He also conceded that the Clerk of the Court had previously drawn his attention to the omission. At that stage Mr Bhoolia for the Defendant lodged, quite correctly, an objection to the stamping of the document with a 50 cent stamp, pointing out that a penalty was payable, almost a year having elapsed since its issue. He applied for the dismissal of the summons. Mr Mia then applied for a postponement, (for what purpose he does not say) and tendered costs of the postponement.

There is nothing in the record of the proceedings to indicate the Commissioner's line of thought. His judgment as recorded on the record was "Summons dismissed with costs". From his reasons for judgment, it is evident however that the failure of Plaintiff's attorney to take advantage of the indulgence already offered him by the Clerk of the Court, influenced the Commissioner in deciding not to grant any further indulgence in the matter.

The firm representing Plaintiff is one of very many years standing with a considerable practice in civil litigations affecting Bantu persons. An unstamped document emanating from this firm is not due to ignorance of the requirements. It is an indication of negligence. It is further observed that although the summons was served on 6 November 1969, almost a year passed before action was taken. As no appearance to defend or plea was lodged, it is not understood why no application for default judgment was lodged, nor is it clear how the matter came before Court. In any event the Clerk of the Court had been kind enough to contact Plaintiff's attorney regarding the unstamped document. It was then open to the attorney to take immediate steps to regularise the matter. Instead the attorney merely indicated that he would bring the stamp on the day of trial. From the Commissioner's reason it is further noted that Plaintiff's attorney had actually been in the Clerk of the Court's office on that day but before the matter came before Court and yet he still failed to tender a stamp. It was only after the Judicial Officer had referred to the matter that the attorney for Plaintiff indicated that he had a 50 cent stamp with him. At this stage it will be more convenient to dispose of the alternate ground of appeal viz. "the learned Commissioner erred in refusing to accept the stamp tendered by the Plaintiff". There is no legal obligation whatsoever on the Judicial Officer to accept, in Court, a stamp tendered in respect of an unstamped document. Any fees which are payable are to be tendered to the Clerk of the Court in terms of the Rules 79 (4). Secondly it would not be lawful for a Judicial Officer to accept the duty without the penalty also having been paid. When the time has elapsed during which the document may be stamped without a penalty, neither the Judicial Officer nor the Clerk of the Court may accept the document until it has been stamped and validated by an authorised revenue officer in terms of section 12 read with section 9 of the Act. Possibly it is a practice of the Clerk of the Court or even of Judicial Officers to allow litigants to stamp documents after the prescribed period without payment of a penalty. A public officer who grants such indulgence can place himself in an invidious position and can be called upon to defray the loss of revenue due to the State through his failure to insist on the proper validation of unstamped process. The attention of all Clerks of the Court and Judicial Officers is drawn to the proper observance of the requirements of the Stamp Duties Act 77 of 1968. The Commissioner quite correctly declined to accept the 50 cent stamp tendered and this ground of appeal must fail. The judgment in the case of *Ochse v. Prinsloo,* 1946, O.P.D. 14 supports this view.

In regard to the remaining ground of appeal that the summons should have been merely struck off the Roll and not dismissed, it is clear that the Commissioner had a discretion in the matter. In this case the Plaintiff's attorney had had ample warning of the position. He had treated, more or less with contempt, the Clerk of the Court's request to stamp the document. Indeed the Clerk of the Court had, it appears, been prepared to accept the stamp and take no action to recover a penalty. Plaintiff's attorney should after having been contacted by the Clerk of the Court, have taken immediate steps to have the summons correctly stamped and validated by an authorised revenue officer. The summons was in correct form and had actually been issued,

signed and served and, it seems, set down for trial. It was therefore correctly placed before the Commissioner who at that stage was the only competent official to decide what action should be taken. Had there been no objection or request for the dismissal of the summons, it is possible that the Judicial Officer might merely have struck it off the roll which would have necessitated its submission to the revenue authorities before it could be made available in Court. It must be noted that a revenue officer is not obliged to validate an unstamped document. If he is not satified on the *bona fides* of an applicant the document may be rejected *in toto* by him. It should also be noted in the instructions laid down by the Secretary for Inland Revenue at page 253 of the Stamp Duties Handbook under the sub-heading "Penalties" under the main heading "Marketable Securities", that validating penalties are not designed as penalties to be imposed and demanded in every case of failure to stamp, but as a provision enabling a person liable for the stamping or desiring to make use of the document, to obtain validation after satisfying the revenue officer that his failure was inadvertent. In the case before us, in view of the request by the Clerk of the Court and the deliberate holding of the matter over until the trial, it is difficult to see how inadvertence could be pleaded. In the case of *Ochse v. Prinsloo,* 1946, O.P.D. 14, the action of a magistrate in allowing a document to be stamped at the trial was held to be incorrect and it was ordered that the matter be struck off the roll. This however, is not an authority for confining the Judicial Officer to one remedy, viz., striking off the roll. It is clearly in the discretion of the court after considering the facts of each case, to decide whether to strike off the roll or dismiss a summons. Where a party has been given the opportunity of rectifying a defective summons and has failed to do so, the proper course is to grant dismissal on the application of the opposite party. This ground of appeal therefore also fails.

Mr Mia, who appeared before us on behalf of the Appellant in a short address to the court referred only to the case of *Ochse, v. Prinsloo supra,* and moreover did not bring out the full facts of that case. In any event that case disposes completely of his alternate ground of appeal viz. that the Commissioner erred in refusing to accept the stamp tendered at the hearing. The balance of his address was aimed at trying to convince the Court that the better course would have been to strike the matter off the roll and leave it to Plaintiff to have it validated. While in appropriate circumstances there would be substance in such a contention, he defeated his own argument by stating that the dismissal of the summons would have the effect of staying further proceedings until the costs of the present matter had been paid. Such an argument clearly indicates that the merits of the appeal were not the real issue. It was brought primarily with a view to obviating Plaintiff having to pay the costs of the abortive proceedings before proceeding further. The appeal does not therefore appear to be *bona fide.* The question of the stay of further proceedings is in any case, in the discretion of the trial Court and is not automatic, and application for a stay of proceedings having first to be made. It might further be mentioned that in the circumstances of this case, a striking off of the matter from the roll, might defeat its own object viz. the validation of the document. No appearance to defend having been entered

and the time having expired, it would be competent for the summons to be withdrawn by notice to the Clerk of the Court in terms of Rule 54 (1) of the Rules of Court, Thereafter a fresh summons could follow and the payment of any costs or stay of proceedings would have been eliminated.

As the abortive litigation was the result of the action of Plaintiff's attorney in not only not stamping the document but also in not heeding the warning given, and in respect of which the Plaintiff himself had no hand, Mr Mia was afforded the opportunity of an adjournment in order to present arguments to show why costs *de bonis propriis* against Plaintiff's attorney should not be awarded. On the papers there was *prima facie* evidence of negligence and irresponsibility on the part of Plaintiff's attorney. Mr Mia referred us to page 749-750 of *Jones and Buckle* which deal mainly with persons such as trustees, guardians. executors etc., but in this case we are concerned with an experienced firm of attorneys. Mr Mia was unable to advance any argument of any substance against the award of costs *de bonis propriis* against the firm which he was representing. He admitted that the action of the Clerk of the Court in drawing attention to the matter had been conveyed to him and stated he had brought a stamp to Court although he did not actually produce it. In reply to a question by the President he thereafter denied knowledge of the omission but on being queried regarding the stamp which he had said was available, he then corrected himself and claimed that his error was due to forgetfulness. He thereafter attempted to cast the blame on the Clerk of the Court for failure to see that the summons was stamped before issue and urged that the appeal had been brought on the instructions of his client. He did not say that he had advised his client against noting an appeal. His action in attemptng to avoid the results of his own or his firm's negligence by such means is not one that commends itself to this Court.

The Plaintiff is a Bantu female and entrusted her attorney with the conduct of the proceedings. The failure to stamp the document is an omission of her attorney for which normally he must be held personally responsible. He, moreover, did not regularise the summons in spite of being afforded the opportunity to do so. The summons was dismissed on 8 October 1970. An appeal was lodged on a mere technicality. The further prosecution of the action was still open to the Plaintiff. All that was required was the issue and service of a fresh summons, duly stamped. The Court had not insisted on the payment of any penalty on the original summons. It decided to reject it *in toto*. The cost of issuing and serving a fresh summons would scarcely be more costly or more inconvenient than bringing the matter on appeal. If the Plaintiff was advised to bring this matter on appeal instead of proceeding afresh on a new summons. this Court considered that she was ill-advised in the matter. The Plaintiff's attorney was clearly the one at fault in the matter. It was surprising, to say the least of it, that an attorney who is at fault in a matter, should attempt to purge his default, by attempting to rely on the mere technicality of no substance whatsoever. It is difficult to appreciate how a defaulting attorney can expect the indulgence of this Court when he, and he alone, is at fault. The proper course would have been for the attorney concerned to issue and serve at his own personal cost a fresh summons in the matter.

The attention of Plaintiff's attorney is invited to the cases of *Nzama v. Mvubu,* 1957, N.A.C. 143 and *Dick Kuzwayo v. Lawrence Gule,* 1950, N.A.C. (C.D.) 25, and *Freeman Kunene v. Cynthia Njukwana,* Roll 10/70. The Latter case is still to be reported and in that matter the attorney was ordered and agreed without demur to pay costs *de bonis propriis* and on an attorney and client basis, his firm being responsible for a certain degree of negligence.

The appeal is dismissed with costs, the costs of the appeal and the costs of the proceedings in the court *a quo* on 8 October 1970 to be paid by Plaintiff's attorney *de bonis propriis.*

In order to clear up any doubt which may arise through an audit check, it must be recorded that the court *a quo,* in dismissing the action, ruled that the summons was rejected *in toto* and that no further use could be made of it. His action was quite correct and is in accord with the instructions laid down by the Secretary for Inland Revenue. The Clerk of the Court is accordingly absolved from any liability in respect of the unstamped summons which now is a complete nullity and stamping and validating thereof therefore fall away.

H. J. Potgieter, President.

Thorpe, Permanent Member: I concur.

Bowen, Permanent Member: I concur.

For Appellant: Mr H. Helman, P.O. Box 9013, Johannesburg.

For Respondent: Mr R. N. Bhoolia, 101 Macosa House, 17 Commissioner Street, Johannesburg.

CENTRAL BANTU APPEAL COURT

MASEKO versus MOKUBUNG

JOHANNESBURG, 1 April 1971. Before Thorpe, Acting President, Bowen, Permanent Member, and Schultz, Member.

PRACTICE AND PROCEDURE

Application for rescission of judgment granted in absence of party—Distinguished from default judgment—Form of order when application late and cannot for that reason be considered—Rules of Bantu Affairs Commissioner's Courts—Interpretation of "one month after" in Rule 77 (1)*—Position where the rules require something to be done within a certain number of days and the period ends on a Saturday—Procedure where Judicial Officer contemplates giving judgment on grounds other than those mentioned in argument—Meaning of "good cause" in Rule* 77 (5)*—Application for extension of time limit in terms of Rule* 87 (5).

Summary: When after the close of pleadings a claim for monies lent and advanced came before Court the Defendant was informed that her attorney had withdrawn and the case was postponed to enable the Defendant to obtain the services of another attorney. At the postponed hearing the Defendant was not present and judgment was given against her. On her filing an application for rescission late, the Commissioner dismissed the application, the Plaintiff's attorney having made it clear that he would not agree to an extension of the time limit. Thereafter a fresh application for rescission accompanied by a prayer for "condonation" was filed; both these applications were dismissed, the grounds recorded being that the matter was *res judicata.*

Held: That as the earlier application had not been dismissed on the merits a further application could be made if accompanied by an application for extension of the time limit.

Held further: That in the circumstances the prayer for condonation must be regarded as an application for extension of the time limit.

Held further: That an application in terms of Rule 87 (5) should be brought only if a request for written consent to the extension of a time limit had been refused.

Held further: That in the present case it had been made clear that consent would be refused and the failure to ask for it could be overlooked.

Held further: That as the Defendant had not shown "good cause" as required in Rule 77 (5) the application for rescission could not succeed and the application for extension of the time limit should be refused.

Quaere: Whether evidence is necessary before judgment in the absence of a Defendant can be granted where the claim is liquidated but there is a plea denying liability, discussed.

References:

Bantu Affairs Commissioner's Courts Rules 1 (2), 43 (6), 76 (a), 77 (1) read with 77 (8), 77 (5), 87 (5) and 90 (2).

Jones and Buckle: "Civil Practice of the Magistrates' Courts in South Africa" Sixth Edition, pages 359, 675 and 682.

Shorter Oxford English Dictionary.

Du Plessis versus United African Furnishing Co., 1921, O.P.D. 156.

Moore versus Van Heerden, 1928, E.D.L. 208.

Versfeld versus S.A. Railways, 1937, C.P.D. 59.

Nair versus Naicker, 1942, N.P.D. 3.

Silber versus Ozen Wholesalers (Pty) Ltd, 1954 (2) S.A. 345 (A.D.).

Sparks versus David Polliack & Co. (Pty) Ltd 1963 (2) S.A. 491 (T.).

Grobler versus Die Landdros, Winburg, 1967 (4) S.A. 423.

Mlandu & Ors versus Mpupu, 1947, N.A.C. (C. & O.) 53.

Bitya versus Kabinyanga (1950), 1 N.A.C. (S) 228.

Kalipa versus Fose, 1953, N.A.C. (S) 100.

Sibentele versus Matole, 1964, N.A.C. (S) 22.

Interpretation Act 33 of 1957 sections 2 and 4.

Appeal from the Court of the Bantu Affairs Commissioner, Germiston.

Thorpe, Acting President:

The Appellant will be referred to as the Defendant and the Respondent as the Plaintiff.

This is an appeal against a judgment delivered on the 17th April 1970, by the Bantu Affairs Commissioner, Germiston, wherein he dismissed (a) an application for "condonation" of the late filing of an application to rescind a default judgment granted on the 17 February 1970, and (b) the application for rescission which was made in the same papers.

The Plaintiff had sued for payment of R1 610,12 being moneys lent and advanced. On 25 July 1969, the summons was served personally on the Defendant at her shop and she should have entered an appearance to defend *within* seven days of that date. To determine when that period ended reference must be made to Rule 1 (2) of the rules for Bantu Affairs Commissioner's Courts and to the Interpretation Act 33 of 1957. Rule 1 (2) lays down that where anything is required to be done within a particular number of days a Sunday or public holiday shall not be reckoned as part of such period and section 4 of the Interpretation Act provides that the period is to be reckoned exclusively of the first and inclusively of the last day. The period therefore ended on Saturday, 2 August. It is common knowledge that the Clerk of the Court's Office is not open on a Saturday (due to the introduction of the five day week in 1964) and the question arises whether the seven day period could for this reason be regarded as extended to Monday 4 August. The answer is to be found in *Grobler v. Die Landdros,*

Winburg, 1967 (4), S.A. 423 from 426, in which the Appellate Division in dealing with the interpretation of a Magistrate's Court rule which was at that time worded identically to that of Rule 1 (2) above held that the litigant was required, where the period ended on a Saturday, to comply with the rule by the preceding Friday. Consequently the Defendant should have entered appearance to defend by Friday 1 August. Apparently she did nothing until 4 August when she consulted an attorney Kraitzick who on that day *posted* an appearance to defend being "under the impression" that he would be in time. Although Mr Kraitzick is partly responsible the delay was mainly due to the Defendant; it resulted in a default judgment being granted against her, though this was rescinded without opposition on 26 August 1969.

Further particulars to the summons were requested (but not until 9 September) and despite the fact that a reply was received the following day there was more dragging of the feet before the Defendant's plea denying liability was prepared on 29 October, apparently after receipt of a notice of bar. On 3 November the case was set down for trial on 20 January 1970. On 9 January the Clerk of the Court received a notice in terms of which Mr Kraitzick withdrew as Defendant's attorney. The Defendant at no time attempted to show that Mr Kraitzick's withdrawal was unjustified and the assumption must be that the Defendant had not fulfilled her duties as a client. The notice of withdrawal indicates that a copy thereof was sent to the Defendant and she did not deny receiving it. On 20 January the Plaintiff and the Defendant (the latter without her attorney) were both in Court. The record shows that on the Defendant's asking for a postponement the case was postponed to 17 February, but the reason why the request was acceded to is not disclosed, as it should have been.

On 17 February the Defendant was not at Court and judgment was again granted against her, with costs. No evidence was led.

It is to be noted that this was not a default judgment *stricto sensu.* The term "default judgment" in this sense relates to a judgment granted when the Defendant has failed to comply with the rules as to entry of appearance or plea; the default relates to procedure and where there is such a default it is possible for a judgment to be entered despite the Defendant's presence in court. The judgment in the instant case is a "judgment in the absence of the person against whom that judgment was granted" as described in Rule 76 (a). That a distinction exists is clear if Rule 77 (1) is read with Rule 77 (8). The procedure where it is sought to rescind either kind of judgment is the same and whether anything substantial flows from the difference is uncertain. In a number of cases dealing with rules apparently similar to those now in force it was held that where a plea is filed, the Judicial Officer must take evidence, or, as was said in *Bitya v. Kobinyanga* (1950), 1 N.A.C. (S) 228 at 230 "in any event there must be a trial in the sense that the court must decide whether the claim is just or not". See also *Mlandu & Others. v. Mpupu,* 1947, N.A.C. (C & O) 53 at 55 and *Kalipa v. Fose,* 1953 N.A.C. (S) 100 at 102. it will be noted that these three

cases are from the Southern Bantu Appeal Court, as it is now known. However, the same Court in the case of *Sibentele v. Matole,* 1964, N.A.C. (S) 22 at 24 expressed the view that evidence was not necessary "for, were it otherwise, one would expect a specific provision in the Rule [Rule 87 (2)] as in the case of Rule 41 (7). That this is the position gains support from the judgment in *Sparks v. David Polliack & Co. (Pty) Ltd,* 1963 (2) S.A. 491 (T) at page 495." The current rules corresponding to those mentioned in the excerpt are Rules 90 (2) and 43 (6) respectively. Whatever the correct position may be the fact that no evidence was led before judgment was granted in the instant case is not a ground of appeal and it is not necessary to decide whether this was a fatal defect.

On 19 February a notice was sent to the Defendant by registered post that a bill of costs would be taxed against her on the 26th idem.

On 9 March the Defendant's shop was placed under judicial attachment.

On 25 March another firm of attorneys, H. W. Chain & Chain, filed on behalf of the Defendant an application to rescind the judgment of 17 February. In such matters Rule 77 (1) read with Rules 77 (8) and 76 (a) applies. This rule is as follows:

"77 (1). Any party to an action in which a default judgment is given may within *one month after* such judgment has come to the knowledge of the party against whom it is given apply to the Court to rescind or vary such judgment."

Rules 77 (8) and 76 (a) make these provisions applicable also to a judgment granted in the absence of a party, which is what was granted in the present case.

In her supporting affidavit the Defendant averred that she had first learnt of the judgment on 24 February. Assuming this date to be correct (although its correctness is by no means proven) the question arises whether the application was in time, that is, was it filed in time. The first point to be considered is the meaning of the word "month" in Rule 77 (1). Section 2 of the Interpretation Act 33 of 1957, states that the word means "calendar month" and from Steyn's "Die Uitleg van Wette", Third Edition, page 154, it appears that one calendar month is the period which runs from a certain date in a given month to the corresponding date less one in the following month and this has been accepted as the position in a number of cases including *Du Plessis v. United African Furnishing Co.,* 1921, O.P.D. 156 and *Nair v. Naicker,* 1942, N.P.D. 3. In passing, these authorities illustrate the caution with which the Shorter Oxford English Dictionary must be used, because there *sub voce* "calendar" an example of a calender month is given as being from the 17th of a month to the 17th of the following month. *Nair* makes it clear that where the period in question is expressed in terms of weeks, months or years, whether in a contract or statute, "the period will expire at the end of the day preceding the corresponding calender day. Thus a period of two weeks from a Sunday will expire at the close of a Saturday, a period of two months from 1 March at the close of 30 April, and a period of one year from the 1st January at the close

of 31 December." The second point concerns the commencement of the calendar month. In this connection it is clear that where a statute or rule of court says "a month after" an event, the calendar month includes the day of the event, the event in the present instance being the learning by the Defendant of the judgment. See *Nair supra* which on this point dissented from *Versfeld v. S.A. Railways* 1937, C.P.D. 55.

From the foregoing it is clear that the application for rescission filed on the 25th March was two days late and when the application was heard on 31 March Mr Goldin, who appeared on behalf of the Defendant's attorney, informed the Court that he withdrew it for this reason. The Commissioner however apparently did not regard it as withdrawn and at the request of the Plaintiff's attorney he dismissed it with costs. It is not necessary to consider whether it was competent for the Court to dismiss an application that had been withdrawn. Suffice it to say that as the application had not been dismissed on the merits a fresh application for rescission could be made and entertained provided the time limit had first been extended in terms of Rule 87 (5), either by written consent or by the Court on application; alternatively, provided, as is the general practice, the application for rescission was accompanied by an application for extension of the time limit, if written consent had been refused. From his reasons furnished later it would appear that the Commissioner had thought that by dismissing the application on the 31st March the default judgment granted on the 17th February had thereby become a final judgment in terms of Rule 71 (7). That this is not so is clear from what Jones and Buckle *op. cit.* say at page 682 in dealing with a rule worded identically to Rule 71 (7). If the application had still been before the Commissioner the correct course would have been to strike it off the roll. Jones and Buckle *loc. cit.*

As was to be expected a further application for rescission of the judgment granted in the Defendant's absence on 17 February was filed soon afterwards and included therein was a prayer for "condonation" of the filing of the application for rescission of judgment. Advocate Borolsky who appeared before us on behalf of the Plaintiff pointed out quite correctly that the only rule which provided for relief where timeous steps had not been taken was Rule 87 (5), which reads:

"87 (5) Any time limit prescribed by these rules may at any time whether before or after expiry of the period limited be extended—

(a) by the written consent of the opposite party; and

(b) if such consent is refused, then by the court. . . "

In connection with this rule Adv. Borolsky made two submissions. The first was that the only prayer relating to the late filing was a prayer for condonation and that this was not the same as an application for extension of a time limit. We ruled against this submission as the practice for years has been often to refer to application for extension of time limits as application for condonation. The second submission was that no application for extension of the time limit of one month could be considered until written consent had been requested and refused. Here again we did not agree with counsel, as, in our view, it would have

been pointless to ask the Plaintiff's attorney for such written consent when he had already indicated his opposition to an extension by applying for dismissal of the former application after it had been withdrawn.

The last application for rescission must therefore be regarded as containing an application for an extension of the time limit. It was accompanied by affidavits by the Defendant and by a Mr Ziman, an articled clerk in the firm of H. W. Chain & Chain. The applications were set down for hearing on the 17th April. On the 16th April an affidavit damaging to the Defendant's application was served on the Plaintiff's attorney, who clearly had every right to expect that a postponement to enable him to reply would have been granted if he had asked for it. However, on the 17th no postponement was requested and the matter was argued on the merits. But despite the fact that both attorneys confined themselves to the merits the Commissioner, without giving the attorneys an opportunity to make their submissions on the point, recorded in effect that the matter was *res judicata* and dismissed the applications for condonation and rescission. It has already been shown that this reasoning is wrong, but apart from this the procedure adopted by the Commissioner cannot be commended. If a judicial officer considers that an issue before him could be disposed of on a point not raised in argument it is desirable that he should afford the parties an opportunity to address him thereon and there is no reason why this procedure should not be followed where the attorneys are still before him as they were in this case, according to the record. Incidentally, before us counsel for the Plaintiff could not support the reasoning of the Commissioner although he submitted that the judgment was correct on the merits.

Appeal was noted on the grounds, in effect, that the Commissioner erred in not finding for the Defendant on the merits of both applications. During argument before us we suggested that as the Commissioner had not considered the merits his judgment should be set aside and the case remitted for his further consideration after the Defendant had been afforded an opportunity to reply to the allegations in the Plaintiff's affidavit. However, Mr Chain, who represented the Plaintiff both in this Court and in the Court below, informed us that he did not think that this course would assist the Defendant and submitted that on the papers as they stood this Court should decide that both applications should be granted. Adv Borolsky was also opposed to a remittal.

In the circumstances I feel that this Court must conclude the matter of the two applications on the material before it.

In general, when considering requests for extension of time, the various shortcomings of a Defendant are matters to be left over for consideration upon a determination of the application for rescission, "save in so far as it may be proved that the Appellant's conduct has been such as to deprive him of any claim to present indulgence or any reasonable hope of success in the application for rescission." *Moore v. Van Heerden,* 1928, E.D.L. 208 quoted at p 762 of Jones and Buckle *op. cit.* In view of this dictum and as the facts and allegations relating to the one application throw light on the other I shall deal with both applications simultaneously.

Rule 77 (5) lays down the circumstances in which rescission may be granted. The rule reads:

"77 (5). The Court may on the hearing of any such application, unless it is proved that the applicant was in wilful default, and if good cause be shown, rescind or vary the judgment in question . . ."

Now, *Silber v. Ozen Wholesalers (Pty) Ltd,* 1954, (2) S.A. 345 (A.D.) at 353A in dealing with a similarly worded rule of the magistrate's courts lay down in relation to "good cause" that "the Defendant must at least furnish an explanation of his default sufficiently full to enable the Court to understand how it really came about, and to assess his conduct and motions".

The onus of showing good cause is on the Defendant and in my view a consideration of whether this onus had been discharged will dispose of the appeal and it will not be neccessary to establish affirmatively whether it has been proved on the probabilities that the Defendant was in wilful default. I shall accordingly confine myself to the aspect of "good cause".

The Defendant was asking that her absence from Court on 17 February should be excused. According to the record this was the date to which the case had been postponed in her presence. This meant that the Defendant's task should have been primarily to furnish an explanation as to how this had come about and to satisfy the Court that she had done at least the minimum that could have been expected of her. In this connection all the Defendant said in her affidavit was that on 20 January the Court interpreter had told her that the case had been postponed to 24 February. She did not say why the case had been postponed. As already mentioned the Plaintiff filed an answering affidavit to which the Defendant did not reply. In his affidavit the Plaintiff alleged *inter alia* that on the 20th January he was present when the Court drew the attention of the Defendant to the fact that her attorney, Mr Kraitzick, had filed a notice of withdrawal and that the Defendant then asked for the matter to be postponed to enable her to obtain the services of another attorney and that he then distinctly heard the interpreter inform both the Defendant and himself that the case been postponed to 17 February. Whether the Plaintiff's allegations as to what the Defendant was told in Court and as to the reason for the postponement were correct or incorrect they called for a reply from the Defendant. As there was no reply the allegations must be accepted as correct and it remains to decide whether the Defendant did the minimum that could have been expected of her between 20 January and 24 February, the date to which she said the case had been postponed. Did she endeavour to obtain the service of another attorney? The first time, according to the Defendant, that she consulted another attorney was the 12th March when she went to H. W. Chain & Chain. According to the Defendant, when she discovered on 24 February that judgment had been granted against her she wanted to see Mr Kraitzick to ascertain the reason. Does this means she still regarded him as her attorney? She could have so regarded him only if she had consulted him since the 20th January but in the absence of affidavits from the Defendant and Mr Kraitzick

and of anything in the record to indicate that Mr Kraitzick was once more her attorney the probability that she still regarded him as such must be discounted. Mr Chain suggested to us that it is possible that the Defendant intended to conduct her case in person on 24 February; this she did not say and that such was the position seems improbable in view of the fact that she acted only through attorneys both before and after that date.

In the papers doubt was thrown on the Defendant's going to Court at all on 24 February. Corrobarative evidence should have been available either from the Court interpreter whom she says she saw on that date or from someone else, but no such evidence was tendered nor an explanation offered for its absence.

In his affidavit the Plaintiff says that the Defendant must have received the notice of taxation sent to her by registered post on 19 February; the Defendant does not deny it and if she did go to Court on 24 February it is possible that she went not because she thought that the case had been postponed to that date but to enquire about the bill of costs. There is nothing in the record to indicate that any date of postponement other than 17 February had ever been mentioned by anyone, nor was the date so far ahead that confusion should have arisen for that reason. Concerning the period from 20 January to 24 February, both dates inclusive, the Defendant gave no explanation which would enable the court to assess the Defendant's conduct and motives. It was not sufficient for the Defendant to make the uncorroborated statement that the interpreter had told her that the date of postponement was 24 February; indeed, the probabilities are against her because it seems that the interpreter spoke to both parties simultaneously and the Plaintiff came to court on the correct day. Although the postponement was granted at the Defendant's request to enable her to take certain steps, it would appear that she did nothing and never intended to do anything; such an attitude would be of a pattern with her previous conduct.

The explanation furnished by the Defendant of her conduct after 24 February is also unsatisfactory. It would seem that it should be accepted that the Defendant consulted Mr Ziman on the 12 March, a date confirmed by Mr Ziman, but what had occurred in the 15 days from 24 February to the latter date has not been properly explained. The Defendant stated in her affidavit that she had tried to see Mr Kraitzick on the day following 24 February and "on two other occasions" but she gave no dates nor did she say when the last occasion was. It is not improbable that she would never have consulted Mr Ziman were it not for the fact that her shop had been placed under attachment on 9 March.

In my view the Defendant has not shown "good cause" as required by Rule 77 (5) and the application for rescission would have to be refused, even if the time limit for its filing were to be extended.

As far as the lateness of the application filed on 25 March is concerned, much of the blame could be attributed to Mr Ziman's failure to take other steps when he could not

contact Mr Kraitzick between 12 and the 23 March despite his telephoning him on "various occasions" (no dates were given). Even though it seems that Mr Ziman was ignorant of Rule 77 (1) whereby the application should have been filed by the 23rd March, he should at least have realised that time was pressing and, on his failure to contact Mr Kraitzick timeously, he should have, for instance, inspected the original record, either personally or through his correspondent. On the other hand the Defendant did consult Mr Ziman sufficiently early to enable him to make the application for rescission in time and if the Defendant's conduct since the service of the summons upon her had been more satisfactory and there had been some prospect that the application for rescission could succeed, I think that the time limit should have been extended. However, these conditions are not present and in view of the dictum in *Moore v. Van Heerden* quoted earlier the application for extension of the time limit should be refused.

The appeal is dismissed with costs.

J. R. Thorpe, Acting President.

Bowen, Permanent Member: I concur.

Schultz, Member: I concur.

For Appellant: Mr E. Chain of H. W. Chain & Chain, Johannesburg.

For Respondent: Adv H. Borolsky i/b S. Wade, Germiston.

IN THE SOUTHERN BANTU APPEAL COURT

B.A.C. CASE 44 of 1970

ZALISILE MZOBOSHE versus DABALAZA TIKIPENI

UMTATA: 20 January 1971. Before Yates, President and Messrs Adendorff and Scholtz, Members.

DAMAGES

Quantum of damages awarded for physical assaults

Summary: In an action in which Defendant alleged that he had "marked" an adulterer.

Held: That the assault was excessive. Plaintiff spent a week in hospital. He suffered no permanent injury. Damages reduced to R100 for pain and suffering.

Appeal from the Court of the Bantu Affairs Commissioner, Umtata.

Yates (President) delivering the judgment of the court:

The first matter to be considered here is an application for condonation of the late noting of the appeal. Judgment was given on 17 March 1970, and the appeal was noted on 10 September 1970.

It appears from the affidavits filed with the application that Plaintiff who was employed in Cape Town, travelled to Umtata for the hearing on 18 September 1969, and returned to work before the case was concluded. His attorneys wrote to him on 25 March advising him of the judgment on 17th idem and he received the letter only on 7 April 1970. He wished to appeal and consulted a firm of attorneys and was advised to first obtain a copy of the record which was only received subsequent to 14 July 1970. His attorney then proceeded to note an appeal.

There was, of course, no reason why an appeal should not have been noted timeously in general terms pending the receipt of the record, see *Ngcamu v. Majoji,* 1959, N.A.C. 74 (N.E.), and furthermore the long delay which ensued after the receipt of the record and before the appeal was noted has not been satisfactorily explained.

It remains to enquire whether the appeal has any reasonable prospect of succeeding and as, in the view of this court, the Applicant has such prospect the late noting of the appeal is condoned. See *Tong v. Ntwayabokwene,* 1956, N.A.C. (S) p. 188 at p. 190.

This is an appeal from a judgment of a Bantu Affairs Commissioner's Court awarding Plaintiff (now Respondent) damages of R500 and costs in an action in which he sued Defendant (now Appellant) for R1 000 alleging:

"2. That on or about 28 December 1967, the Defendant wrongfully and unlawfully assaulted the Plaintiff with a sword, knobstick and sharp instrument, giving unto him severe wounds and injuries on his head and body, as a result of which he suffered much pain and anguish and still so suffers.

3. That *inter alia*, the Plaintiff received 10 open wounds on the head, a stab above the right eyebrow, a stab in the right ear, and numerous weals on the body and legs and was detained in hospital for a period of seven days.

4. That by reason of Defendants wrongful and unlawful attack on the Plaintiff as aforesaid, he has suffered damage in the sum of R1 000 which amount the Defendant neglects and refuses to pay although called upon so to do."

Defendant pleaded as follows:

"2. Defendant admits that he assaulted the Plaintiff but states that he did so by reason of the fact that he 'caught' Plaintiff with his, Defendant's, wife and attempted to mark the Plaintiff in accordance with custom. Plaintiff attempted to escape and also at first showed resistance.

3. Defendant has no knowledge of the wounds as alleged and puts Plaintiff to the proof thereof.

4. Defendant denies the allegations contained in Paragraph 4 and puts Plaintiff to the proof thereof. In amplification Defendant states that bearing in mind the provocation of Plaintiff, the Court in a Criminal charge brought by Plaintiff against the Defendant, cautioned and discharged the Defendant."

Defendant also lodged a counterclaim against plaintiff for damages of three head of cattle or R90 for the alleged "catch." An absolution judgment was granted in respect of the counterclaim and defendant (Plaintiff-in-reconvention) was ordered to pay the costs.

An appeal has been noted against the award of damages on the grounds:

"1. The judgment is against the weight of evidence and on the balance of probabilities the Respondent's claim should have been dismissed;

2. The Court should have found that Respondent had in fact committed adultery with Appellant's wife in the event of the Court granting judgment against Appellant. Respondent's damages should have been greatly reduced by virtue of extreme provocation caused by Respondent;

3. There was no medical evidence whatsoever and the Medical Report handed to Court should have been ruled inadmissible as it was not properly identified.

4. That in the circumstances the award of R500 damages was excessive."

As stated by the Additional Bantu Affairs Commissioner in his "Reasons for judgment" the defendant had admitted the assault so that the court was required to decide whether he had caught plaintiff and his wife in adultery and if so whether or not he had used excessive force in "marking" the adulterer.

The plaintiff's version is that he and his companion, Siqekebu, who gave corroborating evidence, where on their way at midday to wash at the river when they were hailed by Defendant's wife, Mombele, who asked them to wait for her and that subsequently Defendant and his brother arrived. Defendant said he had "caught" him and assaulted him with a sword and a knob stick, knocking him down and inflicting severe injuries. He was taken to a hut where he remained until his father arrived and after hearing Mombele's story paid R80 as damages for adultery. He was then taken to hospital where he was treated for a week. The police at a later stage returned the money and Defendant and his brother were charged with assault. Defendant was cautioned and discharged.

According to the Defendant he was returning home and was still a considerable distance (3 miles indicated) away when he saw his wife and the Plaintiff going to the donga. When he arrived they were lying down with their arms around each other. Plaintiff saw him and attempted to attack him but he hit Plaintiff three times and knocked him down. Defendant's wife stated that she had met Plaintiff by arrangement but that he had preceeded her and was waiting for her in the donga, where they had intercourse before being caught.

In view of this material discrepancy and the surrounding circumstances the Commissioner rejected Defendant's version and this court has not been persuaded that he was wrong in doing so.

However, even had the circumstances in which Defendant found Plaintiff and his wife been somewhat suspicious, there is no doubt that the assault was unnecessarily severe. Mr Mpotulo argued that the contents of the medical report were inadmissible in the absence of evidence by the doctor who completed it but as pointed out by the Commissioner in his "reasons for judgment" he did not regard the report as evidence of the nature of the wounds but only as evidence in support of Plaintiff's statement that he had been severely assaulted. Furthermore particulars of the injuries were set out in the summons and Plaintiff who testified that he was stabbed above the right eye and top of ear and also showed scars on both his elbows and stated that the assault continued after he fell to the ground, was not cross-examined as to the extent of his injuries. It is clear that he was seriously assaulted and spent a week in hospital but there does not appear to have been any permanent injury and in fact he returned to work less than two months later.

In regard to the question of damages the difficulties attendant in making a fair assessment of damages for pain and suffering are referred to in the case of *Sandler v. Wholesale Coal Supplies Ltd,* 1941, A.D. at p. 199. It is sometimes helpful and instructive to have regard to awards of damages by Courts in comparable cases. See *Hulley v. Cox,* 1923, A.D. 234 at p. 246.

R120 was awarded where as a result of an assault a large piece of bone was removed from Plaintiff's head and a year later he was still limping. He spent 27 days in hospital and was treated for another month as an outpatient—see *Mvelase v. Njokwe and two others,* 1961, N.A.C. 46 (N.E.). In the case of *Bocllimyi & Ncobela,* 1961 N.A.C. 36 (S) R300 was awarded where Plaintiff was still suffering pain six months after the assault and in addition there was an impediment in his speech and a slight disability in his right arm and leg which would probably persist. R100 was awarded for pain and suffering where Plaintiff suffered considerable pain, underwent two operations which left one leg shorter than the other and virtually no movement in the knee joint, vide *Mkwanazi v. Langa,.* 1965, B.A.C. 54 (N.E.). See also the numerous decisions cited in pages 353-358 of Bantu Law in S.A. by Seymour (Third Eddition).

Taking all the circumstances of the instant case into consideration the amount awarded for pain and suffering is in my opinion too high and should be reduced.

The appeal is therefore allowed with costs and the judgment of the Additional Bantu Affairs Commissioner altered to read "For Plaintiff damages in the sum of R100 with costs.

On the counterclaim absolution from the instance, Defendant (Plaintiff-in-reconvention) to pay costs."

Adendorff and Scholtz, Members, concurred.

For Appellant: Mr S. M. Mpotulo.

For Respondent: Mr A. T. Berrange.

King William's Town, 22nd January 1971.

IN THE SOUTHERN BANTU APPEAL COURT

B.A.C. CASE 45 OF 1970

SINOSE TSHAKA versus BENJAMIN NJIKWA

UMTATA, 20 January 1971. Before Yates, President, and Messrs Adendorff and Scholtz, Members.

Adultery—Commission in room occupied by children contrary to custom but not unknown. Discrepancies in evidence of witnesses—role of Appeal Court in an appeal on fact.

Summary: The evidence of Plaintiff's wife that during his absence she had cohabited with her cousin was confirmed by her younger sister who stated that when Defendant visited they had all slept in the same room.

Held: That this was contrary to custom but not unknown. In regard to discrepancies in the evidence of Plaintiff's wife and her sister:

Held: That the Commissioner in the Court *a quo* was in the best position to evaluate the evidence and he must be shown to have been wrong before an Appeal Court would alter a judgment in an appeal based on fact.

Appeal from the Court of the Bantu Affairs Commissioner, Umtata.

Yates (President) delivering the judgment of the Court:

This is an appeal from a judgment of a Bantu Affairs Commissioner's Court for Plaintiff (now Respondent) as prayed with costs in an action in which he sued Defendant (now Appellant) for customary damages of five head of cattle or their value R150 alleging that Defendant had committed adultery with his wife, Nomelinjani, and had rendered her pregnant. Defendant denied the allegations.

An appeal has been brought against the judgment on the following grounds:

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

2. That the judicial officer erred in finding for the Plaintiff, for one or more of the following reasons:

(a) He failed to take into account and give due and proper consideration to the many discrepancies in the evidence of Nomelinjani, the wife of the Plaintiff, and the young girl Nomsiti.

(b) He further failed to consider that it is contrary to Bantu Law and Custom for a Bantu female to commit adultery in the presence of a child.

(c) That in view of the discrepancies in the evidence of Plaintiff's wife and Nomsiti the Judicial Officer also failed to scrutinize with care the evidence of the said Nomsiti who is a child 12 years of age.

(d) The Judicial Officer further failed to take notice of the fact that although it is alleged by Plaintiff's wife that she informed the family meeting, which was called when her pregnancy was discovered, that Nomsiti knew about her love affair with Defendant, this party was not called or questioned by the meeting nor was the said witness taken when the report of the pregnancy was made at the kraal of the Defendant."

Nomelinjani's evidence that during her husband's absence at work she accepted a proposal of love from his cousin, the Defendant, in March of 1968, and that they cohabited until October of that year and that a child was born in December was corroborated by her younger sister, Nomsiti, who was 11 years old at the time.

Mr Berrange who appeared for Defendant drew the Court's attention to various factors which militated against the Paintiff's case. He pointed out that it is contrary to custom for adultery to be committed in the presence of children and cited the cases of *Dlula v. Ncanywa,* and *Mrwitshi v. Madubela,* 1939, N.A.C. (C. & O.), at pages 46 and 73 respectively. However, in the latter case it is stated that such conduct is not unknown and the reluctance is not due to fear of demoralising the children but because they make the matter known. In the instant case, as pointed out by Mr Muggleston who appeared for Respondent, there was only one hut at Plaintiff's kraal which provided a reason for this unusual conduct.

Secondly neither when the family meeting was called after the discovery that Nomelinjani was pregnant nor when the stomach was taken to Defendant's kraal was Nomsiti called to confirm Nomelinjani's story, which is what one would have expected. However, it is clear from the evidence of these two girls that she was questioned by men of the family before the birth of the child. She later gave evidence in the Chief's Court.

Finally Mr Berrange drew attention to various discrepancies in the evidence of Nomelinjani and Nomsiti.

In her evidence in chief Nomsiti stated that she stayed at Plaintiff's kraal from green mealie season, i.e. March/April until after the child was born in December so that it is surprising that she only saw Defendant four times bearing in mind Nomelinjani's evidence that he visited her two or three times a week. According to her evidence Defendant visited the hut on four successive nights whereas according to Nomelinjani the relevant visits took place over a period of about 10 days. That Nomsiti did stay at the kraal and slept in Nomelinjani's hut for some time was confirmed by Defendant. Under cross-examination Nomsiti at first confirmed that she had stayed until after the birth of the child but later contradicated herself and said that she only stayed there for two weeks.

Nomelinjani stated that on the first occasion Defendant came late at night when she and Nomsiti were already in bed. She heard a knock and instructed Nomsiti to open the door. However, according to Nomsiti it was early in the evening and she and her sister were seated next to the fireplace when Defendant arrived and her sister opened the door. They then made up their own beds.

On the second occasion, according to Nomelinjani, Nomsiti was already asleep when Defendant arrived. He called to her to ascertain whether she was asleep and she then woke up and went out to pass water. Nomsiti's evidence in this regard, however, is somewhat contradictory for she first said Defendant woke her up by asking if she was asleep and then said she was not asleep and he did not ask her if she was.

Nomelinjani stated that she and her sister were preparing a meal when Defendant arrived for the third time but he refused to eat whereas Nomsiti made no mention of this but merely said that Nomelinjani told her to prepare her bedding.

Both stated that on the last occasion that Nomsiti saw Defendant he was drunk when he arrived but whereas Nomsiti said that after her sister had removed the Defendant's shoes at his request he assaulted her for not opening the door herself. Nomelinjani said that she was assaulted because she refused to take off his shoes.

Mr Muggleston conceded that there were discrepancies in the evidence of these two witnesses but contended that they had been taken into account by the presiding officer. His argument that on material points the witnesses had given corroborating evidence and only differed in regard to detail is borne out by a perusal of the record and as pointed out by him may well be due to Nomsiti's tender age and her inability to recollect clearly details of several similar visits which had taken place some two years previously.

Mr Muggleston also stressed that it was unlikely that Nomelinjani, without good cause, would fabricate a case and implicate a close relative (Plaintiff's cousin) bearing in mind the disgrace that that would bring on the family; or that when the stomach was taken to Defendant's kraal Nomelinjani would have said that she was in love with another man, Matanjana Hlatana, as stated by Defendant in his evidence. He also pointed out that Nomelinjani's evidence that Defendant gave her 25 cents to buy pills "to get rid of the stomach" was not rebutted.

In considering an appeal on fact it must be remembered that the Trial Court has seen and heard the witnesses and is in a better position to estimate the credence to be placed on their testimony. An appellate tribunal will be slow to interfere with the judgment of the Trial Court and must be convinced that the Lower Court's decision is wrong before upsetting it. See that cases cited in Warner's Digest of S.A. Native Civil Case Law at paragraphs 504-509.

It is clear from his "reasons for judgment" that the Assistant Bantu Affairs Commissioner considered the discrepancies in the evidence of these two witnesses carefully and came to the conclusion that their testimony could be relied upon. This Court has not been persuaded that he was wrong or that the discrepancies were so material as to destroy their credibility.

The appeal therefore is dismissed with costs.

Adendorff and Scholtz, Members, concurred.

For Appellant: Mr A. T. Berrange.

For Respondent: Mr K. Muggleston.

King William's Town, 2 February 1971.

IN THE SOUTHERN BANTU APPEAL COURT

B.A.C. CASE 47 of 1970

NQGODOLO RUNGU versus **PETER KWATSHANA**

KING WILLIAM'S TOWN: 9 March 1971. Before Yates, President and Messrs Adendorff and Bouchier, Members.

DAMAGES FOR ASSAULT

Quantum—For loss of eye—restricted vision of other eye—multiple facial injuries.

Summary: General damages of R200 were awarded against Defendant for injuries suffered by Plaintiff as a result of an assault in which he lost his right eye and may still lose his left eye. In addition he sustained multiple facial injuries and lacerations of the head.

On appeal the amount awarded was increased to R400.

Appeal from the Court of the Bantu Affairs Commissioner, Observatory, C.P.

Adendorff (Permanent Member) delivering the judgment of the Court:

This is an appeal from a judgment of a Bantu Affairs Commissioner's Court awarding to Plaintiff (now Appellant) damages of R200 with costs in an action in which he claimed from Defendant (now Respondent) the amount of R2 000 for damages for an assault upon him. In his further particulars Plaintiff claimed as follows:

(i) Hospital expenses	1,00
(ii) Estimated future hospital and medical expenses	50,00
(iii) Loss of earnings	316,40
(iv) General damages for pain and suffering and loss of amenities of life	1 632,60
TOTAL	R2 000,00

Defendant in his plea denied that he had assaulted Plaintiff and averred that any injuries which the latter suffered resulted from an unlawful attack on him by Plaintiff and when he (Defendant) acting in self-defence warded off the attack.

Good cause having been shown the late noting of the appeal was condoned.

An appeal has been noted against the judgment only in regard to the quantum of damages which was awarded to Plaintiff on the following grounds:

"1. The amount awarded to Plaintiff was insufficient, having regard to the extensive injuries sustained by Plaintiff, including the loss of his one eye and the serious impairment of the other eye, which could result in the total blindness of Plaintiff.

2. Both parties having worked and lived in the urban area for a considerable time, the Court should have awarded damages commensurate with the standard of living of the Plaintiff.

3. The Court could not, with respect, have found that a Bantu suffered less pain than a Non-Bantu."

The medical evidence adduced revealed that the injuries which had been inflicted on the Plaintiff were the result of an assault which the doctor described as "pretty vicious" and which could have been caused by a heavy instrument or an axe. He went on to give details of the injuries as follows: The right eye was so badly injured that it had to be removed and was replaced by an artificial eye. The condition of the left eye is very poor, it suffered a dislocated lens, its vision has diminished and it will deteriorate in time. His eyesight is such that although he can still distinguish between colours he has now become near-sighted, cannot see beyond six meters and if it retrogresses only one stage it will be classifiable as blind. Another operation only to this eye to remove a cataract may give him a better vision. Apart from eye-injuries he will suffer permanent face disfigurement with multiple scars on the face and head. The doctor further testified that Plaintiff in addition suffered a large laceration on the left front forehead, a horizontal laceration over the bridge of the nose, a small laceration below the bridge of the left eye and various other facial injuries. As a result of the eye injuries Plaintiff stated that he could no longer watch football matches or visit cinemas as he used to do. He was hospitalised for three weeks and absent from work for three months with no loss of wages and he was retained in employment.

The considerations to be borne in mind when assessing damages in these cases are set out in the case of *Testile v. Mtamo*, 1969, B.A.C. 59 at p. 61. In that case Plaintiff suffered the loss of an eye, his left arm was permanently injured and he was also retained in employment. The amount awarded to him was R300. In the instant case Plaintiff has lost his right eye and may lose his left eye which now gives him only a restricted vision. He has had multiple facial injuries causing him permanent disfigurement. The award for general damages should in the circumstances be increased to R400. Plaintiff gave no evidence to substantiate his other claims.

The appeal is allowed with costs, and the judgment of the Court *a quo* altered to read "For Plaintiff in the amount of R400 and costs."

Yates and Bouchier, Members, concurred.

For Appellant: Mr R. Raduc.

For Respondent: In default.

King William's Town, 2 April 1971.

IN THE SOUTHERN BANTU APPEAL COURT

B.A.C. CASE 33 OF 1971

NGOZA KWATSHA versus THE BANTU AFFAIRS COMMISSIONER, ALICE, and DAVIDSON KWATSHA

KING WILLIAM'S TOWN: 9 March 1971. Before Yates, President, and Messrs Adendorff and Bouchier, Members.

Estate enquiry—Bantu Affairs Commissioner's duty to call witnesses.

Application from the Court of the Bantu Affairs Commissioner, Alice.

Yates (President) delivering the judgment of the Court:

This is an application in terms of regulation 22 of the Regulations for Bantu Appeal Courts contained in G.N. 2084 of 1967 for a review of the proceedings in an estate enquiry conducted by the Bantu Affairs Commissioner at Alice in terms of regulation 3 (3) of the Regulations for the Administration and Distribution of the estates of deceased Bantu, *vide* G.N. R 34, dated 7 January 1966.

The first matter to be considered is an application for condonation of the late noting of the application which should have been made within 14 days of the irregularity or illegality complained of coming to the notice of the Applicant. The decision in regard to the disposal of the assets in the estate of the late Wilmot Kwatsha was given on 15 May 1970. According to the Applicant's supporting affidavit he heard early in July 1970 that an enquiry had been held but being ill at the time it was not until the 13th idem that he was able to leave his work at Port Elizabeth and proceed to Alice. On the 14th he consulted his attorney who undertook to investigate the matter and it was not until the 29th that he received an urgent message to see his attorney and he later learned that the enquiry had been concluded on the 15th May. An affidavit by his attorney disclosed that Applicant consulted him on 14 July 1970, and after enquiries had been made a letter was written to him on 16th idem which was apparently not delivered and in response to an urgent telephone call Applicant consulted him again on 3 August. The application for condonation was lodged on 4th idem.

In view of the circumstances the delay in noting the application for review was condoned.

The application is one to vary, rescind or set aside the proceedings held before the Bantu Affairs Commissioner, Alice, in which Davidson Kwatsha (second Respondent) was declared heir to the quitrent properties which belonged to the late Wilton Kwatsha on the grounds that such proceedings were irregular or improper in that the Applicant, being an interested party and an intestate heir of the deceased, was neither summoned to the enquiry or informed of the proceedings.

It appears from the affidavit filed by the Bantu Affairs Commissioner, Alice, that the estate was reported on 29 April 1969. An estate enquiry was held on 5 December 1969, at which the headman of the location and seven other relatives of deceased were present. At that stage Florida, the eldest daughter and Davidson, an illegitimate son of the deceased who stated in evidence that customary seduction damages had been paid and that he had grown up at his late father's kraal and been accepted as his son, were the only claimants.

After Colbert Kwatsha, the headman and a cousin of the deceased, had confirmed Davidson's evidence the enquiry was adjourned to enable the family to discuss the matter.

On 15 May the enquiry was resumed in the presence of the headman and seven members of the family and it was agreed that the only matter in dispute at that stage was the devolution of the quitrent allotments of the deceased.

Davidson again gave evidence and stated that the late Wilton was the son of Kuze who had had three sons. Titus the eldest was illegitimate, then had come Wilton by Kuze's first marriage, and Ngoza (Applicant) by his second marriage. Titus confirmed this and first claimed to be the heir on the ground that Davidson was illegitimate. However, he then went on to claim the property on behalf of Ngoza although he admitted that he had no mandate to claim on the latter's behalf. He stated that Kuze, before he died in 1968, had given one land to Wilton and the other to Ngoza but admitted that Ngoza had never claimed the land or tried to have it registered in his name.

The Commissioner then declared Davidson to be the heir to the quitrent allotments of the late Wilton Kwatsha on condition that the daughter Florida remained on the property during her life-time. All the cash assets were paid to Florida.

The Commissioner, in his replying affidavit, stated that he first became aware of Ngoza's claim on 12 August 1970, i.e. after the application for review was filed but as pointed out by Mr Woollgar who appeared on behalf of Applicant it was disclosed at the enquiry on 15 May 1970, that there could well be another claimant.

Regulation 3 (3) of the Regulations for the administration of deceased Bantu estates provides that where any dispute or question has arisen concerning the administration or distribution of estate property the Commissioner should summon before him all the parties concerned and such witnesses as he may consider necessary. The responsibility is therefore that of the Commissioner and he must exercise his discretion judicially as to whom he calls to be present. See *Gwatyu v. Gwatyu*, 1951, N.A.C. (S) 348 at p. 349.

As pointed out by the Commissioner in his affidavit the estate was reported in April 1969, the formal enquiry held on 5 December 1969 and 15 May 1970 so that the family and everyone concerned had had ample time in which to make representations and submit claims. It was only when Titus, who had been present at the enquiry in December, gave evidence in May 1970 that Ngoza's name was mentioned as a possible claimant. He had had months in which to inform him of what was happening.

The Commissioner then, at that stage, knew that there was another possible claimant and he might well have attempted to ascertain where he was and whether or not he was aware that Wilton had died and whether he wished to prefer a claim. The other members of the family, except Titus, who attended the enquiry, obviously supported Davidson's claim and may well have refrained from notifying the applicant.

This was after all, a semi-judicial enquiry and a further delay would not have been important. By not making sure that Ngoza did not wish to claim and coming to a decision in his absence the latter was undoubtedly prejudiced. See *Nobaza v. Nobaza*, 1945, 5 N.A.C. (C. & O.) 85, and a grave irregularity was committed, albeit unwittingly.

The application is allowed. The decision appointing Davidson Kwatsha as heir is set aside and the enquiry proceedings remitted for further hearing.

By consent there will be no order as to costs.

Adendorff and Bouchier, Members, concurred.

For Applicant: Mr N. E. Woollgar.

For Respondent: Mr R. Sogoni.

King William's Town, 24 March 1971.

IN THE SOUTHERN BANTU APPEAL COURT

B.A.C. CASE 41 OF 1970

BASSIE DUMEZWENI versus GXEKWA KOBODI

KING WILLIAM'S TOWN: 9 March 1971. Before Yates, President, and Messrs Adendorff and Bouchier, Members.

BANTU CUSTOM

"Ukungena" not practised amongst Xhosas. Children born to a widow belong to her late husband's heir.

Summary: After the death of Plaintiff's brother the latter's widow went to live with Defendant and had children by him. The summons alleged that Defendant had "ngenaed" her but no evidence to support this allegation was adduced. Lobola was paid to Defendant for one of the female children and claimed by Plaintiff.

Held: That as the Xhosa did not practice the "ngena" custom all that the summons conveyed was that Defendant had fathered the widow's children.

Held further: That as the original customary union had not been dissolved Plaintiff was entitled to any dowry paid for her children.

Appeal from the Court of the Bantu Affairs, Commissioner, Mdantsane.

Yates (President) delivering the judgment of the Court:

This is an appeal from a judgment of a Bantu Affairs Commissioner's Court for Plaintiff (now Respondent) for six head of cattle or R120 and costs in an action in which he sued the Defendant (now Appellant) for the delivery of dowry cattle paid to Defendant for his daughter Jekani. He stated in his particulars of claim that: "4. Plaintiff is the heir, kraalhead of the late Marikan Kobodi who married by Bantu law and custom Nomanti Kobodi born Mkokeli and paid nine (9) horned cattle as dowry to Basela Mkokeli. 5. During 1945, after the death of Marikan Kobodi, Defendant herein ngenaed the above-named Nomanti Kobodi born Mkokeli as a result of which the said Nomanti Kobodi born Mkokeli has given birth to certain children and the eldest of the said children is Jekani (daughter) which said children according to Bantu law and custom belong to the Plaintiff herein. 6. The said Jekani is now married by Bantu law and custom to Mtunzi Dumezweni who paid six (6) head of cattle to Defendant herein. 7. Plaintiff's claim against Defendant is for the delivery of six (6) head of cattle paid to Defendant as dowry for the said Jekani or their value two hundred and forty rand."

Defendant who was unrepresented pleaded as follows:

"1. Defendant pleads that there is no substance in the allegations by Plaintiff.

2. Plaintiff must prove where this ngena took place and when.".

An appeal has been brought against this judgment on the grounds that:

"1. The learned Assistant Bantu Affairs Commissioner erred in giving judgment for the Plaintiff inasmuch as Plaintiff's evidence in regard to the amount and payment of the alleged dowry was in the nature of hearsay and was therefore not legally admissible.

2. The learned Assistant Bantu Affairs Commissioner erred in giving judgment for the Plaintiff even though Plaintiff's claim purported to be based on the *ukungena* custom and there was no scintilla of evidence on record to bear out this claim, inasmuch as Defendant was not shown to be in any way related to the late husband of the said Nomanti Kobodi.

3. The judgment is generally against the weight of evidence and the probabilities of the case and is not supported thereby".

Plaintiff stated in his evidence that he paid dowry for his younger brother Marikan who married Nomanti (also known as Nozamile alias Nosize). The union was not dissolved and after Marikan's death his widow went back to her peoples' kraal and thereafter went to live with Defendant by whom she had five children including a daughter who is now married and for whom three head of cattle on the hoof and three head of cattle in money was paid. He regarded Nomanti as still being a member of his family and claimed the dowry paid for her daughter.

Defendant stated that he paid R60 to Nomanti's father as dowry but under cross-examination admitted that he had not paid it as lobola but so that he would not be troubled in the matter. He also stated that his second daughter, Tunzi, had been twalaed and that three head of cattle and R100 representing a further three head had been paid to him as dowry. Nomanti confirmed that she and Defendant had not been married and stated that they had merely lived together and had had eight children.

The Commissioner, in his "reasons for judgment" pointed out that there had been no suggestion that the marriage between Nomanti and her late husband Marikan had been dissolved by the return of lobola to Plaintiff or that Defendant had paid damages for rendering Nomanti pregnant. He came to the conclusion that Nomanti was still the ward of her late husband's heir. i.e. Plaintiff, who was, in accordance with Bantu law and custom, entitled to the dowry paid for her daughter.

Mr Popo who appeared on behalf of the Defendant contended that the claim was on the *ukungena* custom.

As pointed out by Seymour at p. 225 of "Bantu Law in S.A." (Third Edition), children born of an *ukengena* relationship by a widow with one of her late husband's male relations; or children born to her by promiscuous intercourse, whether while staying at her late husband's kraal or away from it, belong to her house and so to her late husband's heir. It is

a principle common to all tribes that "the cattle, not the man, beget the children which is a way of saying that, once dowry has been paid for a woman, she becomes part and parcel of her husband's family and all children born to her, no matter who their progenitor may be, belong to her husband's family," vide Seymour *supra* at p. 266.

Amongst the Thembu and Xhosa [and it must be presumed in the absence of a note on the record as there should have been, see *Nkwentsha v. Hlwati,* 1955, N.A.C. 142 (S) at p. 144, that the parties here are Xhosas as they live in the District of East London] intercourse between a widow and one of her male relatives is regarded as incest and is forbidden but no hindrance is placed in the woman's way to have children by other men (see Seymour *supra* at p.p. 266-7 and the authorities there cited. Also S.A. Native Law by Whitfield (Second Edition), at p. 136 and "Die Privaatreg van die S.A. Bantoe" deur Olivier, bl. 526), so that amongst those tribes there is practically no difference between the ukungena custom as such and what has taken place in the instant case.

It cannot be said therefore that because the summons alleged that Defendant "ngenaed" Nomanti the latter was misled in any way. All that the summons really conveyed is that Defendant is the father of Nomanti's children and this has been admitted. In the circumstances Plaintiff is entitled to any dowry paid for Nomanti's children.

The appeal is dismissed with costs.

Adendorff and Bouchier, members, concurred.

For Appellant: Mr D. Popo.

For Respondent: Mr I. Ciliza.

King William's Town, 25 March 1971.

IN THE SOUTHERN BANTU APPEAL COURT

B.A.C. CASE 13 OF 1971

MAHLALESHUSHU MANCIYA versus SIYU PERCY MDINGI

UMTATA, 4 May 1971, before Yates, President, and Messrs Adendorff and Hooper, Members.

Application for interim interdict. Subrule 60 (10) *of the rules for Bantu Affairs Commissioners' Courts. Approval of security by Clerk of the Court.*

Held: Security for the fulfilment of an interim interdict must be specifically approved by the Clerk of the Court.

Held: Where return of specific cattle is sought the subrule providing for an *ex parte* order to be discharged upon security being lodged is not applicable.

Appeal from the Court of the Bantu Affairs Commissioner, Lusikisiki.

Yates (President) delivering the judgment of the Court:

The Applicant (Respondent in the appeal) applied for and obtained on 14 July 1970 an interim *ex parte* order requiring the Messenger of the Court to attach and retain under his control, until the expiration or otherwise of the order, certain four head of cattle and a calf which he alleged in his supporting affidavit had been taken from his possession by the Messenger of the Amantlane Tribal Court in pursuance of a judgment obtained in that Court by Respondent (Appellant in the appeal) against his father Ndiya Mdingi and his brother Ntobeko Mdingi. He alleged further that the cattle were his, that he was not liable for the debts or torts of Ndiya or Ntobeko and that he would suffer irreparable harm if the cattle remained with Respondent as the latter might sell them, slaughter them or otherwise alienate them.

In his replying affidavit Respondent confirmed that the cattle had been attached in pursuance of a tribal Court judgment against Ndiya and Ntobeko but stated that the cattle were known to be the property of the judgment debtor, Ndiya, and had been placed with applicant by Ndiya when he applied for an old age pension.

After hearing evidence the rule *nisi* was confirmed with costs and respondent was ordered to deliver the cattle to Applicant. He has appealed against this decision on the grounds that:

"1. The judgment is against the evidence and the weight of evidence.

2. The Learned Bantu Affairs Commissioner erred in not allowing the Bond of Security lodged by the appellant.

(3) The Learned Bantu Affairs Commissioner erred in not allowing a full examination of the Appellant when he gave evidence."

The first ground was not pressed on appeal.

In regard to the second ground of appeal the respondent, on 16 August 1970, filed with the Clerk of the Court a Bond of Security for R160 in which it was stated that the Court had fixed the security to be given in the sum of R160 which included R10 for costs. The "Court" in fact had not done so. When the matter was heard on 15 September, Respondent's attorney referred to subrule 60 (10) of the Rules for Bantu Affairs Commissioners' Courts (G.N. 2083 of 1967) which reads "An order made *ex parte* shall *ipso facto* be discharged upon security being given by the Respondent for the amount to which the order relates together with costs", and to page 782 of the Civil Practice of the Magistrates' Courts in S.A. by Jones & Buckle (sixth Edition) where, in regard to rule 58 of the Magistrates' Courts Rules which deals with the provisions of security by a Plaintiff in certain circumstances, it is stated that security may be provided by way of a bond to the satisfaction of the Clerk of the Court, and to the case of Greek Farming Syndicate v. Zevenfontein, 1926, C.P.D. 248 (Jones & Buckle p. 359) where it was held that the Clerk of the Court determines the amount of the security. Respondent's attorney contended that the Clerk of the Court by stamping the security bond had accepted it and that it was adequate as the standard value of cattle in the District of Lusikisiki was R30 per beast. The Court ruled that the bond did not comply with the rules and that the Respondent had not discharged the onus on him of furnishing security.

At the request of the Respondent's attorney the Clerk of the Court then gave evidence and stated that he considered he was bound to accept the security bond presented to him but denied that he had approved it although he admitted that the value of cattle had been discussed and that he was satisfied with the amount of R30 per beast. He pointed out that he had not seen the stock nor the stock cards of either the Respondent or his surety and therefore was not in a position to approve.

Respondent was then called and he stated under cross-examination that Applicant was a party to the action in the Chief's Court and judgment was given against him as well, which is in direct contradiction to his affidavit and is not supported by a copy of the record in the Chief's Court which was put in by the Clerk of the Court. Respondent gave this as a reason for attaching the cattle which, he stated unequivocally under cross-examination, were Applicant's property. Under re-examination he stated "when I said that these cattle are the Applicant's property I mean that they are actually his". A further question put to Respondent by his attorney in an attempt to clarify this answer was correctly disallowed by the Court. See Hoffmann's "S.A. Law of Evidence" at p. 233.

As pointed out by the Commissioner in his able "Reasons for Judgment" the rule *nisi* sought in the present action was for the return of specific cattle so that it was not possible to lodge a security bond, i.e. it is one of those cases contemplated in the note to the corresponding subrules 32 (10) and (11) of the Magistrates' Courts Rules (vide Jones & Buckle at p. 638) where it is stated that these two rules apply only where the circumstances of the case make that possible. In addition it is clear that the Clerk of the Court at no stage indicated that he was satisfied with the security provided. That he was not in a position to approve of a valuation of R30 per beast is supported by the evidence of Respondent who stated that he had sold one of the cattle for R60.

The onus was on the Respondent to satisfy the Court that the rule *nisi* should be discharged and this he signally failed to do. In fact, as stated by the Commissioner, once he admitted that the cattle belonged to Applicant, against whom he had no claim, that was the end of the matter.

The appeal is dismissed with costs.

Adendorff and Hooper, Members, concurred.

For Appellant: Mr T. N. Makiwane.

For Respondent: Mr J. J. Swartz.

IN THE SOUTHERN BANTU APPEAL COURT

B.A.C. CASE 9 of 1971

STANFORD GQOLI versus GUSHA DOUGLAS MFIKILE and MOLLY LOVIS BARNES

UMTATA: 5 May 1971. Before Yates, President and Messrs Adendorff and Botha, Members.

Rescission of default judgment. Application, supported by Affidavit, may be made on behalf of his client by an attorney.

Appeal from the Court of the Bantu Affairs Commissioner, Mount Frere.

Yates (President) delivering the judgment of the Court:

This is an appeal against a judgment of a Bantu Affairs Commissioner's Court granting an application to rescind a default judgment against the Defendants (now Respondents).

The Plaintiff (now Appellant) sued the Defendants jointly and severally for damage of R140 which he alleged he had sustained as a result of an accident in which two of his cattle were killed after being hit by a bus which was negligently driven by Defendant 1 who was at the time in the employment of Defendant 2 and acting within the scope of his employment.

On 8 April 1968, Defendant 1, through his attorney entered an appearance to defend. No appearance to defend was entered by Defendant 2 and on the 19th idem Plaintiff filed a request for default judgment against 2nd Defendant which was granted on the same day against both Defendants.

On 7 May 1968, a plea was filed on behalf of Defendant 1 denying that he was negligent.

On 29 May 1968, Defendant 2 filed an affidavit and an application for the rescission of the default judgment which was not opposed and was granted on 10 March 1969. A plea was filed on behalf of the Defendants seven days later.

On 2 March 1970, a second default judgment was granted against both Defendants jointly and severally for R122,90 and costs.

On 3rd idem an application for rescission of this judgment supported by affidavits signed by Defendant 2 and her attorney, Mr Moshesh, was filed. According to the affidavits Mr Moshesh had to attend circuit court at Kokstad on Monday, 2 March 1970. He unsuccessfully tried to contact Plaintiff's attorney over the weekend and advised the Defendants that the case would not proceed in his absence. Acting on this advice the Defendants did not appear in court.

On 17 August 1970, Plaintiff filed a replying affidavit and on the same day the following order was made:

"The application for rescission of default judgment entered against Defendants 1 and 2 is hereby granted. Application amended to include Defendant 1."

An appeal has been noted against this judgment on grounds which amount to this:

1. The Assistant Bantu Affairs Commissioner should not have allowed Defendant 1 to be joined as a co-applicant for the rescission of the default judgment as—

(a) no supporting affidavit was filed on his behalf;

(b) application was made verbally by Defendants' attorney only when replying to the address of Plaintiff's attorney;

(c) the application was out of time;

(d) there was no application for condonation of the delay.

2. In the absence of an acceptable application by Defendant 1 the application for the rescission of the judgment against Defendant 2 should have been refused as the liability of Defendant 2 stems from that of Defendant 1.

3. The Bantu Affairs Commissioner erred in holding that Defendants were not in wilful default.

4. Applicants failed to comply with rule 77 (3) of the Bantu Affairs Commissioners' Court Rules in that they had not paid the wasted costs.

There appears to be no substance in the 4th ground of appeal as Plaintiff in his replying affidavit affirmed that "wasted costs and security for costs had been paid" thus bearing out the statement in the application for rescission to that effect.

Mr Berrange drew the attention of the Court to the fact that the rescission of a default judgment is merely interlocutary having no final or irreparable effect and is therefore not appealable, vide The Civil Practice of the Magistrates' Courts in S.A. by Jones & Buckle, Sixth Edition at p. 228/9, and requested that the matter be reviewed.

The application is for rescission of a judgment granted against the Defendants (plural) and is signed by the Defendants' attorney. Defendant 1 in her affidavit refers to the judgment "entered against *us* Defendants" and avers that "*we* were not in wilful default." The attorney's supporting affidavit also refers to both Defendants. Furthermore subrule 77 (1) (G.N. 2083/67) provides that any party may apply for a default judgment to be rescinded and according to the definition "party" includes the attorney appearing for any such party. The application on behalf of the Defendants was therefor in order.

In the circumstances the appeal is struck off the roll with costs.

Adendorff and Botha, Members, concurred.

For Appellant: Mr T. Berrange.

For Respondents: Mr S. Mpotulo.

King William's Town, 14 May 1971.

IN THE SOUTHERN BANTU APPEAL COURT

B.A.C. CASE 3 OF 1971

BUNGQU KUTALI v. MLALA DOLOKULU

UMTATA: 5 May 1971. Before Yates, President and Messrs Adendorff and Botha, Members.

Vindication—eye of heir's kraal sued for return of stock removed by him from deceased's kraal—plea that stock removed on behalf of heir.

In an action claiming that Defendant had wrongfully possessed himself of Plaintiff's property which had been left for safekeeping at the kraal of his late brother-in-law. Defendant denied that Plaintiff ever had livestock at that kraal and pleaded that he took the stock on behalf of his brother, the heir.

Held: That this was a vindicatory action and the wrong party had been sued.

Held further: That Defendant never had "possession".

Appeal from the Court of the Bantu Affairs Commissioner, Willowvale.

Yates (President) delivering the judgment of the Court:

This is an appeal from a judgment of a Bantu Affairs Commissioner's Court for Plaintiff (now Respondent) for eight head of cattle or their value R50 each and costs. He sued Defendant (now Appellant) for delivery of eight head of specified cattle and four mixed goats or their value, alleging in his particulars of claim that:

"2. At various times for the past 17 years the Plaintiff has, through his brother-in-law, the late Dlayedwa Kutali, purchased cattle and goats, and left this livestock for safekeeping at the kraal of the said Dlayedwa in the Ngqaqini Location.

3. At the time of the death of the said Dlayedwa about a month ago there were eight horned cattle and four goats belonging to Plaintiff at the kraal of deceased.

4. After Dlayedwa's death the Defendant, who is his half-brother, wrongfully possessed himself of all Plaintiff's said property and removed it to the kraal of Defendant's elder brother who has been away for a number of years, and in spite of demand wrongfully neglects to deliver it to Plaintiff.

5. Plaintiff's said stock consists of two red cows, two young red oxen, two ntusi young oxen, a black young ox and a red heifer, each valued at R50 and four mixed goats each valued at R5 each."

Defendant pleaded as follows:

"2. He denies the allegations contained in paragraph 2 and puts the Plaintiff to the proof of his allegations.

3. He further denies that Plaintiff has ever had any livestock at Dlayedwa's kraal.

4. The Defendant admits only that after Dlayedwa's death he took all the stock that was at the latter's kraal and placed it at his brother's kraal. The Defendant says that the said stock belongs to the estate of the late Dlayedwa and is now the property of Defendant's brother, Khofu, who is Dlayedwa's heir.

5. The Defendant likewise denies that the property mentioned in paragraph 5 of the particulars is Plaintiff's property."

An appeal has been brought against the judgment on the grounds that:

"1. The judgment is bad in law against the weight of evidence and on the balance of probabilities the Plaintiff's claim should have been dismissed.

2. The Court erred in finding that Defendant was in possession of the cattle claimed at the time of the issue of the summons or parted with possession after he was aware of Plaintiff's claim.

3. That Plaintiff failed to allege and prove that Defendant was in possession of the said stock, at the issue of summons or at any time thereafter.

4. That in any event as the description of the cattle claimed by Plaintiff as regards earmarks in particular was completely at variance with that made by Defendant and his witnesses, the Court erred in finding for the Plaintiff."

Mr Mpotulo, who appeared on behalf of the Defendant, argued that this was a vindicatory action and that the wrong party had been sued. He pointed out that Defendant had at no time claimed the stock as his. It is common cause that Khofu, Defendant's elder brother, is heir to the estate of the late Dlayedwa and that after the latter's death Defendant removed the cattle in dispute from Dlayedwa's kraal to that of Khofu. According to Defendant's evidence, which was not rebutted, Khofu had been away at work for about three years and he (Defendant) was the "eye" and keeper of his kraal. When Dlayedwa died he notified Khofu by telegram and received a reply instructing him to take possession of Dlayedwa's estate on his behalf. He notified the headman and then took the stock from Dlayedwa's kraal to that of Khofu. Plaintiff stated that on his arrival he found that the cattle, which he claimed as his own property, had gone and were now at Khofu's kraal. He claimed them from Defendant who refused to deliver them saying that they belonged to his brother. He then issued a demand and later a summons claiming the return of the cattle or their value.

As pointed out by Mr Mpotulo, the cattle were and had been for some time at Dlayedwa's kraal and this raised a presumption that they had belonged to him. Defendant, therefore, in the absence of any indication that Plaintiff would claim them was justified in assuming that they were estate stock and in removing them for safe-keeping to the heir's kraal. Defendant pleaded that the cattle were estate stock and the property of the heir. There has never been any suggestion that he claimed them as his own

and the fact that he acted as his brother's agent is borne out by the removal of the cattle to the latter's kraal. It is also clear from Plaintiff's evidence that they were already at Khofu's kraal before he returned home and claimed them. They were therefore not in Defendant's possession in his individual capacity although they were under his control in his capacity as "eye" of Khofu's kraal. Vide *Moosa v. Constantia Motors* 1958 (2) S.A. 334 (E.C.D.).

The fact that Khofu returned home during the hearing of the case and failed to intervene can hardly be held against the Defendant.

As pointed out in the case of *S. v. Mtolo* 1963 (3) S.A. 676 at p. 678 quoting as authority *Scholtz v. Faifer* 1910 T.S. 243 and *Groenewald v. Van der Merwe* 1917 A.D. 223 "possession in our common law involves two elements, a physical one, styled *detentio*, and a mental one, styled *animus possidendi*. The latter element is the intention of the holder to hold for his own benefit, not necessarily as owner, but not solely for another person." In the instant case Defendant at no time had the necessary mental intent.

Having come to this decision it is unnecessary to consider the other grounds of appeal.

The appeal is allowed with costs. The judgment of the Court *a quo* is set aside and for it is substituted "Judgment for Defendant as prayed with costs."

Adendorff and Botha, Members, concurred.

For Appellant: Mr S. Mpotulo.

For Respondent: Mr K. Muggleston.

King William's Town, 3 June 1971.

IN THE SOUTHERN BANTU APPEAL COURT

B.A.C. CASE 6 OF 1971

MASOKA BOOI versus 1. HEADMAN W. NDONDO and 2. MAFICELA NDLOVU

UMTATA: 4 May 1971, before Yates, President and Messrs Adendorff and Hooper, Members.

TRANSKEI LAND REGULATIONS: GRAZING PROHIBITED IN CLOSED CAMP

A camp having been closed and the grazing reserved.

Held: that the correct steps having been taken stock was not permitted in a reserved grazing area.

Appeal from the Court of the Bantu Affairs Commissioner, Tsomo.

Yates (President) delivering the judgment of the Court:

This case emanated from a Chief's Court in which Plaintiff (now appellant) sued the defendants (now Respondents) for the return of 90c paid by him as trespass fees. The Defendants alleged that the cattle trespassed in a closed camp in which Defendant was not entitled to grazing. The Chief gave judgment for Defendants for 90c. In an appeal to the Court of the Bantu Affairs Commissioner the judgment of the Chief's Court was upheld with costs.

A further appeal was then noted to this Court on the grounds:

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

2. That the judgment is bad in law in that the Court erred in ignoring in its judgment the provisions of Act 10 of 1966 dealing with soil conservation schemes and areas."

In his argument before this Court the Plaintiff contended that the camp in which his cattle grazed had not been closed and that his cattle were entitled to be there. However, the headman and the Agricultural Officer, Austin Ncwaiba, stated unequivocally that the Dotyeni camp in which the cattle were grazing when impounded was closed. This is supported by the written notice issued in terms of the Transkei Agricultural Development Act, No. 10 of 1966, addressed to the headman of the Mahlubini Location and dated 12 June 1969, closing the Dotyeni camp, amongst others, for 12 months from 1 July 1969.

Section 11 of that Act gives the Minister wide powers which include *inter alia* the withdrawing of any defined portion of land from grazing and the provision of grazing management and rotational grazing. Subsection 31 (1) gives the Minister authority to delegate powers to officers of the government which

include Agricultural Officers; vide definition section 1 (ix). Subsection 33 (1) provides further that any notice shall be in writing and may be handed to a headman (as was done here) for publication. Subsection 33 (2) provides that it shall be presumed conclusively that the subject matter of such notice shall have come to the knowledge of every resident within 30 days after the service upon the headman.

It is clear therefore that Defendant had no right to graze his stock in the reserved grazing area in question.

Defendant's further argument that his cattle were unlawfully debarred from the Dotyeni grazing area because he lived in a different locality is not supported by the evidence.

The appeal is dismissed with costs.

However, the Chief's judgment is incorrectly worded as defendants are not entitled to claim a further 90c from plaintiff. His judgment is altered to read "Plaintiff's claim is dismissed with costs."

Adendorff and Hooper, Members, concurred.

For Appellant: In person.

For Respondents: Headman Ndondo: In person; M. Ndlovu: In default.

IN THE SOUTHERN BANTU APPEAL COURT

B.A.C. CASE 15 of 71

GEBA MANYUBE versus PAHLA MANYUBE

UMTATA: 5 May 1971. Before Yates, President and Messrs Adendorff and Botha, Members.

BANTU AFFAIRS COMMISSIONERS' COURT RULE 77

Application for rescission of default judgment timeous even though not stated explicitly in supporting affidavit when applicant became aware of the judgment.

Appeal from the Court of the Bantu Affairs Commissioner, IDUTYWA.

Yates (President) delivering the judgment of the Court:

On 25 May 1970, Plaintiff (now Respondent) issued a summons in the Bantu Affairs Commissioner's Court claiming delivery of six head of cattle or their value R300 from his younger brother the Defendant (now Appellant). He alleged in his particulars of claim that when Defendant was married he (Plaintiff) paid six head of his cattle as dowry which Defendant agreed to refund from the dowry of his eldest daughter who has now been married.

The summons was served upon Defendant's wife at his place of residence. No appearance to defend or plea was filed and on written application by Plaintiff's attorney a default judgment was granted on 27 July 1970.

On 19 September 1970, Defendant applied for rescission of the default judgment stating in his supporting affidavit:

"2. That during or about January 1970, I left for work and I have been away from home until 11 September 1970.

3. That on or about 8 September 1970, I received a telegram from Mbumbuto Nombolo informing me that my cattle had been attached.

4. That I immediately returned home on 11 September 1970, and realized that my cattle were attached at the instance of the Respondent.

5. That I never received a summons in this matter and if it had been served on me, I would have defended the matter.

6. That I deny being indebted to the Respondent for six head of cattle or for any lesser number.

7. That I want the default judgment rescinded and set aside so that I may place my defence before the Court."

The application was dismissed with costs.

An appeal against this judgment has been noted on the grounds:

"That the Bantu Affairs Commissioner erred in dismissing the Appellant's application on the ground that it was out of time regard being had to the fact that the Appellant first knew about the judgment against him on 8 September 1970, and that he made an application on 19 September 1970."

The Commissioner in his Reasons for Judgment drew attention to subrule 77 (1) of the Rules for Bantu Affairs Commissioners' Courts (G.N. 2083 of 1967) which reads as follows: "any party to an action in which a default judgment is given may within one month after such judgment has come to the knowledge of the party against whom it is given apply to the Court to rescind or vary such judgment" and to subrule 77 (4) "Unless the applicant proves to the contrary, it shall be presumed that he had a knowledge of such judgment within two days after the date hereof" and came to the conclusion that as Defendant had nowhere in his affidavit given the Court any idea when he first became aware that a default judgment had been given against him he had not rebutted the presumption contained in subrule 77 (4) *supra*.

However, as pointed out by Mr Mpotulo, the Defendant was away at work from January 1970 until he returned home on receipt of a telegram on 8 September 1970. The summons was issued on 25 May 1970, and served on his wife on 8 June. Default judgment was granted on 27 July. A writ was issued and his cattle attached on 8 September, i.e. about six weeks later.

It is implicit in the substance of his affidavit that Defendant was not aware that he had been sued or that a judgment had been given against him and his immediate return on receipt of the telegram, and his application dated 19 idem, requesting a rescission of the judgment bear this out.

It is true that he did not expressly state in his affidavit, which was probably drawn up by his attorney, that he was not aware of the judgment against him until he received the telegram on 8 September but the whole tenor of his statement indicates that this was so. His application was therefore timeous.

The appeal is allowed with costs. The judgment of the Court *a quo* is set aside and the case remitted for hearing to a conclusion.

Adendorff and Botha, Members, concurred.

For Appellant: Mr S. Mpotulo.

For Respondent: Mr T. Berrange.

Umtata, 5 May 1971.

IN THE SOUTHERN BANTU APPEAL COURT

B.A.C. CASE 31 OF 1970

MSEBENZI NOGOBA versus SIPHANGO STANFORD MPETO

KING WILLIAM'S TOWN: 29 June 1971. Before Yates, President and Messrs Adendorff and Bouchier, Members.

PRACTICE AND PROCEDURE

Default judgment—Rescission—allowing evidence to be led to amplify a faulty affidavit

Summary: A default judgment was granted against Defendant. He applied for a rescission of the judgment alleging that he had not received the summons and was not in wilful default in not entering a plea. The pleadings disclosed that an "appearance to defend" and a plea had been filed on his behalf on the day after service of the summons on his daughter by a different attorney from the one who drew up his supporting affidavit. It appeared from the circumstances that the allegations in the affidavit may well have been true.

Held: that if the Commissioner was in doubt in regard to the facts he should have allowed the Applicant to give *viva voce* evidence and not have dismissed the application.

Appeal from the Court of the Bantu Affairs Commissioner, CALA.

Yates (President) delivering the judgment of the court:

Good cause having been shown the late noting of the appeal was condoned.

Plaintiff (now Respondent) sued the three defendants jointly and severally for the return of five head of cattle or their value R242 alleging that he was the lawful owner of the cattle and that they had been wrongfully and unlawfully attached by First and Second Defendants and handed to the Third Defendant.

The summons was issued on 26 November 1968 and according to the endorsement thereon was served by the Messenger of the Court on the daughter of Second Defendant on 3 December 1968. Defendant himself having left for work in Cape Town. On 4 December 1968 an appearance to defend signed by their attorney, Mr Beukes, was filed on behalf of the Defendants. A plea was filed on 13 idem and a notice of amendment on 28 February 1969.

The case was set down for hearing on 13 June 1969, and on that day defendants' attorney was not available. It was then set down for 17 September and again for 21 January 1970. On the 21st Defendants' attorney phoned to say that he could not attend and advised Plaintiff's attorney that he had not noti-

fied his clients of the date of trial. At the request of Plaintiff's attorney the claim against defendant 1, who had died, was withdrawn and after leading evidence default judgment was then granted against Defendant 2 and 3 with costs. Plaintiff's attorney intimated at the time that if the Defendant's felt aggrieved they could always apply for a rescission of the judgment.

On 2 March 1970, an application for the rescission of the judgment by Defendant 2 was filed by a different attorney and in his supporting affidavit Defendant 2 stated that when proceedings were instituted against him he was away at work and had never received the summons and also that he was not in wilful default in not entering an appearance to defend the action; that he first learned of the default judgment against him when his cattle were attached on 25 February 1970; and that he had a good defence in that he averred that the attached cattle were not the property of the Plaintiff.

On 18 March 1970, after hearing argument and having refused an application to allow Defendant to give evidence, the Bantu Affairs Commissioner made the following entry on the record: "Application for rescission in its present form dismissed with costs and with permission from the Respondent's attorney the Applicant granted 14 days within which to re-apply for rescission."

An appeal has been brought against this judgment on the grounds:

"1. That the judicial officer erred in basing his judgment on facts which were never placed before him in the form of an opposing affidavit which facts in consequence came to the notice of the Applicant and his attorney as a bolt from the blue only during the course of the argument and the judgment is therefore bad in law.

2. That the judicial officer erred in refusing application by the attorney for the Applicant for leave to lead *viva voce* evidence to prove that the Applicant had never instructed attorney M. M. Beukes to enter appearance on his behalf and to file further pleadings on his behalf and the Applicant was prejudiced thereby."

Mr Kelly who argued the appeal on behalf of the Plaintiff contended that Defendant could not rely on an affidavit which was inconsistent with the facts as Defendant 2 had filed an "appearance to defend" and a plea.

In his address to the Court *a quo* he made it clear that in his view the fault lay in Applicant's attorney for he stated that had the latter studied the record he would not have drafted the affidavit on the lines he did.

The fact that the summons was served on Defendant's daughter on 3 December in Defendant's absence and the filling of an "appearance to defend" on the following day should have caused the Commissioner to realise that Defendant's statement that he had not received the summons may well have been true particularly bearing in mind his further statement contained in his affidavit that he had not entered an appearance to defend.

In his reasons for judgment the Commissioner stated that the Court was fully aware, when the default judgment was granted, that the Defendant's attorney had not advised his client of the date of trial and that when the application for rescission was heard the Court was satisfied that the Defendant was not in wilful default. He also stated that Plaintiff's attorney had intimated that an application for rescission would have to be granted if it was applied for. Nowhere has it been suggested that Defendant did not have a good defence to the action.

Bearing all these factors in mind it is difficult to appreciate why the application was refused.

Subrule 59 (2) (a) of the Rules for Bantu Affairs Commissioners' Courts (G.N. 2083 of 1967) expressly provides for the hearing of *viva voce* evidence where there is any dispute arising in regard to the facts and had the Commissioner been in any doubt he should have allowed Defendant to testify. Any potential prejudice could have been overcome by means of a postponement and an appropriate order as to costs.

It is true, as stated by the Commissioner, that Defendant could have re-applied for a rescission in terms of his judgment but then he would have had to pay the costs of the present application, which, in my view, should not have been dismissed.

In the result the appeal is allowed with costs, the judgment of the Bantu Affairs Commissioner is set aside and the application for a rescission of the default judgment remitted for amplification of the supporting affidavit if considered necessary and hearing to a conclusion.

Adendorff and Bouchier, Members, concurred.

For Appellant: Mr S. Njamela.

For Respondent: Mr H. J. C. Kelly.

King William's Town, 2 July 1971.

IN THE SOUTHERN BANTU APPEAL COURT

B.A.C. CASE 36 OF 1970

LLOYD JAFTA versus ESAU K. TUNGATA

UMTATA: 18 January 1971. Before Yates, President and Messrs Adendorff and Botha, Members.

Pledge—In an action for delivery of pledged cattle the transaction on which the agreement is based must be established.

Summary: Plaintiff sued for the delivery of two cattle which he averred had been pledged to him as security for a loan of money.

Held: In the absence of a legal and valid obligation a pledge based thereon would be of no force or effect.

Appeal from the Court of the Bantu Affairs Commissioner, Qumbu.

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

This is an appeal from an absolution judgment in a case in which Plaintiff (now Appellant) sued the defendant (now Respondent) for the transfer of two specific cattle to him.

The summons originally claimed that Plaintiff was the holder for value of a promissory note made by the Defendant for the transfer to Plaintiff of two specific cattle and Defendant in his plea as amended, admitted that he had signed the document but stated *inter alia* that he was induced to do so by threats and that he only signed to save his life after he had allegedly been caught in adultery with one Gretta who was not Plaintiff's wife. He pleaded that the document was unenforceable in law and that Plaintiff was not entitled to delivery of the cattle.

Plaintiff denied that Defendant was forced or induced by threats to sign the document. Defendant then filed a special plea alleging that the document was not a promissory note and Plaintiff filed an application to substitute the words "holder of an undertaking in writing" for the words "holder for value of a promissory note". In reply to a request for further particulars he also averred that the undertaking was in respect of a loan of R120.

Despite an objection the application to amend the summons was granted.

An appeal has been brought against the judgment on the grounds that:

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

(2). That there was nothing in Defendant's case to support his plea that the "document was procured through threats and duress and was only signed to save Defendant's life."

(3). That the Court should have found no difficulty in accepting that Defendant had signed the said document with the aim of pledging the cattle mentioned therein and should have given judgment as prayed."

It is clear from the evidence of Defendant and Gretta, who is the wife of Plaintiff's younger brother, and that of Plaintiff's witnesses, that he was caught in Gretta's room at night in suspicious circumstances. Defendant stated that about eight men entered and he was forced to write a confession that he was caught in adultery and that he would pay two head of cattle and transfer them to Plaintiff. The next day the sub-headman Leonard Jafta and two others came to his kraal to inspect the cattle and at the sub-headman's behest he wrote and signed the document on which the present action is based. It is dated 24 March 1968 and a translation reads "I will transfer two cattle, a black cow with a white belly and red bull calf with white belly to Lloyd Jafta after the inoculation." He stated that he was afraid of them but did not try to run away as they were mounted. He denied that he had borrowed money from Plaintiff.

Plaintiff in his evidence stated that in March 1968 he had lent Defendant R120 and the latter had agreed to pledge two cattle as security and to transfer them to his stock card pending repayment of the loan, when the cattle would be returned to Defendant. There were not witnesses to this transaction which according to him took place on Monday 18 March, 1968, i.e. about a week before the alleged "catch", nor was his explanation of the circumstances and how the loan came to be made at all convincing. He stated that thereafter he sent the sub-headman and another to see the cattle and they came back with the document on which this case is based, which would be most unusual had the cattle been pledged as security for a loan. The sub-headman stated that Plaintiff asked him to inspect the cattle but made no mention of a loan, although according to Plaintiff's witness Christian Jongwe Plaintiff had told him. It is also most unlikely that had he loaned money to Defendant, he would, over a year later, issue summons for the delivery of two specific pledged cattle and not sue for the return of his money. A pledge is defined as a right possessed by one person over the property of another having the effect of securing an obligation, and the *first requirement* of a valid pledge *is a legal or valid obligation* vide Wille & Millin's Mercantile Law of S.A. 16th Edition at p. 268.

In my view the Plaintiff has failed to establish that a loan was made and consequently any pledge allegedly based thereon would be of no force or effect. vide The Law of Things Vol. II eighth Edition of Maasdorp at p.p. 182 and 186.

The appeal is dismissed with costs.

Adendorff and Botha, Members, concurred.

For Appellant: Mr C. M. Kobus.

For Respondent: Mr H. H. Nakani.

Umtata, 19 January 1971.

IN THE SOUTHERN BANTU APPEAL COURT

B.A.C. CASE 32 OF 1970

MILDRED NDAMASE versus ZWELINZIMA NGCINGWANE

UMTATA: 19 January 1971. Before Yates, President and Messrs Adendorff and Hutchison, Members.

PRACTICE AND PROCEDURE

Costs—judgment must be explicit. Applications—outcome must be recorded. Judgment—a judgment deciding ownership of animals is in personam *and effective between parties and not a judgment* in rem *binding against the whole world. Successful* litigant *entitled to costs.*

Summary: In a case in which animals were attached in possession of the claimant but were declared executable costs were awarded against the judgment creditor on the grounds that in a previous case she had obtained a default judgment against the judgment debtors for a declaration of rights in respect of the same animals and that had the information been put before the Court at the start of the case further costs would have been obviated.

The Commissioner failed to record the outcome of an application and his award of costs was contradictory.

Held: That as the prior judgment was not between the same parties *res judicata* did not apply.

Held: That the previous judgment was *in personam* and not *in rem.*

Held: That the outcome of an application must be recorded.

Held: That the judgment creditor, having discharged the onus was entitled to her costs.

Appeal from the Court of the Bantu Affairs Commissioner, Mount Frere.

Yates (President) delivering the judgment of the Court:

The first matter to be considered here is an application for condonation of late noting of the appeal. Judgment was given on 15 June 1970, so that the last day for noting an appeal was 9th July. The Notice of Appeal was filed on 6 July 1970. but security for costs was not lodged until 20th idem due to an oversight by a clerk employed by Appellant's attorneys. This, of course, is not an acceptable excuse but as Appellant had an arguable case and it was felt that she should not be penalized for a fault for which she was not responsible, the late noting of the appeal was condoned.

This is an interpleader action in which a heifer and a horse were attached by the Messenger of the Court while in the possession of the claimant (now Respondent) in pursuance of a judgment in favour of the judgment creditor (now Appellant) in a case in which she had sued Mataba Mafola and Moses Mafola, the judgment debtors, for the animals in question

The onus was placed on the judgment creditor to prove that the animals were executable as they had been attached in the possession of the claimant and after a considerable amount of evidence had been heard judgment was given on 15 June 1970 which read "Summons is dismissed with costs. Judgment creditor to bear her costs of trial."

An appeal has been brought against the judgment in respect of costs only on the grounds that:

"1. The Judicial Officer erred at law in awarding costs against Judgment Creditor.

2. The Judicial Officer ignored the general principle at law that costs are awarded to the successful party."

The order in regard to costs is undoubtedly contradictory for it would appear from the first sentence that the claimant should pay the costs whereas the second sentence indicates that the judgment creditor is responsible for her own costs.

The Assistant Bantu Affairs Commissioner in his "Reasons for Judgment" stated that "the Appellant, though successful was ordered to pay her own costs of the trial from 23 March 1970, i.e. exclusive of the costs up to that date." If this is indeed what he meant he should have stated so explicitly in his judgment.

The hearing started on 23 March 1970 when the judgment creditor completed her case and the matter was then postponed. On 18th May the claimant presented his case and on 25th idem the case was re-opened to hear a witness called by the judgment creditor. Judgment was given on 15 June 1970.

Attached to the record is a notice filed by the attorney for the judgment creditor dated 14 April 1970, to the effect that an application would be made for a special plea of *res judicata* to be incorporated as part of the pleadings: in that in Case 97 of 1969, in the Bantu Affairs Commissioner's Court at Mount Frere, the Judgment creditor obtained a judgment by default against Mataba and Moses Mafola for a declaration of rights over the two animals now claimed and that that was a judgment *in rem*, binding against the whole world and that claimant was estopped from claiming the animals.

There is no indication from the record that the application was ever made or granted [see *Ngombane v. Mankayi*, 1956, N.A.C. 115 (S) at p. 117 in which it is stressed that Judicial Officers must record the outcome of any application] nor, if it was granted, why the special plea was not disposed of at that stage thus possibly obviating further costs from that date.

The Commissioner based his decision in regard to costs on the contents of the special plea and held that had it been filed earlier there would have been no need to hear evidence and the resulting costs would have been saved.

However, his conclusions are entirely erroneous.

In the first place the plea of *res judicata* could not possibly apply as the previous Case 97 of 1969 and the instant one are not between the same parties or their privies.

Secondly the judgment in that case was not *in rem* but *in personam*.

Judgments *in personam* are the ordinary judgments between parties in cases of contract, tort or crime. *vide* Phipson on Evidence Ninth Edition at p. 426.

The test to be applied in determining whether or not the judgment is *in rem* is whether it determines the status of a person or thing or the disposition of a thing (as distinct from the particular interest in it of a party to the litigation). See S.A. Law of Evidence by Hoffman at p. 389 and the case of *Kabi v. Punge*, 1956, N.A.C. (S) 7 at p. 12.

In Case 97 of 1969 the judgment does not refer to nor can it have any bearing on the status of the parties. All that that case decided was that as between the Judgment Creditor and the Judgment Debtors the former had the better claim to the animals.

In the instant case as the claimant was in possession of the property at the time of attachment the onus was on the Judgment Creditor to satisfy the Court that the claimant had no title to the property and to do this she had to lead evidence. The judgment in her favour against the Judgment Debtors (Case 97 of 1969) had no bearing on the merits of claimant's title to the animals and having succeeded in discharging the onus she (the Judgment Creditor) was entitled to her costs.

The appeal therefore is allowed with costs and the judgment of the court *a quo* altered to read "The summons is dismissed with costs.".

Adendorff and Hutchison, Members, concurred.

For Appellant: Mr T. Berrange.

For Respondent: No appearance.

King William's Town, 22 January 1971.

CENTRAL BANTU APPEAL COURT

NAPO versus SKOSANA

ROLL 9 OF 1971

JOHANNESBURG: 2 April 1971, 13 May 1971. Before Thorpe, Acting President, Bowen, Permanent Member and Schultz, Member.

LAW OF DELICT

Damages—Collision between motor lorry and stationary motor scooter—Negligence of driver of motor lorry in not taking adequate precautions when reversing vehicle—Basis on which damages should be assessed—Cost of repairs not necessarily a true basis—Evidence of pre- and post-collision values of scooter to be adduced if there is an indication that the cost of repairing it will exceed the difference in such values.

Summary: Without taking adequate precautions to ensure that it was safe to do so, Defendant (present Respondent) reversed his motor lorry into the motor scooter owned by Plaintiff (present Appellant) which was parked behind him next to the kerb of the street. Plaintiff tendered evidence that the cost of repairing the scooter was R296,58 and claimed that amount. However, when re-examining one of his own witnesses the Plaintiff's attorney put it to the witness that the pre-collision value of the scooter was R250, but did not adduce evidence of either the pre- or post-collision values of the scooter though such evidence was obtainable.

Held:

(a) That when reversing a large motor lorry, a glance in the rearview mirror is not an adequate precaution, and that the sole cause of the accident was the negligence of the Defendant.

(b) That the normal measure of damages is the difference between the market value of the vehicle immediately prior to the collision and the market value thereafter and though the reasonable cost of repairing the vehicle is a convenient way of assessing damages, it is not a true basis in all cases.

(c) That if there is an indication that the cost of restoring the vehicle to its pre-collision condition would exceed the difference between its pre- and post-collision values, a claim based entirely on the cost of repairs would be founded on an incorrect basis.

Cases referred to:

State v. Lalla, 1964 (4) S.A. 320.
Janeke v. Ras, 1965 (4) S.A. 583.
Enslin v. Meyer, 1960 (4) S.A. 520.
Erasmus v. Davis, 1969 (2) S.A. 1.
Du Plessis v. Nel, 1961 (2) S.A. 97.
Lazarus v. Rand Steam Laundries (1946) *(Pty) Ltd.* 1952 (3) S.A. 49.
Hersman v. Shapiro & Co., 1926, T.P.D. 367.

Works of reference referred to:

Mc Kerron: Law of Delict, Sixth Edition, p. 112.

Appeal from the Court of the Bantu Affairs Commissioner, Germiston.

Bowen, Permanent Member:

The Appellant, Plaintiff in the court *a quo*, brought an action against the Respondent, Defendant in the Court *a quo*, the particulars of the claim being as follows:

"On the first day of February 1969, and in De Venter Street, Elsburg, the Defendant whilst driving certain motor truck TS 18260, negligently reversed the said truck into the said Plaintiff's motor scooter which was stationary in the said street.

Arising out of the collision caused by the negligence of the Defendant, the Plaintiff's motor scooter was damaged to the extent of R296,58.

Despite demand the Defendant fails or neglects and/or refuses to make payment of the said sum of R296,58.

Wherefore Plaintiff prays for judgment against the Defendant for payment of the sum of R296,58 with costs."

In the Court *a quo* the Commissioner found that the accident had been caused by the sole negligence of the Defendant but that neither the pre- nor post-collision values of the scooter had been proved and that it was therefore not possible to find whether the quantum of damages claimed was reasonable. An absolution judgment was accordingly granted which is the subject of this appeal. The grounds of appeal are as follows:

"That the Bantu Affairs Commissioner erred in finding that on the balance of probabilities the Plaintiff had failed to prove the damages sustained by him arising out of the collision were caused by the sole negligence of the Defendant. The Court should have assessed the damages on the facts established by the Plaintiff which were not refuted by the Defendant by evidence, there being sufficient such evidence to enable the court to make such an assessment."

The material facts in this case are not in dispute. The Defendant being the driver of a coal truck had parked this vehicle at the side of the street for the purpose of having coal off-loaded. Thereafter the Plaintiff arrived on his motor scooter and parked it directly behind the truck of Defendant. Both vehicles were, it seems, correctly parked. Plaintiff then went away for about 15 minutes and on his return, he found that the truck of Defendant had reversed into the scooter, one of the rear wheels of the truck being still on top of the scooter. As a result the scooter suffered substantial damage, the Plaintiff claiming R296,58 from Defendant.

The off-loading of the coal was performed by two Bantu employees of Defendant. It is not clear whether Defendant alighted from the truck during off-loading operations. According to an eye witness, Kruger, the Defendant returned to the truck, entered it and immediately commenced to reverse the vehicle.

The Defendant, however, and his Bantu employee (who incidentally gave his evidence before the Defendant) both testified that Defendant remained seated in the truck during off-loading operations. The point, however, is not really material in so far as the question of negligence is concerned. The Defendant admitted that apart from looking into the rearview mirror prior to reversing the truck, he took no further steps to ascertain whether it was safe to reverse. Neither of his two Bantu employees who were on the truck at the time took any steps to direct the Defendant or to ascertain whether anything was parked behind the truck. The Defendant admitted that the rearview mirror did not give him full rearview visibility. The truck was some 18 feet in length and well raised from the ground. A small motor scooter parked directly behind the truck would not normally be visible to the driver. Quite obviously the driver of such a truck who proposes to reverse the vehicle in such circumstances must first satisfy himself that it is safe to do so. No check by Defendant or his employees was carried out. In short the Defendant did nothing but glance in the rearview mirror and commence to reverse the truck to a distance of four feet with the resulting collision. Defendant admitted that that there was a distance of six feet behind the truck that was not visible to him.

Mr Gishen. who appeared before us for the Defendant, submitted that the Commissioner had erred in finding that the Defendant had been negligent and that the absolution judgment was correct. *inter alia,* for this reason. In support of his argument he quoted the case of *State v. Lalla,* 1964 (4) S.A. 320. This case is not an authority for the proposition that a glance in a rearview mirror would amount to a proper lookout. The most that it indicates is that in certain circumstances a glance in the rearview mirror may be a sufficient precaution when the vehicle is being driven in the street. The Commissioner attributed the sole cause of the accident to the negligence of the Defendant and actually found that Defendant did not look into the rearview mirror prior to reversing the truck. He states that there is no evidence to the effect that Defendant did look into the mirror but in this respect he has misdirected himself as there is the undisputed evidence of the Defendant that he did look into the mirror before reversing the vehicle. Mr Barolsky who appeared before us for the Plaintiff conceded this point. We see no reason to disagree with the finding in the court *a quo* that the sole cause of the accident must be attributed to the negligence of the Defendant and after confirming this finding, the parties were given the opportunity of an adjournment with a view to arriving at a possible settlement on the quantum of damages. No settlement being reached, the question of damages was then argued before us.

Plaintiff's claim of R296.58 was based entirely on the estimated cost of repairing the vehicle. A foreman mechanic from Lambretta's Services, who had examined the scooter after the accident, handed in a written quotation for the repairs amounting to R296,58 dated 29 July 1969. This witness added that the repair costs were reasonable but that at current prices the amount would now be about R340. He stated that as scrap the scooter would be worth only R3 to R4. He admitted that he did

not make an estimate of the value of the scooter but added that if it was in good condition it would have been worth R160 prior to the collision. He agreed that this was a mere guess and that he did not deal in the selling of vehicles. After being informed by the Plaintiff's attorney on the strength of a letter from Lambretta's Services that his firm estimated that the scooter in question, if in good condition, would have been worth R250, the witness first disagreed with this figure but thereafter agreed with it. On the post-collision value, the views of this witness were equally unsatisfactory. It is clear that the views of this witness on either the pre- or post-collision values of the scooter have no evidential value. In so far as the repair costs were concerned, the evidence was not challenged in any way and the figure quoted, viz R296,58, must therefore be accepted as reasonable.

This however does not end the matter as the true basis for calculating the damages is the actual diminution in the value of the scooter, that is, the difference between the value thereof immediately prior to the accident and its value immediately thereafter *(Mc Kerron's "Law of Delict"*, sixth Edition page 112.) and normally the market values are taken. *Erasmus v. Davis,* 1969 (2) S.A. 1 at p.7 (H). The means of arriving at the diminution may vary from case to case. *Du Plessis v. Nel* 1961 (2) S.A. 97. One method is to establish the cost of restoring the thing to its original condition, that is, the reasonable cost of repairs, but this is subject to the proviso that the cost does not exceed the diminution of value. *Enslin v. Meyer,* 1960 (4) S.A. 520. In *Janeke v. Ras,* 1965 (4) S.A. 583 (T) at 588 Jansen, J., said in connection with a plaintiff who relied solely on the cost of repairs to establish his damages:

"Die juiste posisie skyn te wees as volg. Die bewyslas is op die eiser om sy skade te bewys en as sy getuienis aan die einde van die saak slegs betrekking het op 'n maatstaf wat uit die getuienis blyk verkeerd te wees, dan kan hy nie slaag nie. Maar dit volg geensins dat omdat hy nie getoon het dat alle ander maatstawwe ontoepaslik is, sy eis van die hand gewys moet word nie. Om sodanige bewyslas op die eiser te plaas sou juis wees om 'n bewys metode te verhef tot regsreël. In 'n sekere sin is die leerstuk van die sogenaamde 'mitigation of damages' analoog. As 'n eiser paslik getuienis voorlê dat sy skade 'n sekere bedrag beloop, dan hoef hy nie by voorbaat, 'n negatief te bewys nie, naamlik dat daar geen ander maatstawwe toepaslik is wat tot 'n kleiner bedrag van skadevergoeding sou lei nie. Die bewsylas is op die verweerder om feite aan te voer wat toon dat die eiser se skade te hoog aangeslaan word."

The same judge in *Erasmus v. Davis supra* at the bottom of page 12 commented:

"Meer algemeen gestel, is die benadering: As 'n eiser aanvaarbare getuienis van redelike reparasiekoste voorlê en dit blyk nie in genoegsame mate dat die waardevermindering daardeur aangetoon dalk onjuis is nie, dan moet die verweerder die basis van voldoende twyfel lê bv. by wyse van ontlokking van erkennings in kruisverhoor of die voorlegging van getuienis in hierdie verband. Die beslissing in *Janeke v. Ras,* 1965 (4) S.A. 583 (T), is hiermee versoenbaar."

In die present case the Plaintiff's attorney put in without objection the letter dated 27 May 1970, purporting to have been written by Lambretta's Services (Pty) Ltd, to which reference has already been made. This was a letter written to the Plaintiff's attorney in reply to a letter from him and it is to the effect that the value of the scooter in question in July 1969, would have been approximately R250, if it was in good order and condition. Presumably the scooter would have been valued at approximately the same figure immediately prior to the date of the accident, namely, 1 February 1969. It is obvious that the Plaintiff's attorney made it part of his case that the pre-collision value of the scooter was R250; in fact, in addressing the court *a quo* at the conclusion of the case he referred to this figure as if it had been proved. Mr Barolsky submitted that the letter was not evidence of the pre-collision value and that the letter and any reference thereto should be ignored. Though the letter is not evidence I don't think we can ignore the Plaintiff's attorney's reference to it. Although the pronouncements by Jansen, J. (later J. A.), quoted above referred to evidence I think they are wide enough to include statements made by the Plaintiff's attorney during the presentation of the Plaintiff's case and I think we should hold that, although the Plaintiff has given acceptable evidence of the reasonable costs of repairs, his case shows "in genoegsame mate dat die waardevermindering . . . dalk onjuis is" and that there was consequently no onus on the Defendant to lead evidence on this point.

The Plaintiff has himself shown that the cost of repairs would not be a correct basis for measuring the damages and it remains to be seen whether there is any other basis on which damages can be assessed. The only possible basis emerging from the evidence would appear to be the difference between the pre-collision and post-collision values.

In regard to the pre-collision value the Plaintiff testified that he purchased the scooter on 6 December 1966, the cash price being R392. The relative invoice was handed in, this evidence being uncontested. He added that the vehicle was in good condition before the accident and had never been repaired. The mileage performed was not given and though the further particulars quote a mileage figure, there is no evidence on this aspect. Apart from this somewhat niggardly evidence by Plaintiff, there was no other direct evidence on record from which to form an estimate on the pre- or post-collision values of the scooter. The Plaintiff himself placed no values on the scooter nor did he apparently make any serious attempt at having it valued. The summons moreover indicates more or less clearly that he was only concerned with the costs of repair. There is of course the letter from Lambretta's Services already mentioned, but while it throws doubt on the cost of repairs as a measure of damages sustained it does not actually prove the pre-collision value, as its contents are hearsay. Although the letter was admitted without objection there was no admission from the Defendant's side of the correctness of the contents of the document.

In the case before us there is no evidence of the post-collision value of the scooter. No reason has been given why

such evidence was not produced and it is clear that it can still be produced as the scooter has not yet been repaired and is still at Lambretta's Services in its post-collision condition. In the case of *Lazarus v. Rand Steam Laundries* (1946) (*Pty*) *Ltd*, 1952 (3) S.A. 49 at p. 51, De Villiers, J., quoted with approval the following passage from *Hersman v. Shapiro & Co.*, 1926 T.P.D. 367 at p. 379:

"Monetary damage having been suffered, it is necessary for the court to assess the amount and make the best use it can of the evidence before it. There are cases where the assessment by the Court is very little more than an estimate but even so, if it is certain that pecuniary damage has been suffered, the Court is bound to award damages, *It is not so bound where evidence is available to the Plaintiff which he has not produced.* In those circumstances the Court is justified in giving and does give absolution from the instance."

This is precisely the position in the case now before us. There is moreover no satisfactory evidence of its pre-collision value but there is an indication that such value is less than the repair cost quotation. This was admitted by Plaintiff's attorney in the Court *a quo.*

No reason was advanced for failure to produce satisfactory evidence of values which evidence is still obtainable.

In the result the Plaintiff has not proved his damages and the appeal must be dismissed with costs.

D. O. Bowen, Permanent Member.

Thorpe, Acting President and Schultz, Member, concurred.

For Appellant: Adv H. Barolsky i/b S. Wade, Germiston.

For Respondent: Mr M. C. Gishen of Hammerschlag, Frank, Stoloff and Gishen, Springs.

CENTRAL BANTU APPEAL COURT

KHUMALO versus NTSHALINTSHALI.
ROLL 8 OF 1971

JOHANNESBURG: 2 April 1971. Before Thorpe, Acting President, Bowen, Permanent Member, and Schultz, Member.

HUSBAND AND WIFE

Lobolo paid with a view to civil marriage—marriage not materialising—claim for refund.

Summary: Both Plaintiff and Defendant belonged to the Zulu tribe. Plaintiff paid R284 as lobolo for Defendant's daughter with a view to a civil marriage, but sued for its return because the marriage did not materialise through the fault of the Defendant's daughter. The Defendant denied liability, saying that the Plaintiff had rejected his daughter. It was common cause that the marriage would never materialise.

Held: That irrespective of fault the Plaintiff was entitled to the refund of all lobolo paid.

References:

Seymour "Bantu Law in South Africa" (third edition, 1970) p. 243.

Mbonjiwa v. Scellam, 1957 N.A.C. (S) 41.

Bantu Administration Act, No. 38 of 1927, section 11.

Nyamane v. Busakwe, 1944, N.A.C. (T & N) 78.

Appeal from the Court of the Bantu Affairs Commissioner, Johannesburg.

Thorpe, Acting President:

I shall refer to the Appellant as the Defendant and to the Respondent as the Plaintiff.

After two amendments in the Court *a quo* the Plaintiff's summons as amplified by further particulars read that during 1967 the Plaintiff negotiated with Defendant with regard to a customary union to be entered into between the Plaintiff and the Defendant's ward, Thoko, and that the Plaintiff paid in respect of lobolo for the said Thoko a total of R284 being made up of R140 paid on 8 September 1967, R24 on 24 September 1967 and R120 on 19 November 1967. The Plaintiff alleged that despite the fact that he hade paid the lobolo required the Defendant refused to hand over Thoko in marriage and that notwithstanding demand he fails or refuses to return to the Plaintiff the sum of R284.

The Defendant in his plea denied that there had been any negotiations for a customary union and stated that the intention of the parties was that the Plaintiff and the Defendant's daughter Thoko, would enter into a civil marriage. Receipt of the R284 was acknowledged but the Defendant denied having refused to hand over his daughter in marriage. The Defendant pleaded that the Plaintiff had rejected his daughter and asked for dismissal of the summons.

After hearing the evidence of the Plaintiff and his witness and that of the Defendant and Thoko the Commissioner entered judgment for the Plaintiff, with costs.

The Court *a quo* dealt with the case on the basis that both parties had agreed on a civil marriage. Before us their attorneys stated that it was common cause that a civil marriage had been agreed upon and in the circumstances we allowed the summons to be amended accordingly. We were further informed that it was common cause that the marriage would not take place.

In his reasons the Commissioner said that he had found it impossible to decide who was responsible for the termination of the engagement, but that in any event a finding on this aspect was not necessary. He held in effect that where a civil marriage had been intended but none would take place, all lobolo paid must be refunded, no matter who was responsible for the termination of the engagement.

Appeal was noted on the grounds that the above view of the law was incorrect and that judgment should not have been given for the Plaintiff. Before us Mr Madikizela who appeared on behalf of the Defendant conceded that the evidence did not determine who was at fault and submitted that the judgment should have been one of absolution.

There have been various views as to the legal consequences of a lobolo agreement entered into with a view to a civil marriage but as stated by *Seymour* in "Bantu Law in South Africa", third edition, 1970, the first paragraph of page 243:

"The . . . best opinion, now well established as the correct one, is that the dowry agreement is entirely ancillary to the civil marriage; the parties to the agreement are deemed to have intended that it should be adjusted to meet the exigencies of the marriage."

The cases listed by Seymour bear out this statement, especially that of *Mbonjiwa v. Scellam*, 1957, N.A.C. (S) 41, where it is said at page 43 that a lobolo agreement or payment made in connection with a civil marriage must be regarded as ancillary to, and modified by, the legal principles underlying such marriage.

Bantu law must then be applied to the lobolo contract in so far as this is compatible with a civil marriage. Section 11 of the Bantu Administration Act, No. 38 of 1927, as amended, provides that Court of Bantu Affairs Commissioners shall have a discretion to apply Bantu Law except in so far as it shall have been repealed or modified.

In the present case both parties are of the Zulu tribe and as the evidence establishes that the Defendant is domiciled in the Transvaal it is the original Zulu law and not the Natal Code which must be looked to, although the result in the present circumstances would be the same. Now, in *Nyamane v. Busakwe*, 1944, N.A.C. (T & N) 78 it was held that under original Zulu custom all payments of lobolo made with a view to a customary union must be refunded if the customary union

does not eventuate, even where the prospective groom is to blame. As Zulu law on this point is not contrary to the principles applicable to an engagement to marry by civil rites, Zulu law must be followed and the appeal cannot succeed.

The appeal was noted late but as there is no prospect of success the application for condonation must be refused and the appeal must be dismissed, with costs.

Bowen, Permanent Member, concur.

Schultz, Member, concur.

For Appellant: Mr J. N. Madikizela, Johannesburg.

For Respondent: Mr Mia of Henry Helman, Johannesburg.

NORTH-EASTERN BANTU APPEAL COURT

B.A.C. CASE 19 OF 1970

NGCOBO versus MTHEMBU

DURBAN: 11 March 1971. Before Cronjé, President, and V. d. Merwe and Warner, Members.

POLICE

Policeman—assault—course of duty—things done in pursuance of Police Act, 1958 (*No.* 7 *of* 1958)*—time limits regarding commencement of action and notice to Defendant—special plea—condonation late noting of appeal.*

The reader is referred to the full judgment below.

Laws referred to:
Police Act, 1958 (Act 7 of 1958) 5, 32.

Rules referred to:
Bantu Appeal Court Rules 2 (1), 4, 5 (3).

Cases referred to:

Tauzini v. Tsoki, 1964, B.A.C. 92 (S).

Dhladhla & Ors. v. Linda I, N.A.C. (NED) 73 (1949).

Cwele v. Sigwebela, 1959, N.A.C. (N & T) 19.

Ngubani v. Divisional Commissioner S.A.P. Witwatersrand, 1963 (1) S.A. 316.

Dease v. Minister of Justice, 1962 (3) S.A. 215.

Works referred to:

"A Digest of S.A. Native Civil Case Law", Warner para. 437, 454.

Appeal from the Court of the Bantu Affairs Commissioner, Umzinto.

Cronjé, President:

Plaintiff (now Respondent) claimed from Defendant (now Appellant) payment of R700 damages, of which R200 represented damages for wrongful assault upon her person by Defendant, and R500 damages in respect of a wrongful charge of obstructing a policeman in the execution of his duties, which the Defendant without reasonable and probable cause preferred against her.

Defendant filed a special plea to the effect that "at all the relevant times he was a member of the South African Police acting in pursuance of Act 7 of 1958, and—

(1) as no notice as contemplated by section 32 of Act 7 of 1958, has been given to Defendant, and

(2) as summons has in any event been issued on 9 August 1968, more than six months after the cause of action arose in or about April 1967, again contrary to the provisions of section 32 of Act 7 of 1958,

Plaintiff is in terms of the said section 32 of Act 7 of 1958 barred from instituting this action against Defendant in that he has failed to give notice to Defendant as aforesaid".

It appears from the record that the attorneys for Plaintiff and Defendant on 12 January 1970, argued the special plea before the Assistant Bantu Affairs Commissioner who postponed the matter to 2 February 1970. The record then shows the following entry: "On 2 February 1970 special plea dismissed".

The Defendant was then called to give evidence, at the conclusion whereof Defendant's attorney asked for a decision on the special plea. The Commissioner, after again hearing argument, dismissed the special plea "as at this stage there is no factual evidence that the Defendant acted in pursuance of the Police Act at the stage of the alleged assault".

Against the whole of that judgment the Defendant noted an appeal on the ground that the Court erred in holding that Defendant had not established that he acted in pursuance of Act 7 of 1958 at the relevant time, and that Defendant could consequently not rely on the provisions of section 32 of the said Act.

In terms of Rule 2 (1) of the rules of this Court (Government Notice R. 2084 of 1967) Defendant's attorney applied for a written judgment on 10 February 1970, which the Commissioner should have furnished within 10 days i.e. not later than 21 February. He only furnished his judgment on 16 March 1970, on which date the Defendant noted his appeal. It was laid down in *Tauzeni v. Tsoki*, 1964. B.A.C. 92 (S) that where the written judgment has not been delivered within 10 days of the request therefor the party concerned should take care to see that his appeal is noted within 21 days of the original judgment. It follows that in the instant case the appeal should have been noted not later than 26 February and was accordingly noted late. Defendant's attorney, furthermore, did not when noting the appeal, furnish security in the sum of R15 as required by Rule 5 (3) of the rules.

An application for condonation of the late noting of the appeal and of the late furnishing of security for Respondent's costs was filed, supported by an affidavit by a Mr Hattingh who was at the relevant time employed as a clerk in the office of the Deputy State Attorney, Durban. He attributes the late filing of the notice of appeal to a misunderstanding of the rules of this Court, and the late furnishing of security to the fact that he was under the impression that the Government—who is the employer of Defendant—was not required to furnish security, nor was its employee when acting within the scope of his employment. There are no grounds for that presumption. Neither the Government nor its employee is exempted by the rules from furnishing security for the Respondent's costs of appeal, nor is it the practice in this Court not to require the furnishing of security in such circumstances. The Government is, in any event, not a party to these proceedings.

Mr Jacobs submitted that the misunderstanding of the rules was bona fide, that there was no deliberate negligence on the part of Defendant's attorney and that just cause therefore existed for condonation of the late noting of the appeal.

The reasons furnished by Defendant's attorney do not, in my view, constitute just cause within the meaning of Rule 4 of this Court's rules. Ignorance of the rules cannot be accepted as a valid excuse—*vide Dhladhla and Others v. Linda,* 1 N.A.C. (NED) 73 (1949) and the decisions mentioned in paragraph 437 of Warner's "A Digest of South African Native Civil Case Law".

Whilst this Court is not prepared to ignore the time limit fixed by the rules within which an appeal should be noted, it will however grant condonation if *ex facie* the record the Appellant has a good chance to succeed on appeal—see *Cwele v. Sigwebela,* 1939, N.A.C. (N & T) 19 and the other decisions referred to in paragraph 454 of Warner's Digest.

To establish whether the Appellant had a prospect of success, counsel were allowed to argue the merits of the appeal and I now proceed to examine the merits and prospects of success of the appeal.

Section 32 of the Police Act, 1958 (No. 7 of 1958), to which I hereinafter refer as the Act, provides as follows:

"32. Any civil action against the State or any person in respect of anything done in pursuance of this Act, shall be commenced within six months after the cause of action has arisen, and notice, in writing, of any civil action and of the cause thereof shall be given to the Defendant one month at least before the commencement thereof".

Section 5 of the Act defines the functions of the South African Police as follows:

"5. The functions of the South African Police shall be *inter alia*—

(a) the preservation of the internal security of the Republic;

(b) the maintenance of law and order;

(c) the investigation of any offence or alleged offence;

(d) the prevention of crime."

Defendant stated in evidence that on 23 April 1967, he went on a raiding squad with three European and five Bantu constables, the purpose of which was a "crime prevention patrol". Whilst he was examining Plaintiff's husband's reference book, she asked him what he was doing at her kraal. He alleged that she eventually pushed him when he was investigating what object was bulging under her jersey and that she was noisy. He denied that he had assaulted her.

It appears that the Police decided to withdraw from the scene because people gathered on account of the noise made by Plaintiff and the Police feared that they might be attacked, that Defendant then laid a charge at the charge office against the Plaintiff of obstructing the Police in the execution of their duties. She was arrested the following day by a European constable. It appears further that the charge against Plaintiff was withdrawn and that she then laid a charge of assault against Defendant who was convicted and fined R15 for an assault upon Plaintiff.

The Commissioner states in his reasons for judgment that it had not been established that the Defendant acted in pursuance of the Act, and for that reason the special plea was dismissted.

To succeed on his plea the Defendant must show that at the time of the alleged assault (which he denied) and of laying a charge against Plaintiff (which he admitted) he was acting in pursuance of the Act.

In *Ngubani v. Divisional Commissioner, South African Police, Witwatersrand,* 1963 (1) S.A. 316, dealing with the question of determining whether an act had been done "pursuant to the Act", within the meaning of section 32 of the Police Act, No. 7 of 1958, Kuper, J. stated, at page 322: "I would suggest that the proper test to apply in every case of this kind is a subjective test. What the policeman concerned has to show is that the act which he has done and which is the basis of the complaint is done in pursuance of the Act or as incidental to or flowing from an act so done".

Considering the meaning of the expression "performing police duties" Munnik, A. J., in *Dease v. Minister of Justice,* 1962 (3) S.A. 215, at pages 217 and 218 remarked as follows: "In ordinary everyday usage this expression to my mind connotes the maintenance of law and order and the investigation and prevention of crime. . . . It follows therefore that if the Police were, at the time of the assault, "performing police duties" in the sense I have ascribed to the words, they were doing something in pursuance of the Act, it being in terms of section 5 of the Act their function, *inter alia,* to investigate crime, to maintain law and order and to prevent crime".

In my view the Defendant's evidence establishes that when he allegedly assaulted the Plaintiff he was acting in the execution of his duties, viz., a patrol by a Police party, of which Defendant was a member, undertaken for the prevention of crime.

The laying of a charge by Defendant against Plaintiff of obstructing a policeman in the execution of his duties, was an act incidental to and flowing from the crime prevention patrol, and was also done in pursuance of the Act.

It follows, therefore, that the Defendant having acted in pursuance of the Act is entitled to the prescriptive protection of section 32 of the Act. It is common cause that the cause arose on 23 April 1967, and that summons was only issued on 9 August 1968, some 10 months after the expiry of the period of six months allowed by section 32. It is also common cause that Plaintiff neglected to give one month's notice of the civil action as required by section 32.

The Defendant in my view has every prospect of success on appeal In the premises the late noting of the appeal should be condoned.

In the circumstances there appears to be no good reason why the late furnishing of security for Respondent's costs in terms of Rule 5 (3) should not also be condoned.

Condonation of the late furnishing of security and of the late noting of the appeal was granted, and the appeal was allowed with costs.

The Assistant Bantu Affairs Commissioner's judgment is altered to read: "The Defendant's special plea is upheld with costs".

Van der Merwe and Warner, Members, concurred.

Appearances:

For Appellant: Mr B. Jacobs i.b. Deputy State Attorney.

For Respondent: Mr A. S. P. Nxumalo.

NORTH-EASTERN BANTU APPEAL COURT

B.A.C. CASE 60 OF 1970

NCANANA versus XULU

ESHOWE: 22 April 1971. Before Coertze, President, and Van der Merwe and Noble, Members.

PRACTICE AND PROCEDURE

Chief's judgment—registration—delivery of written record—lapsing of judgment.

Summary: Nothing emerged from the proceedings in this case to indicate the date on which the Chief's Written Record was delivered to the Bantu Affairs Commissioner though there was an indication of the date on which registration of the Chief's judgment was effected.

Held: That there is a clear distinction between delivery of the written record of the Chief's Court and registration of the judgment contained therein.

Held: That a Chief's judgment lapses if the written record is not delivered within two months after the date on which such judgment was given irrespective of the date on which actual registration was effected.

Rules referred to:

Chief's & Headmen's Civil Courts Rules 6 and 7.

Appeal from the Court of the Bantu Affairs Commissioner, Mahlabatini.

Coertze, President:

The Plaintiff (now Respondent) sued Defendant (now Appellant) for the return of a certain "nkoni" heifer or its value R120 allegedly wrongfully and unlawfully attached by a tribal messenger and handed over to Defendant, and was awarded judgment for the return of the heifer or its value R60.

Defendant has appealed to this Court on the following grounds:

"1. That the Learned Bantu Affairs Commissioner erred in finding that Plaintiff had proved his claim beyond a reasonable doubt.

2. That the Court erred in rejecting the evidence of the Defendant and that the Court erred in not affording the Defendant an opportunity of ascertaining from the Clerk of the Court whether such judgment mentioned in the evidence of Defendant was in fact registered by the Chief concerned and that it actually was a valid one.

3. The judgment is against the evidence and weight of evidence."

It is common cause that the heifer concerned was attached though its value was disputed. In testimony the Plaintiff placed the value at R60 and the Defendant placed it at R25. The Bantu Affairs Commissioner did not explain why he preferred Plaintiff's valuation.

A point vital to the proceedings viz., whether the Chief's judgment by virtue of which the attachment was made was a valid one, came up crisply for decision.

According to the testimony of the Clerk of the Court who quoted from the "Register of Civil and Criminal matters heard in the Chief's Court" the judgment concerned was given by the Chief on 6 March 1967 and was registered by the Chief on 11 May 1967.

Rule 6 (1) of Chiefs' and Headmen's Civil Courts rules (published in Government Notice R. 2082 of 1967), requires a Chief to "within one month of the date of the judgment cause the orginal of the written record (of any case decided in his civil court) to be addressed and posted, or delivered by messenger, to the Bantu Affairs Commissioner of the area in which the Defendant resides".

Rule 7 (1) of these rules requires that all judgments of a Chief's Court be registered and that particulars of the written record referred to in Rule 6 (1), together with the date of registration, be entered in a register to be kept for the purpose by the Clerk of the Bantu Affairs Commissioner's Court. That register is prescribed in form 2 of the annexures to the rules.

In my view the "Registration" required by Rule 7 (1) means the act of entering the particulars mentioned in Rule 6 (1) in the "register" by the Clerk of Court. No time limit for such registration is stipulated. It is conceivable that an overworked or indolent clerk of Court will not register the judgments forthwith and I draw attention to the Bantu Affairs Commissioner's comments on 7 November 1968 regarding the lagging in arrear of the registration of judgments during 1967 and 1968. Clearly then the failure to "register" a judgment cannot affect its legality.

I am strengthened in this view by the provision of Rule 7 (2) which reads "if *after two months* the written record has not been *delivered* to the Bantu Affairs Commissioner as provided in Rule 6 (3) or (4) the judgment (of the Chief's Court) *shall lapse*" (my underlining).

Quite clearly then the date of delivery of the Chief's written record to the Bantu Affairs Commissioner is the deciding factor on the point of whether or not the Chief's judgment in the instant case had lapsed and with it the validity of that judgment by virtue of which the attachment was made.

Unfortunately the Chief's original "Written Record" was not produced in the Court *a quo*. On the reverse side of that record provision is made for endorsement of "Date Received" and "Date Registered". The first of these two endorsements would have cleared up the point of the date of *delivery* to the Bantu Affairs Commissioner of the written record. According to the Clerk of Court, who quoted from the register, the Chief registered (I presume this means "caused to be registered" as it is the Clerk's duty to perform the act of registration) the judgment on 11 May 1967. This suggests that the Chief brought the "written record" and *delivered* it personally and caused registration to be effected. This, of course, is pure conjecture and there is nothing definite on record to establish the applicability of Chief's Courts Rule 7 (2).

In my view, therefore, ground 2 of the appeal is of substance.

Though there was no specific appeal against the quantum of the award it might well be argued that it is covered by ground 1. Plaintiff claimed a beast or its value of R120 but in testimony valued it at R60 but gave no reason for the change. It seems clear that his valuation is an arbitrary one. Defendant placed the value at R25 and stated that he sold it for R28. It seems desirable that his point be fully investigated.

In the result the appeal is allowed with costs and the judgment of the court *a quo* is set aside and the case is remitted to that Court in order that the questions of whether or not the Chief's Court's judgment has lapsed and the value of the heifer in question, may be fully canvassed and thereafter a fresh judgment given.

Van der Merwe and Noble, Members, concurred.

Appearances:

For Appellant: In person.

For Respondent: Mr W. E. White.

NOORDOOSTELIKE BANTOE APPÈLHOF

B.A.H. SAAK 3 van 1971

NDEBELE versus NDEBELE

PIETERMARITZBURG: 10 Mei 1971. Voor Coertze, Voorsitter, en Van der Merwe en Warner, Lede.

BANTOEREG

Ngquthu-*bees—eiendom van moeder van dogter—Eienares kan daaroor beskik maar nie sonder medewete van voog.*

Opsomming: Eiser het vyf beeste van Verweerder geëis synde 'n Ngqutu-bees wat aan Eiser se moeder gegee was en dié se aanteel, op grond daarvan dat hy na sy vader se dood die kraalhoof geword het en ook sy oorlede moeder se erfgenaam. Verweerder het die verweer opgewerp dat sy moeder die beeste gedurende haar leeftyd aan hom geskenk het.

Beslis: Dat aangesien Eiser sy oorlede moeder se erfgenaam is en sodanige skenking neerkom op onterwing, die skenking nie sonder sy medewete gemaak kon word nie. Die bewyslas was op Verweerder om te bewys dat so 'n skenking gemaak was.

Verwysings:

Artikel 96 (2), Natalse Wetboek van Bantoereg (Proklamasie R. 195 van 1967).

Artikel 96 (2), Natalse Wetboek van Bantoereg (Proklamasie R. 195 van 1967) Hoofstuk XII bladsye 181 tot 192.

Principles of Native Law and the Natal Code—Stafford and Franklin p. 183.

Nkunzi v. Nyaware, 1916, N.H.C. 47.

Appèl van die Hof van die Bantoesakekommissaris, Vryheid.

Van der Merwe, Permanente Lid:

Hierdie saak het sy oorsprong in die hof van kaptein Mdlalose. Die kaptein het uitspraak gegee ten gunste van die Eiser vir vyf beeste. Die Verweerder het teen hierdie uitspraak appèlleer na die Hof van die Bantoesakekommissaris waar die appèl van die hand gewys is met koste en die uitspraak van die kaptein gehandhaaf is.

Die Verweerder het nou teen hierdie uitspraak appèlleer. Paragraaf 3 van die kennisgewing van appèl wat lui—

"The additional grounds of appeal will be filed as soon as a complete record with reasons of judgment is obtained" is nie ter sake nie. Die aantekening van appèl of inlewering van verdere redes vir appèl kan nie verbind word aan die voorsiening van die oorkonde of redes vir uitspraak nie. Hierdie aangeleentheid is al oor en oor beklemtoon en regspraktisyns moet asseblief daarop let en die reëls bestudeer. Die twee oorblywende redes waarop die Verweerder staatmaak is dat die uitspraak teen die oorwig van getuienis is en dat die

Hof moes bevind het dat daar 'n skenking van die *Ngqutu*-bees was in die lig van Willie Ndebele se getuienis.

Die partye het op 23 Oktober 1970 in die Hof verskyn en Eiser se eis is soos volg genotuleer:

"Eiser se eis is vir vyf beeste synde beeste en aanteel wat aan Eiser se moeder betaal was as *Ngqutu-beeste* en ten opsigte waarvan eiser die erfgenaam is. Eiser is die oudste seun in die huis van sy oorlede moeder en sodoende geregtig op die erflating".

Verweerder se antwoord hierop is soos volg genotuleer:

"Alhoewel bewerings van Eiser nog nie erken word nie. Verweerder beweer dat die beeste aan hom behoort—as jongste —as bemaking van sy moeder van sy huis."

Uit die getuienis is dit duidelik dat die volgende nie in geskil is nie:

1. Dat Eiser die oudste en Verweerder die jongste seun is van dieselfde vader en moeder;

2. Dat die vyf beeste in geskil die *Ngqutu*-bees en dié se aanteel is en dus die eiendom van Eiser se moeder was;

3. Dat die beeste by Willie Ndebele, 'n jonger broer van Eiser, se kraal gehou was waar Eiser en Verweeder se vader en moeder ingewoon het.

Die eiser maak nou aanspraak op die beeste op grond daarvan dat hy na die afsterwe van sy vader die kraalhoof geword het en na sy moeder se dood ook geregtig geword het op haar *Ngqutu*-bees en dié se aanteel.

Daar kan geen twyfel bestaan dat die partye se moeder, as eienares van die beeste, daaroor kon beskik nie. Artikel 96 (2) van die Natalse Wetboek van Bantoereg (Proklamasie R. 195 van 1967) bepaal dat die *Ngqutu*-bees, tesame met die vermeerdering daarvan die dogter se moeder se eiendom word om deur haar aangewend te word ten voordele van haar huis of na goeddunke.

In die onderhawige saak was die bewyslas dus eintlik op Verweerder om te bewys dat sy moeder die beeste aan hom geskenk het gedurende haar leeftyd want na haar dood word dit die eiendom van die Huis waartoe sy behoort het en, tensy die teendeel bewys word, kom dan onder die beheer van die kraalhoof van die betrokke huis, in hierdie geval die Eiser. In "Principles of Native Law and the Natal Code" deur Stafford en Franklin, bladsy 183 paragraaf 4. staan: "It must be remembered that when the kraal head dies and his eldest son of the chief wife assumes control, such eldest son becomes heir to his mother's house, the *indhlunkulu*, as well as general heir to the whole kraal. By virtue of being the general heir he succeeds to all kraal property."

Dit blyk uit die getuienis dat die Verweerder eers ongeveer 'n jaar na sy moeder se dood en terwyl sy broer Willie nie tuis was nie, die vee by Willie se stat gaan haal het en dat die getal beeste toe reeds vermeerder het van drie ten tyde van sy vader se oorlye tot vyf.

Die Verweerder het getuig dat sy moeder die beeste aan hom geskenk het min of meer 'n maand na sy vader sy oorlye in teenwoordigheid van die Eiser en sy suster Jacolina; dat Willie toe reeds weg was maar dat hy dit aan Willie rapporteer het toe laasgenoemde by sy (Verweerder) se stat gekom het.

Verweerder se getuienis is deur dié van Jacolina ondersteun met betrekking tot die skenking. Sy sê egter dat Willie by die stat was maar nie in die hut nie. Sy sê Eiser het toevallig daar gekom—hy is nie geroep nie en dat sy Verweerder net daar gesien het en nie weet of hy geroep was nie en dat Willie die kraalhoof was waar haar moeder gewoon het. Daar moet in gedagte gehou word dat Jacolina blykbaar spesiaal gekom het om te "ween" want sy was nie by die begrafnis nie. Sy behoort dus beter as enigiemand anders te onthou wie by daardie spesifieke geleentheid by die stat was. Dit kom dus baie eienaardig voor dat die hoof van die stat en die erfopvolger, Eiser hierin, nie spesifiek ontbied is toe die beskikking gemaak is nie. Eiser en Willie ontken beide dat so 'n beskikking gemaak is. Dit was ook nooit onder kruisverhoor aan enigeen van hulle gevra waar hulle ten tye van die beskikking was nie.

Die Bantoesakekommissaris het dan ook die getuienis van Eiser en van Willie aanvaar en dié van Verweerder en sy suster verwerp.

Vanweë die beginsels wat in *Rex v. Dhlumayo & Another*, 1948 (2) A.D. 677, neergelê is werp 'n appèlhof nie maklik die bevindings van die voorsittende beampte wat die saak aanvanklik verhoor het, oorboord nie. Hy het immers die getuies gesien en gehoor en was verdiep in die atmosfeer wat daar tydens die verhoor van die saak geheers het. Die Bantoesakekommissaris het na my mening in 'n goed gemotiveerde uitspraak sy redes verstrek en na my mening word hierdie redes deur die getuienis gestaaf en ek kan geen rede vind om sy bevinding omver te werp nie. Daar is egter 'n ander rede waarom die getuienis van Verweerder onder verdenking staan.

Hoewel die partye se moeder by Willie ingewoon het was sy, kragtens die bepalings van artikel 44 (4) van die Natalse Wetboek van Bantoereg, nog onder die voogdyskap van haar man se erfgenaam, in hierdie geval haar oudste seun d.w.s. Eiser.

Hoewel die *Ngqutu*-bees en die aanteel daarvan haar absolute eiendom is, is dit tog paslik dat sy haar voog sal sê wat sy daarmee maak. Doen sy niks voor sy te sterwe kom nie sou Eiser daardie bees ook erf want hy is die algemene erfgenaam. Deur die bees aan iemand anders te gee is gelykstaande aan onterwing van die oudste seun. Familiesake en veral sake van nalatenskap word nie in die geheim gedoen nie. Niemand sou haar reg om die beeste aan iemand anders te gee betwis nie maar met die oog op haar posisie is dit uiters onwaarskynlik dat sy so 'n belangrike stap as die weggee van *Ngqutu*-beeste sou onderneem sonder om vir almal daarvan te sê. Sien Die Natalse Wetboek Hoofstuk XII bl. 182-192 *Nkunzi v. Nyawose* 1916, NHC 47.

In die onderhawige geval is daar 'n onus op Verweerder om te bewys dat die beeste wel aan hom gegee was. Die

oorwig van waarskynlikheid, vir redes wat reeds genoem is, is dat hy nie hierin geslaag het nie.

Die finale resultaat is dat die appèl van die hand gewys word met koste en die Bantoesakekommissaris se uitspraak word bekragtig.

Coertze, Voorsitter en Warner, Lid, het saamgestem.

Verskynings:

Vir Appellant: Adv. D. Carey-Miller.

Vir Respondent: Adv W C H. Menge.

NORTH-EASTERN BANTU APPEAL COURT

B.A.C. CASE 7 OF 1971

DLAMINI versus HLOPE

PIETERMARITZBURG: 11 May 1971. Before Coertze, President and V.d. Merwe and Warner, Members.

PATERNITY

Paternity—admission of prior intimacy—denial of fatherhood—Defendant's onus.

Summary: Defendant admitted paternity of one of Plaintiff's illegitimate children but denied it in respect of two others. Acceptable evidence of intimacy subsequent to the birth of the first child was tendered.

Held: there was an onus on Defendant to prove that he could not be the father of the two younger illegitimate children.

Cases referred to:

S. v. Swart, 1965 (3) S.A.L.R. (A.D.) 454. *McDonald v. Stander,* 1935, A.D. 325.

Laws referred to:

Maintenance Act, 1963 (Act 23 of 1963).

Coertze, President:

The Respondent (now Appellant) was summoned to appear before the Bantu Affairs Commissioner, Pietermaritzburg, to answer an allegation by Complainant (now Respondent) that he failed to comply with the provisions of section 4 (1) (a) of Act 23 of 1963, in that he did not support three children viz. Nompumelelo, a girl aged six years; Bhekithemba, a boy four years and Mzonjani, a boy nine months of age.

Appellant, then Respondent, admitted paternity of the first child but denied paternity of the two children aged four years and nine months, respectively.

The Bantu Affairs Commissioner found that appellant was the father of these two children and ordered Appellant to pay R2,50 per month per child as from 7 October 1970 to the Bantu Affairs Commissioner, Pietermaritzburg, for all three children.

Against this decision and order Respondent in the court *a quo* appealed to this Court on the following grounds:

"1. That the judgment was against the weight of evidence and not supported thereby.

2. That the Judicial Officer erred in finding that the Appellant was the father of the two children Bhekithemba and Mzonjani.

3. The Judicial Officer erred in holding that the onus of proof was on the Appellant to prove that he is not the father of the two children.

4. The Judicial Officer erred, in finding that the witness Agnes Njilo was a satisfactory witness notwithstanding his finding that she was an unco-operative witness.

5. The Judicial Officer should have found that the Complainant, Bettina Hlophe, was an unsatisfactory witness in view of the contradiction and inconsistencies in her evidence and also in her evidence and that of the witness Nozo Hlopha."

I shall deal first with ground 3 of the Notice of Appeal.

It is common cause that Appellant is the father of complainant's first child, a girl aged six years. It is also common cause that Complainant and Defendant continued to be lovers after the birth of this child and that this relationship, according to Appellant, ended in January 1965, when they parted company.

Complainant denied that the relationship had ended then and stated that they had had sexual intercourse right up to two days before the inquiry which took place on 17 September 1970.

Leaving aside the question of Complainant's credibility for the moment the question arises whether there is substance in ground 3 of the Notice of Appeal that "the Judicial Officer erred in holding that the onus of proof was on the Appellant to prove that he is not the father of the two children".

The Bantu Affairs Commissioner in his reasons for judgment, inter alia, quoted *S. v. Swart,* S.A.L.R., 1965 (3) A.D. 454. In this case it was decided according to the headnote that "Kragtens Romeins-Hollandse reg, waar 'n vrou onderhoud vir haar onegte kind vorder, 'n erkenning van byslaap, watter tyd ookal, deur die man wat die moeder aanwys, skep 'n vermoede dat daardie man die vader is en dit hom dan ten laste gelê word om te bewys dat hy nie die vader kan wees nie".

In this judgment the learned Acting Judge of Appeal refers to the case of *McDonald v. Stander,* 1935, A.D. 325, where it is said "Luidens ons regsvoorskrifte, soos ek hulle verstaan, is dit dus onnodig om na te gaan of eiseres geloofwaardig is by die aanwysing van die vader. Verweerder kan die regsgevolge van sy byslaap ontduik slegs deur bewys van die onmoontlikheid daarvan dat die kind van hom ontvang is".

This view is confirmed in the judgment of *S. v. Swart* at p. 460 where it is said . . . . "Na my beskouing kan die destydse Romeins-Hollandse-reg by huidige omstandighede aangepas word op so 'n wyse dat die erkenning van byslaap, watter tyd ookal, deur die man wat die moeder aanwys, 'n vermoede skep dat daardie man die vader is en dit hom dan ten laste gelê word om te bewys dat hy nie die vader kan wees nie. Al was daar in die ou prosedure twee stadiums, kan, na my mening, die afleiding van die kenbronne, waarna ek verwys het, gemaak word dat die vermoede geskep word sodra die man die erkenning van byslaap maak. Dit is sy erkenning wat die vermoede skep en dit maak dus nie saak dat daar in hedendaagse prosedure nie twee stadiums is nie. Indien die man kan bewys dat hy nie die vader van die kind kan wees nie, het hy hom van die bewyslas gekwyt. Dit kan hy op verskeie maniere doen; byvoorbeeld, deur te bewys dat hy nie met die vrou gedurende die bevrugtingstydperk geslagsverkeer kon gevoer het nie omdat hy uitlandig was of om enige ander gegronde rede; of al het hy met haar gemeenskap gehad, maar kan bewys dat hy steriel was en haar bygevolg nie kon bevrug het nie; of dat by wyse van 'n bloedtoets dit bewys kan word dat hy nie die vader kan wees nie".

Having regard to the foregoing the Bantu Affairs Commissioner, in my view did not err in holding that the onus of proof was on the appellant to prove that he is not the father of the two children. Ground 3 of the Notice of Appeal is therefore without substance.

The other grounds of appeal are on the evidence and weight of evidence, the facts and the credibility of witnesses.

Having decided that the onus is on the Appellant it is necessary to determine whether his evidence is sufficient to discharge this onus.

The Appellant's evidence is almost entirely a denial. He denies that he is the father of Complainant's two younger children and stated that he and Complainant parted company some 10 months before November 1965, the month mentioned by Complainant as the time of the conception of the second child. He denies that reports about the complainant's pregnancy of the second and third children had been made to his family and he denied Complainant's statement that he had taken her to his mother's home with a view to subsequent marriage. Appellant's denials are however entirely uncorroborated. Moreover, he admits having been to the Chief's Court and that Complainant's father obtained judgment against him. When questioned whether he had undertaken in the Chief's Court not to appeal he stated "They did not tell me anything at Chief's Court". When asked why he did not appeal timeously he said "they did not tell me about the judgment". In fact he did nothing about this judgment, not even when two head of cattle belonging to him were attached in execution. He stated he had wanted to appeal but that it was then too late to do so. Appellant appears to have regarded the affair in an entirely light-hearted manner.

I have come to the conclusion that he did not discharge the onus which rested upon him to show on a balance of probabilities that he was not the father of the two younger children.

In addition the Bantu Affairs Commissioner decided to accept the evidence of Complainant and the witness Agnes Njilo, despite certain unsatisfactory features therein. He has given cogent reasons for his findings which in my view are supported by the evidence. I am not prepared to hold that he has misdirected himself. In the result the appeal must fail.

It is ordered that the appeal be and it is hereby dismissed with costs and the judgment of the Bantu Affairs Commissioner confirmed.

Van der Merwe and Warner, Members, concurred.

Appearances:

For Appellant: Mr A. M. Moleko.

For Respondent: In default.

NOORDOOSTELIKE BANTU APPÈLHOF

B.A.H. SAAK 12 VAN 1971

SITHOLE versus SITHOLE

PIETERMARITZBURG: 1 Junie 1971, voor Coertze, Voorsitter, Van der Merwe en Warner, lede van die Hof.

PROSESREËLS

Opsomming: Aansoek om verlenging van tydperk waarin appèl aangeteken kan word—Bantoesakekommissaris se uitspraak op 19 Augustus 1970—aansoek vir skriftelike uitspraak op 25 Augustus 1970 en ontvang deur prokureur op 16 September 1970—kennisgewing van appèl deur Klerk van die Hof ontvang op 25 September 1970—aansoek geweier omdat appèl nie binne 21 dae vanaf 19 Augustus 1970 aangeteken is nie.

Beslis: Die tydperk waarin appèl aangeteken kan word word nie onbepaaldelik verleng as redes vir uitspraak kragtens Reël 2 (1) van die Reëls vir Bantoe-Appélhowe aangevra is nie—as voorsittende beampte nie sy redes vir uitspraak binne 10 dae na so 'n aansoek aan die Klerk van die Hof besorg nie moet appèl binne 21 dae na uitspraak aangeteken word—vergunning in Reël 4 tree eers in werking nadat Reël 2 (1) stiptelik nagekom is.

Verwys: Reëls 2 (1) en 4 van Reëls vir Bantoe-Appèlhowe. Appèl van die Hof van die Bantoesakekommissaris, Weenen

Van der Merwe, Permanente Lid.

Beide partye in die geding het regsverteenwoordigers gehad in die hof *a quo*. Aan die einde van die verrigtings op 1 Julie 1970 het die Bantoesakekommissaris uitspraak voorbehou tot 19 Augustus 1970 op welke datum 'n geskrewe uitspraak gelewer is en uitspraak ten gunste van Eiser gegee is.

Teen hierdie uitspraak het die Verweerder appèl aangeteken. Die kennisgewing van appèl is gedateer 22 September 1970 maar is op 25 September 1970 deur die Klerk van die Hof ontvang.

Reël 4 van die Reëls vir Bantoe-Appèlhowe, afgekondig by Goewermentskennisgewing R. 2084 gedateer 29 Desember 1967, lui soos volg:

4. " 'n appèl teen 'n uitspraak van 'n Bantoesakekommissarishof word aangeteken binne 21 dae na die datum van dié uitspraak of binne 14 dae nadat die amptenaar wat die uitspraak gegee het, 'n skriftelike uitspraak ingevolge Reël 2 (1) aan die Klerk van die genoemde Hof besorg het, na gelang van watter tydperk die langste is, maar die Appèlhof kan op aansoek en by verstrekking van 'n billike rede dié tydperk in elke geval by die verhoor van die Appèl verleng".

Reël 32 (2) van bogenoemde reëls bepaal:

"Waar hierdie Reëls vereis dat iets binne 'n bepaalde getal dae gedoen moet word, word 'n Sondag of 'n openbare vakansiedag nie as deel van die tydperk ingereken nie."

In sy kennisgewing van appèl beweer die Appellant dat die reëls van die hof nagekom is omdat—

(a) "Security for Respondent's costs of appeal in the sum of R15 is hereby paid into Court;

(b) the Commissioner's reasons for judgment were applied for on 25 August 1970, and after a reminder to the Clerk of the Court on 2 September 1970 they were received at Estcourt on 16 September 1970".

Blykbaar gaan die Appellant van die veronderstelling uit dat as 'n appèl binne 14 dae nadat hy die regterlike beampte se uitspraak ontvang het, aangeteken word, die reëls van hierdie hof nagekom is. Hierdie veronderstelling berus op heeltemal 'n verkeerde premisse en kom heel dikwels voor in aansoeke om die tydperk waarin appèl aangeteken kan word te verleng. Blykbaar word daar nie ag geslaan op die bepalings van Reël 2 (1) nie wat soos volg lui:

"2 (1) Op die skriftelike versoek deur 'n party by 'n siviele geding in 'n Bantoesakekommissarishof binne sewe dae nadat uitspraak gegee is en voordat appèl aangeteken word, en na betaling van een rand deur die party, besorg die amptenaar wat die uitspraak gegee het, binne 10 dae aan die Klerk van sodanige Hof 'n skriftelike uitspraak wat deel van die oorkonde van die hof uitmaak en waarin die volgende aangegee word—

(a) die feite wat, na bevinding van die Hof, bewys is; en

(b) die redes vir die Hof se uitspraak.

Bostaande reël het slegs betrekking op die aanvra van 'n skriftelike uitspraak voor appèl aangeteken word. Reël 4 bepaal egter die wyse waarop appèl teen 'n uitspraak aangeteken word, te wete binne 21 dae na uitspraak of 14 dae nadat 'n skriftelike uitspraak deur die amptenaar wat die uitspraak gegee het, sodanige skriftelike uitspraak aan die Klerk van die Hof besorg het.

Hierdie toegewings, wat in Reël 4 gemaak word kan nie so vertolk word dat die Appellant 14 dae het waarin hy appèl kan aanteken nie as die amptenaar nie sy skriftelike uitspraak binne 10 dae nadat daarvoor aansoek gedoen is, aan die Klerk van die Hof besorg het nie maar miskien eers 'n maand of twee daarna. Die bedoeling van Reël 4 is myns insiens dat die tydperk slegs verleng word as Reël 2 (1) nagekom is d.w.s. die aansoek vir redes moes binne sewe dae gedoen gewees het en die amptenaar moes sy skriftelike redes binne 10 dae daarna aan die klerk van die hof besorg het. Dit gee 'n maksimum tydperk van 17 dae nadat uitspraak gegee is. Eers as Reël 2 (1) stiptelik nagekom is tree die vergunning in Reël 4 in werking.

Dit is beleid dat daar 'n einde aan litigasie moet kom en die beleid sal verydel word as die reëls anders vertolk word.

As die skriftelike uitspraak dus nie binne 10 dae aan die Klerk van die Hof besorg word nie kan die party wat wil appélleer nie maar net sit en wag tot dat dit eendag in die toekoms aan die Klerk van die Hof besorg is nie maar moet toesien dat sy appèl binne 21 dae nadat uitspraak gegee is aangeteken word. Dit kom daarop neer dat die getal dae waarin appèl aangeteken kan word nooit minder as 21 dae en nooit meer as 31 dae nadat uitspraak in die Hof gegee is, kan wees nie

In die onderhawige geval is uitspraak gegee op 19 Augustus 1970. Aansoek vir 'n skriftelike uitspraak kragtens Reël 2 (1) is op 25 Augustus 1970 gedoen. Die skriftelike uitspraak moes dus nie later nie as 5 September 1970, d.w.s. 10 dae vanaf 25 Augustus 1970 aan die Klerk van die Hof besorg gewees het. Kragtens Reël 4 moes die appèl teen die uitspraak nie later as 23 September 1970 aangeteken gewees het d.w.s. 14 dae vanaf 25 Augustus. Dit is eers op 25 September 1970 deur die Klerk van die Hof ontvang en was dus laat.

Adv. Menge se kontensie dat die appèl betyds aangeteken was is dus nie aanvaarbaar nie.

Om in sy aansoek om kondonasie te slaag moes die Appellant ook kon aantoon dat hy 'n redelike kans het om met sy appèl te slaag.

Die Bantoesakekommissaris het baie goeie redes gegee vir sy bevinding en daar is niks in die oorkonde wat my enigsins kon beweeg om van hom te verskil nie. Adv. Menge het dan heeltemal tereg ook toegegee dat die Bantoesakekommissaris se redes onaanvegbaar is.

Aangesien die appèl dus nie betyds aangeteken is nie en die Appellant ook nie 'n redelike kans het om met sy appèl te slaag nie, word die aansoek om kondonasie geweier met koste.

Coertze, Voorsitter en Warner, lid, het saamgestem.

Verskynings:

Vir Appellant: Adv. W. O. H. Menge (i.o.v. Lombard & Kitshoff).

Vir Respondent: Adv. D. Carey-Miller (i.o.v. Nel & Stevens).

NORTH-EASTERN BANTU APPEAL COURT

B.A.C. CASE 19 of 1971

MZONELI versus MZONELI

DURBAN: 8 March 1971. Before Cronjé, President and V. d. Merwe and Warner, Members.

BANTU APPEAL COURT JURISDICTION

Maintenance—race of parties not established—order for maintenance made by Additional Magistrate.

Summary: This was an inquiry in terms of the Maintenance Act, 1963 (Act 23 of 1963). It was not established that the parties were Bantus and the judicial officer presided in his capacity of Additional Magistrate. The Defendant appealed to this court against the order made.

Held: That the Bantu Appeal Court had no jurisdiction to hear the appeal.

Laws Referred to:

Maintenance Act, 1963 (Act 23 of 1963).
Bantu Administration Act, 1927 (Act 38 of 1927).

Proclamation 298 of 1928.

Regulations Referred to:

Government Notice R.97 of 1965.
Government Notice R. 99 of 1965.

Appeal from the Court of the Magistrate, Stanger.

Cronjé, President:

The judicial officer presiding over the maintenance court at Stanger, and signing above the designation "Additional Magistrate", on 29 April 1970, ordered the Defendant (now Appellant) to pay the sum of R20 per month with effect from the 5 May 1970, towards the maintenance of two children Neville and Merle, in terms of section 5 of the Maintenance Act, 1963 (Act 23 of 1963).

By a notice of appeal headed "In the Bantu Affairs Commissioner's Court for the District of Stanger, held at Stanger" and addressed to the complainant (now Respondent) and "The Clerk of the Court. Bantu Affairs Commissioner's Court, Stanger", the Defendant noted an appeal to this Court against the whole of the Additional "Magistrates judgment on the following grounds:

(i) The additional Magistrate had no jurisdiction to preside in the said Maintenance Enquiry;

(i) the Court erred in making an order for Maintenance without taking into consideration that the Appellant was presently unemployed and could not afford to pay R20 per month maintenance as ordered.

There is nothing in the record to indicate that the parties to the enquiry are Bantu (as defined in section 25 of the Bantu Administration Act, 1927 (Act 38 of 1927).

Ex facie the record the judicial officer in his capacity as "Additional Magistrate" or as "Magistrate" (he has used both designations a number of times) presided over the "Maintenance Court (Magistrate's Court"), Stanger—a court which for the purposes of the Maintenance Act, 1963, is thus a Maintenance Court "corresponding to a Magistrate's Court".

The additional Magistrate in his reasons for judgment—in so far as the legal aspects are concerned—made no comment on the fact that the appeal purported to be directed against the judgment of the "Bantu Affairs Commissioner's Court" at Stanger—a court which was established by Proclamation 298 of 1928 and over which the Additional Magistrate presides in his capacity as Additional Bantu Affairs Commissioner when the parties before the Court are Bantu persons.

The Additional Magistrate merely referred to section 2 of the Maintenance Act which provides that "Every Magistrate's Court shall within its area of jurisdiction be a Maintenance Court for the purposes of this Act".

That, however, is not necessarily the final word on this matter. As it is not on record whether the parties are Bantu persons, this Court is not called upon to decide whether there is any substance in the first ground of appeal.

I would, nevertheless, in passing, remark that it was obviously the intention of the legislature that cases involving persons who are Bantu should be heard in a Maintenance Court corresponding to a Court of Bantu Affairs Commissioner, where such a Court is in existence. In terms of the definitions contained in section 1 of the Maintenance Act, a Magistrate's Court includes a Bantu Affairs Commissioner's Court and two Ministers—of Justice and of Bantu Administration—have powers conferred upon them, *inter alia*, of making regulations. The Minister of Justice made the regulations contained in Government Notice R. 99 of 1965, for maintenance Courts "other than Bantu Affairs Commissioners' Courts", and the Minister of Bantu Administration made the regulations contained in Government Notice R. 97 of 1965, for "Maintenance Courts in respect of Bantu persons". The Act further provides for different forums to which a party aggrieved by an order under the Act, may appeal, viz. to the Supreme Court and, in the case of Bantu, the Bantu Appeal Court, which is more readily accessible to them especially from the point of view of costs.

It was the existence of the different courts to which an appeal may lie which obliged this court *mero motu* to raise the point whether in view of the provisions of section 7 (1) (a) of the Act it has jurisdiction to hear the instant appeal.

That section provides that an appeal against an order "made by a Maintenance Court corresponding to a Magistrate's Court other than a Court of Bantu Affairs Commissioner lies to the provincial or local Division of the Supreme Court having jurisdiction".

It follows that in the instant case, which is an appeal against a judgment purporting to be that of a Maintenance Court corresponding to a magistrate's Court, this court is not possesed of jurisdiction to hear that appeal. It is ordered that the appeal be and it is hereby struck off the roll.

Van der Merwe and Warner, Members, concurred.

Appearances:

For Appellant: Mr M. M. Pamla.

For Respondent: In person.

NORTH-EASTERN BANTU APPEAL COURT

TSHEHLA versus KOMANE AND OTHERS

B.A.C. CASE 29/71

PRETORIA: 17 June 1971. Before T. F. Coertze, President and W. A. van der Merwe and H. P. Smit, Members.

BANTU LAW

Resolution taken at meeting of induna and residents of farm attachment in execution of such resolution—power of "eye"—terms "kgoro" and "lekgotla"—recording of evidence

Summary: A bag of mealies was removed from Plaintiff's kraal on instructions of induna in pursuance of a resolution by the residents of the farm on which they all lived. Plaintiff and his wife were both absent when this happened and only a boy was present. There was nothing on record to establish that Plaintiff was given a hearing before resolution was passed. Judgment was given in favour of the Defendants.

Held: That the meeting of the induna and farm residents was not a tribal meeting.

Held further: An attachment not founded on a judgement of a competent court is not valid and is opposed to principles of public policy and natural justice and the *audi alteram partem* rule.

Held further: That the terms "kgoro" and "lekgotla" are not synonymous.

Appeal from the Court of the Bantu Affairs Commissioner, Nebo.

Van der Merwe, Permanent Member:

The Plaintiff (now Appellant) sued the defendants (now Respondents) in the Bantu Affairs Commissioner's Court for (a) the return of one bag of mealies or payment of its value R5; (b) payment of R40 removed from Plaintiff's kraal; (c) payment of R60 damages suffered by Plaintiff on the ground of *contumelia* and/or *crimen injuria* (d) alternative relief and (e) costs.

The Bantu Affairs Commissioner gave judgment for the Defendants with costs and the Plaintiff has now appealed against this judgment on prayer (a) only viz. return of the bag of mealies or payment of its value, R5. The grounds of appeal being:

(a) The Court erred *in law* in finding that Defendants had a right to remove the bag of mealies from Plaintiff's kraal;

(b) the Court erred *in law* in finding that Plaintiff's wife and/or her son had the right to hand over the bag of mealies to Defendants;

(c) the Court erred in finding that Plaintiff's wife had given consent for the removal of the bag of mealies;

(d) the Court erred in finding that Plaintiff had delegated his authority to his wife who in turn delegated her power to her son who in turn gave Defendants the mealies.

The underlining in paragraphs (a) and (b) are mine. The Appellant has failed to state briefly what the law is—see numerous cases referred to at paragraph 375 of "A Digest to S.A. Native Civil Case Law" by Warner. These two grounds of appeal are accordingly struck out.

The Defendants pleaded as follows to the elaim:—

"Verweerders erken dat hulle een sak mielies van eiser se kraal verwyder het en sê dat hulle die sak mielies kragtens stambesluit, alternatiewelik kapteinsopdrag, by eiser se kraal gaan haal het en dat die sak mielies deur eiser se seun aan die verweerders afgegee is".

It is observed that the judicial offieer failed to state on the record which system of law he applied in eoming to a decision. It would have assisted the Court if he had done so. See decisions referred to in paragraph 4217 of A Digest of S.A. Native Civil Case Law by Warner.
From his reasons for judgment it would appear that he applied Bantu Law and Custom.

The Plaintiff stated in evidenee that he was employed at Witbank and that he had not given anybody permission to remove the bag of mealies. Also that during his absenees his wife was responsible.

Plaintiff's wife gave evidence that she had gone to Steelpoort for three days and on her return found that the bag of mealies had been removed and that she sent one Sehladi to report to one Mapuna Leshaba.

Plaintiff's son gave evidenee that the three Defendants removed the bag of mealies; that he tried to stop them but that they threatened to assault him.

On the evidenee and on the Defendant's plea the onus was on Defendants to prove that their act was lawful.

The defence ealled Johannes Leshaba who stated that Mapula Leshaba is his elder brother. This is apparently the person to whom Plaintiff's wife sent a report but nowhere in the record is there any indieation what his position on the farm Eenzaam is in relation to the other oeeupants of the farm. Johannes elaims that he, Johannes, is the foreman and ehairman of the *kgotla*. He stated that there was a meeting about the sehool building and that the tribe decided that eaeh home failing to give money should give a bag of mealies and that the names of all those who agreed to give mealies were written down. After the harvest another meeting was called and "it was agreed that people who had no means of transport should *arrange with the kgotla to fetch their bags*" (the underlining is mine) and a little further on "Defendants were sent by the tribe to eollect the mealies. They were aeting as agents of the tribe. The bag of mealies . . . . was delivered to the kgotla". In cross examination he said the Chief is Sekhukhune of Maroten and that there is an induna at Eenzaam. That he, Johannes, is appointed over those plaeed under him and that Plaintiff is also under him. When re-examined he stated that he was the induna and the only one in authority at Eenzaam. Aeeording to the second Defendant, who was the only one of the Defendants to give evidenee, there is another Leshaba, elder brother of Johannes Leshaba, who is aetually the induna. Aeeording to him also the bag of mealies was given to them by Plaintiff's son voluntarily. He denied that the boy was threatened. The evidenee was reeorded as follows:

"Question: Komane threatened to hit him not true?

Answer: Not true.

Question: Did the old lady not say leave them?

Answer: Yes *it was at that stage but we were not fighting* (The underlining is mine.)

It is not clear what the witness exactly meant by saying: "it was at that stage" and why it was necessary to add "but we were not fighting". In his evidence in chief he said the old lady merely asked why Selabuhlane gave them the mealies.

According to section 2 (6) of the Bantu Administration Act (Act 38 of 1927) the State President may recognize or appoint any person as a Chief of a Bantu tribe and may make regulations prescribing the duties, powers, privileges and conditions of service of Chiefs so recognized or appointed, and of headmen .....appointed under subsection (8).

There is no evidence on record to show that the foreman or induna was appointed as headman or Chief's deputy or a Chief or acted on the authority of the Chief or had delegated powers. There is also no evidence that the meeting was a tribal meeting. It appears to have been a meeting of residents of the farm. As regards the handing over of the bag of mealies by Selabuhlane it is clear that he did not have authority from his father or mother to do so as borne out by the fact that Plaintiff's wife sent a report to Mapuna Leshaba and that they subsequently appeared before someone where they complained and were told they could "go where they liked". It is very unlikely that Plaintiffs would have acted in this manner had authority been delegated to Selabuhlane.

The third and fourth grounds of appeal were therefore well taken in view of the fact that the Defendants had failed to establish their case on their plea. There is however no doubt in my mind that the Defendants acted *bona fide*.

Although Johannes Leshaba said that it was agreed that those who had no transport had to arrange with the *kgotla* to fetch their bags it was apparently decided to go and fetch the bags without such a request having been made. The bag was also removed in the absence of the kraalhead or his duly appointed representative and contrary to the instructions given to Defendants.

The evidence was recorded as folows:

"Q. Should owner not be in.

A. If nobody they should not enter.

Q. Should the owner be absent even his wife?

A. To find out where the owner is.

Witness repeats answer. We shall find where owners are tell them what we wanted. Should there be someone to give us what we came for he may do so.

Q. Were those the instructions?

A. Yes.

Q. Should they just get into the house and remove it would be contrary to your instructions?

A. Yes."

It would also be contrary to Bantu custom to enter a kraal in the absence of the kraalhead or person in charge of the kraal.

The normal procedure would be that a tribesman who fails to carry out his obligations in terms of a tribal resolution, whether such resolution was taken in his presence or in his absence—with or without his consent for that matter—is summoned to appear before the Chief's court to show cause why he should not comply with the resolution. This would have been in accordance with the principles of public policy and natural justice referred to in section 11 Act 38 of 1927, and the *audi alteram*

partem rule. This was not done and the action of the Defendants was tantamount to an attachment in exccution of a judgment which cannot be sanctioned by the Court as there was no judgment by a competent court.

The judicial officer in his reasons for judgment, paragraph 2, states: "There was no evidence which contradicted the fact that the Defendants had got to the Plaintiff's house to fetch the bag contrary to the instructions of the *kgoro*." Having found as a fact that the Defendants acted *contrary to the instructions of the kgoro,* it is difficult to understand how the judicial officer came to the conclusion that they acted lawfully.

I also could not find anything in the record to substantiate the judicial officer's finding of fact that Defendant's wife had delegated her powers to or appointed her son to represent her. She stated in evidence that she did not authorise her son to give the bag of mealies to anyone. The judicial officer quotes from Seymour's "Native Law in S.A." 2nd edition at page 60 paragraphs 4 and 5. At page 86 of the 3rd edition under subhead 3 the learned author however says: "During his temporary absence, a kraalhead *may* appoint an "eye" to *watch* over the affairs of his kraal. An "eye" may be unrelated to the kraalhead, and has *no control over the family property of the kraal*". (The underlining is mine.) It is therefore quite clear that, assuming Plaintiff's wife was an "eye", the Plaintiff's wife could not have handed over the bag of mealies unless she had reported to him and had his authority to do so.

In the result the appeal must succeed.

I am constrained to remark on the loose manner in which the terms *kgora* and *lekgotla* were used. These terms are not synonymous and it is not clear whether the witnesses referred to different things or whether the interpreter mixed up the terms. These terms can cause confusion and it would be advisable not to use them unless used in their proper context—see "The Laws and Customs of the Bapedi and Cognate Tribes" by Harries at page 137 where these terms are briefly defined as follows:

Kgoro: Household, may also refer to a Chief's courtyard, court or gateway.

Lekgotla: a Chief's court.

The manner in which the record was prepared leaves much to be desired. Mr Pitje pointed out a number of instances where the evidence was badly recorded. The question-answer method of recording evidence is probably the best way of recording evidence provided it is done properly. I associate myself with the unfavourable criticism in this regard and the judicial officer should exercise more care in future.

Johannes Leshaba was also cross examined on certain papers which he produced but which were not handed in as exhibits.

The Plaintiff only appealed against the judgment on prayer (a) viz. the return of a bag of mealies or payment of its value R5 and the judicial officer's finding of fact as regards the R40 removed and R60 damages is therefore not understood as also his reference to Plaintiff's wife in paragraph 5 of the Facts Found Proved as "accused".

The judgment of the court was therefore as follows:

The appeal, in so far as prayer (a) is concerned, is allowed with costs. The Bantu Affairs Commissioner's judgment is set aside in respect of prayer (a) only and for it is substituted "For Plaintiff for one bag of mealies or its value R5, with costs".

Coertze, President and Smit, Member, concurred.

Appearances:

For Appellant: Mr G. M. Pitje.

For Respondent: Mr J. A. du P. Joubert (Viljoen & Joubert).

NOORDOOSTELIKE BANTOE-APPÈLHOF

SAAK No. B.A.H. 42/71

MARTIN ZONDI versus PHILLIS SENGANE

PIETERMARITZBURG: 29 September 1971. Voor Coertze, Voorsitter, en Van der Merwe en Maytham, Lede van die Hof.

PRAKTYK EN PROSEDURE

Onderhoud—Vaderskap—Bevestigende getuienis, wat is—Praktyk en Prosedure—Pligte van Voorsittende Beampte en Onderhoudsbeampte—Aard van—Alle beskikbare getuienis moet voor Hof wees—Appèl teen bevinding van vaderskap en bevel tot onderhoud

Opsomming: 'n Bevel om 'n beweerde onwettige kind te onderhou is teen Verweerder gegee nadat die onderhoudshof hom as die vader aangewys het. Eiseres het nog twee ander onwettige kinders by twee verskillende vaders gehad. Verweerder het enige byslaap met Eiseres sowel as vaderskap van die kind ontken en appèl op die feite aangeteken. Sekere getuienis wat lig op die saak sou kon werp was nie aan die onderhoudshof voorgelê nie.

Gehou: Dat bevestigende getuienis vereis word in sake waar vaderskap betwis word.

Gehou: Dat gereelde betaling van geld aan Eiseres deur Verweerder nie volgens 'n oorwig van waarskynlikhede in die gegewe omstandighede as stawende getuienis van vaderskap aanvaar kan word nie.

Gehou: Dat Reël 8 van die Reëls vir Onderhoudshowe uitgevaardig kragtens artikel 15 van Wet 23 van 1963 'n plig op die onderhoudsbeampte sowel as op die voorsittende beampte lê om alle beskikbare getuienis aan te hoor en dat die saak dus nie voldoende ondersoek was nie.

Sake waarna verwys is:

Sewchoran versus *Roopnarain,* 1967 (2), P.H. F 81
Moodley versus *Gramani,* 1966 (1), P.H. H. 207
Wiehman versus *Simon* N.O., 1938, A.D. 447.
MacKay versus *Ballot,* 1921, T.P.D. 432
Buch versus *Buch,* 1967, T.P.D. 83

Wetgewing waarna verwys is:

Wet 23 van 1963 en die Reëls van Onderhoudshowe gepubliseer in die Staatskoerant van 22 Januarie 1966.

Appèl van die Bantoesakekommissarishof, Ixopo.

Coertze, Voorsitter:

Eiseres (Respondent) het 'n klagte ingevolge artikel 4 (1) (a) van die Wet op Onderhoud, 1963 (Wet 23 van 1963), by wyse van 'n beëdigde verklaring teen Verweerder (Appellant) gelê dat Verweerder, terwyl hy regtens verplig is om die kind Nano Mildred, gebore 20 April 1969, te onderhou, in gebreke gebly het om dit te doen.

'n Dagvaarding (ongedateerd) is teen Verweerder uitgereik en op 12 Februarie 1971 het die Bantoesakekommissaris bevind dat Verweerder wetlik aanspreeklik is vir die onderhoud van die kind en, na die aanhoor van verdere getuienis, die volgende bevel gegee: "Order (sie) to pay R6 per month to the Clerk of the Court, Ixopo, as from the 15th of February 1971 and thereafter on the 15th of each sueceeding month for the child Mildred Nano".

Teen die bevinding en bevel teken Verweerder appèl aan op die volgende gronde:

"(1) The learned Bantu Affairs Commissioner erred in accepting the evidence of the Complainant in preference to that of the Defendant;

(2) The learned Bantu Affairs Commissioner erred in accepting the point that the payments made to the Complainant were in respect of the support of the child Nano Mildred to which there is no evidence;

(3) The version of the Complainant is not supported by her only witness Gretta Hlengwa".

Eiseres het getuig dat daar tussen haar en Martin Zondi, die Verweerder, 'n intieme verhouding was en dat as gevolg daarvan sy op 20 April 1969 aan 'n kind geboorte gegee het. Haar getuienis lui verder dat Verweerder teenoor haar erken het dat hy die vader van die kind is en dat hy vanaf die kind se geboorte tot Desember, 1969, gereeld geld aan haar vir die onderhoud van die kind betaal het. Verder dat Verweerder in Desember 1969 "moeilikheid begin maak het" en dat in Januarie 1970, sy Verweerder voor die Landdros gehad het in wie se teenwoordigheid Verweerder ook erken het dat hy die vader van die kind is. Daarna sou Verweerder sporadies bygedra het vir die kind se onderhoud tot September 1970, waarna Verweerder haar weggejaag het en sou gesê het dat dit nie sy kind is nie.

Verweerder het Eiseres taamlik lank onder kruisverhoor geneem en die volgende verdere relevante getuienis is deur Eiseres gegee.

Verweerder het Eiseres in haar kamer besoek gedurende die tydperk Julie 1968 tot Oktober 1970 en Verweerder sou met Eiseres intiem verkeer het tot Oktober 1969 en nie tot September 1970 nie soos sy eers beweer het. Eiseres het reeds voor die geboorte van die kind geld van Verweerder ontvang wat, volgens haar, gegee was om koste i.v.m. die kliniek en die hospitaal te betaal. Sommige van hierdie kostes is deur Eiseres uit haar eie sak betaal. Eiseres het nie haar swangerskap aan haar vader rapporteer nie want dié is oorlede maar wel aan haar moeder. Eiseres het twee ander kinders, albei buite-egtelik en van verskillende vaders. Vir die eerste een word onderhoud betaal en vir die tweede is 'n tradisionele boete volgens stamgebruik betaal. Eiseres het 'n brief aan Verweerder geskrywe, vermoedelik op instruksie of advies van haar ma. By ontvangs van hierdie brief sou Verweerder gesê het dat die wet vereis dat hy onderhoud moet betaal. Hiertoe sou Eiseres se ma ingestem het. Eiseres sou 'n shebeen aangebou het—'n omstandigheid wat deur die getuie Mathew Buthelezi bevestig word. Aldus die kruisverhoor.

Dit is inderdaad gemene saak dat geld deur die Verweerder aan Eiseres betaal is.

Waaroor daar botsende getuienis is is die doel waarvoor hierdie geld betaal is. Verweerder het onder eed ontken (1) dat Eiseres sy nooi was; (2) dat hy ooit gemeenskap met haar gehad het; en (3) dat hy die vader van die kind is. Verweerder ontken ten ene male dat hy geld aan Eiseres vir onderhoud van die kind betaal het. Hy beweer die geld was vir drank. Hy sê dat Eiseres 'n shebeen aangehou het en dat hy gereeld daar gedrink het en dat die geld wat hy betaal het drankskuld was. Sy getuie bevestig dat Eiseres drank verkoop het.

Die Bantoesakekommissaris het hierdie getuienis van Verweerder nie aanvaar nie. Die Bantoesakekommissaris, in par. 5 van dié deel van sy uitspraak gemerk "Feite—Bewese Bevind", gee 'n lys van die betalings wat gemaak is, en kom tot die gevolgtrekking dat die gereelde maandelikse betalings vanaf April 1969 tot Desember 1969 en die daaropvolgende sporadiese betalings beskou moet word as duidelike bewys dat die gelde vir onderhoud en nie vir drank was nie.

In sake soos hierdie is dit soos die Bantoesakekommissaris tereg opmerk, noodsaaklik om versigtigheid aan die dag te lê by die beoordeling van die geloofwaardigheid van die getuienis van die Klaagster. Volgens die Bantoesakekommissaris sou hy hierdie sorg aan die dag gelê het.

Die reël in verband met sulke sake word duidelik gestel in *Sewchoran* versus *Roopnarain* 1967(2) P.H. F 81 waar die gelecrde Regter as volg opmerk:

"As the law stands it is necessary to find evidence other than that of the woman which corroborates her in the sense that it accords with her evidence and is inconsistent with innocence on the part of the man. This may be, but in the nature of things seldom is, evidence directly supporting hers and contradicting his in relation to the question in issue, but almost always the available evidence cannot be other than circumstantial; it may be evidence of surrounding facts or circumstances or of words or conduct on his part (whether amounting to express or implied admission on whether evidence pointing to guilt) or it may be evidence which shows him to be an untruthful witness in respects so materially associated with the question in issue as to point to untruthfulness of his denial on that question.

"The mere fact that there has been opportunity for intercourse is not in itself corroboration of the woman's word but the opportunity, if proved, may be of such a character by reason of the circumstances and locality as to arouse suspicion in such degrec as to amount to corroboration; or proved untruthfulness on the part of the man in relation to the opportunity may be so material to the issue as to amount to corroboration. Untruthfulness on his part in regard to matters or incidents in themselves innocent and not rendered guilty or suspicious by reason of that untruthfulness is equivocal and not corroboration because not inconsistent with innocence on the part of the man".

Hierdie sienswyse word bevestig deur die uitspraak in *Moodley* versus *Gramani* 1966(1) P.H. H 207, wat ook deur die Bantoesakekommissaris aangehaal word en waarin o.a. beslis is dat "waar 'n ondersoek na vaderskap van 'n kind nodig is, soos voornoemd, is duidelike bewys op 'n oorwig van waarskynlikhede genoegsame bewys". Dieselfde reël word neergelê in

Wiehman versus *Simon* N.O. 1938 A.D. 447 uit welke beslissing dit duidelik is dat getuienis *aliunde* as bevestiging nodig is. Bevestiging word in *MacKay* versus *Ballot* 1921 T.P.D. bl. 432 as volg definieer: "corroboration means that some evidence must be given in addition to the woman's which, in some degree, is consistent with her story and inconsistent with the innocence of the defendant".

By 'n ontleding van die getuienis blyk dit dat Eiseres se storie eintlik nie volgens 'n oorwig van waarskynlikhede bevestig word nie. Eiseres sê Verweerder het teenoor haar erken dat hy die vader van die kind is. Sy sê ook dat Verweerder dit voor die Landdros erken het. Die Landdros is egter nooit geroep nie en as hy notas gemaak het van die beweerde onderhoud wat hy met die partye sou gevoer het, is hierdie notas nie ingehandig nie.

Die Bantoesakekommissaris het klaarblyklik die getuienis van Eiseres oor wat Verweerder voor die Landdros sou gesê het as hoorsê getuienis beskou en buite berekening gelaat.

Die feit dat die Landdros 'n ondersoek gehou het is nog nie bewys van vaderskap nie. Die enigste duidelike getuienis hieroor is eintlik dié van die Eiseres en soos die Bantoesakekommissaris tereg opmerk hierdie getuienis moet met versigtigheid bejeen word. Hierdie versigtigheid is temeer noodsaaklik omdat Eiseres onder kruisverhoor erken het dat sy die moeder van twee ander buite-egtelike kinders is welke kinders van verskillende vaders is. Dat daar geleentheid vir byslaap tussen Eiser en Verweerder was kan nie betwis word nie. Verweerder ontken dat hy ooit daar geslaap het maar erken dat hy wel daar dronk geword het. Dit is egter nog geen duidelike getuienis om vaderskap in Verweerder te bewys nie. Daar is geen bevestigende getuienis dat daar geslagtelike verkeer tussen die partye was nie—net maar die woord van Eiseres. Dit kom dus daarop neer dat beslis moet word of die betaling van gereelde bydraes vir die nege maande geëindig Desember 1969 en die daaropvolgende sporadiese betalings stawende getuienis vir vaderskap is veral in die lig van Eiseres se reputasie. Ek herhaal dat na my mening kan hierdie getuienis op 'n oorwig van waarskynlikhede nie voldoende wees om vaderskap te bewys nie.

Uit die oorkonde is dit duidelik dat daar getuienis is wat nie deur die Hof *a quo* aangehoor is nie nl. wat die aard en resultaat van die onderhoud was wat tussen die partye en die Landdros gevoer was. Die blote feit dat so 'n onderhoud plaasgevind het is nie genoegsame bevestiging van getuienis oor vaderskap nie. Dit sou ewewel getuienis tot die teendeel kon wees.

Dit moet onthou word dat hierdie 'n ondersoek is wat gehou word. Die Bantoesakekommissaris en die onderhoudsbeampte word verwys na die beslissing in die saak van *Buch* versus *Buch* 1967(3) T.P.D. 83 op bl. 87 sê die geleerde Regter "If he (the maintenance officer) decides on an inquiry he is then entitled and I think is in duty bound to lay all the relevant evidence obtainable before the Court....." en verder "If the parties do not produce existing relevant evidence, he (the maintenance officer) is entitled to do so,

and where necessary should probably do so. He would also be guided by the presiding officer because the rules promulgated under section 15 of the Act as printed in the Gazette dated 22 January 1966, provide in Rule 8:

"The Court may at any stage of the enquiry summon or cause to be summoned any person as a witness or examine any person in attendance, though not summoned as a witness, and may recall and re-examine any person already examined".

In view of these provisions it seems to me it is no longer correct to speak of an *onus* resting on a party in connection with proceedings before a maintenance court. The responsibility of placing evidence before the Court no longer rests only on the parties concerned, but is shared by the maintenance officer and the presiding judicial officer".

Ek is van mening dat die huidige saak nie voldoende ondersoek is nie. Dit lyk my noodsaaklik dat getuienis van die Landdros sowel as enige ander verdere beskikbare getuienis geneem word sodat die Hof ten volle ingelig kan word oor al die beskikbare getuienis.

Ten gevolge word die volgende bevel gemaak:

1. Die bevel van die hof *a quo* word ter syde gestel;

2. die saak word na die onderhoudshof terugverwys sodat verdere ondersoek ingestel kan word soos in hierdie uitspraak aangedui en sodat 'n vars uitspraak gegee kan word.

Ten slotte nog net iets oor die oorkonde: Bladsy 3 daarvan lees as volg:

"On 26/1/71
P.P. addresses Court.
Acc. eleges (sic!) that he has not been served with summons.
R 12/2/71. Acc. warned.
Comp. Philiss Sindewe warned"

Daar is nog 'n tendens om die onderhoudsbeampte as 'n staatsaanklaer en die Verweerder as 'n beskuldigde in hierdie sake te beskou.

Hierdie gebruik word afgekeur en moet vermy word.

Van der Merwe en Maytham, lede, stem saam.

Vir Appellant: In persoon.

Vir Respondent: In Verstek.

IN DIE SUIDELIKE BANTOE-APPÈLHOF

BANTOE-APPÈLHOF SAAK No. 39/69

BEST MAKABA MHLAHLO versus ELLIOT MBULI

KING WILLIAM'S TOWN: 12 Oktober 1971. Voor Yates, Voorsitter, en mnre. Adendorff en Moll, Lede.

SKADEVERGOEDING VIR AANRANDING

Erkenning van skuldigbevinding weens aanranding in 'n strafhof is nie tot nadeel van 'n Verweerder in 'n siviele aksie nie. Verdediging noodweer.

Opsomming: Toe Verweerder Eiser se houding oor vee wat in weidingsgebied oortree het as kinderagtig bestempel het, het laasgenoemde se toorn ontvlam en het hy tot aanranding oorgegaan.

Beslis: Dat die Hof in 'n siviele aksie tot 'n beslissing oor feite wat voor hom aangevoer is, moet geraak sonder inagneming van verrigtinge in 'n ander hof.

Sake waarna verwys: Mbali Masoke versus *Bangimpi Mcunu,* N.A.H. (N.O.) 1951 bl. 327.

Kenbron: "The Law of Evidence" deur C. Norman Scoble.

Appèl van die Bantoesakekommissarishof, Sterkspruit.

Adendorff (Permanente Lid)—lewer uitspraak:

Hierdie is 'n appèl teen die uitspraak van die Bantoesakekommissarishof ten gunste van Eiser (nou Respondent) vir mediese koste R1 en algemene skade R10 plus koste in 'n saak waarin hy Verweerder (nou Appellant) aangespreek het vir skadevergoeding weens aanranding en beweer het dat hy met 'n kierie oor sy linker voorarm, skouers, linkerbeen onder en op sy linker oog geslaan was met gevolglike wonde wat hom pyn veroorsaak het en dat sy waardigheid weens die aanranding gekrenk was. In die nadere besonderhede deur Eiser verstrek, beweer hy soos volg:

"1. *Ad. Para.* 1: The amount of R200 is calculated as follows:

	R
Doctors expenses.....	1,00
Travelling expenses to attend surgery.....	1,20
General damages for pain and suffering.....	197,80
	R200,00

Ad. Para. 2: Plaintiff was treated by Dr. Ditton of Sterkspruit, District of Herschell, for wounds sustained in the assault upon him and had to pay the amount of R1, Annexure A hereto for an X ray of his skull."

"ANNEXURE A": Mr Elliot Mbuli,
Tyinindini Location.

Dr to: Dr M. DITTON
For medical services rendered
13/5/68 X Ray skull. R1 Paid by Cash.
(Sgd) M. DITTON.

Verweerder het in sy pleit ontken dat hy Eiser aangerand het en betoog dat Eiser die beweerde beserings opgedoen het toe hy homself verdedig het teen Eiser wat hom eerste aangerand het.

Appél is teen die uitspraak aangeteken op die volgende gronde:

"(1) That the Bantu Affairs Commissioner erred in finding that the Plaintiff was assaulted by the Defendant and that the Plaintiff suffered damages.

(2) That the Bantu Affairs Commissioner erred in not finding that the Defendant had acted in legitimate self-defence after he had been assaulted by the Plaintiff and also erred in not finding that the injury sustained by the Plaintiff was an inevitable result of the combined action of the Plaintiff and the Defendant whilst the Defendant wanted to prevent the Plaintiff from further assaulting him (Defendant).

(3) That the Bantu Affairs Commissioner erred in awarding damages to Plaintiff in view of the fact that such award was against the weight of the evidence adduced.

(4) That the findings and deductions of the Bantu Affairs Commissioner were against the weight of the evidence adduced."

Eiser se getuienis het gelui dat hy as Kampwagter in diens van die Bantoe-owerheid op 10 Mei 1968 Verweerder se beeste vind oortree het in die woongebied tussen die statte waar hulle gewei het onder toesig van laasgenoemde se vcewagter, Tandabuzo Siboto. Hy het Verweerder ontbied deur Tandabuzo te versoek om hom te gaan roep. Nadat Verweerder sy opwagting gemaak het, aldus Eiser, het 'n woordewisseling plaasgevind en het Verweerder toe verneem waarom sy beeste dan geskut moet word. Daarna getuig Eiser het Verweerder hom met 'n kierie teen die grond plat geslaan ten spyte van sy verduideliking waarom die vee nie daar mag gewei het nie. Eiser sou Verweerder toe vasgevang het om te verhoed dat hy hom verder slaan en het die rede vir die aanslag op hom toegeskrywe aan Verweerder se weerwraak omdat hy vantevore sy donkies aangehou het. Eiser het meegedeel dat hy aan sy linkeroog verwond was asook beserings aan sy linker onderbeen en skouers opgedoen het. Nadat hy die hoofman en polisie verwittig het van die gebeure was hy deur die polisie na die distriksgeneesheer vir behandeling geneem. Eiser het gekla dat sy oog hom nog veel las besorg en gesê dat Verweerder in die strafhof skuldig bevind was weens die aanranding op hom. Behalwe vir die rekening, Bew. "A", was daar geen mediese getuienis gelei van die omvang van die oogbesering nie en wat die ander beserings, indien enige, betref was dit blykbaar nie van 'n ernstige aard nie.

Onder kruisverhoor het Eiser geswig toe hy moes erken dat hy ook 'n kierie ten tye van die aanval op hom gehad het, wat Verweerder vasgegryp het en met die worsteling wat gevolg het, het dit later op die grond langs hom geval. Hy het beweer dat hy op sy oog geslaan was met die kierie wat Verweerder toe opgetel het terwyl hy op die grond vasgedruk was. Dit het ook duidelik geword dat Eiser die beeste nie tussen die statte nie maar wel in Ndubane se tuin gevind het en dat die werklike rede vir die aanslag eerder was dat hy die vee wou skut omdat Verweerder geen toestemming vir weiding daar gehad het nie en hy geweier het om ander manne te laat roep op aandrang van Verweerder. Dit het ook

geblyk dat Eiser alhoewel hy dit in hoof getuienis verswyg het, deeglik bewus was van die feit dat 'n meisie deur Tandabuzo gestuur was om Verweerder te gaan roep het en dat die veewagter nie gegaan het nie.

Verweerder se relaas aan die ander kant was dat hy op die dag deur 'n dogter by sy winkel geroep was om Eiser in Ndubane se tuin te gaan ontmoet. Hy het getuig dat sy beeste met Ndubane se toestemming daar kon wei onder toesig van sy veewagter en het Eiser dit meegedeel na sy aankoms daar. Eiser het volgehou dat hy geen reg daartoe gehad het nie en dat hy die vee sou skut. Sy voorstel om ander manne te laat roep was deur Eiser van die hand gewys. Daarna het sy aanmerking dat eiser kinderagtig sou optree laasgenoemde se toorn laat ontvlam en het hy hom (Verweerder) met 'n kierie aangeval waarvan die middeldeel omdat hy so naby gestaan het, hom op die kop getref het en moes hy tot noodweer oorgaan deur die stok vas te gryp om so te verhoed dat hy verder aangerand word. Met die worsteling wat toe gevolg het om besit van die kierie wat heen en weer beweeg het, het dit Eiser teen die oog getref en het hy sy greep daarop laat vaar. Daarna was die gestoei beëindig en het die veewagter die kierie wat toe in Verweerder se besit gekom het. weggeneem, het Verweerder getuig. Hy het ontken dat hy ook 'n kierie by hom gehad het en dat hulle, soos Eiser dit gestel het, twee keer teen die grond beland het met die worsteling. Verweerder het erken dat hy deur die hof skuldig bevind was weens aanranding op Eiser.

Tandabuzo Siboto het Verweerder se getuienis bevestig en bygevoeg dat Eiser die dag self die meisie gestuur het om Verweerder te gaan roep het, aangesien hy die vee moes oppas om nie die mielies in die tuin te beskadig nie en hy was dit eens met Verweerder dat sy aanmerking dat Eiser kinderagtig sou opgetree het, geensins as vloek bestempel kon word nie, soos deur Eiser beweer was. Hy het gesê dat hy ook sou gesien het toe Eiser se kierie sy oog beseer het gedurende die worsteling en dat die twee op geen tydstip op die grond beland het nie.

Die Bantoesakekommissaris het toe hy sy redes vir uitspraak verstrek het, aangedui dat hy nie kon insien waarom Eiser eerste sou geslaan het nie, uit die oog verloor dat Eiser hom waarskynlik vereerg het oor Verweerder se aanmerking dat sy houding kinderagtig was en dat Eiser later moes erken het dat Verweerder sy kierie vasgegryp het in die stoeiery wat gevolg het nadat die eerste hou geslaan was en het verder 'n mistasting begaan deur te aanvaar dat Verweerder tot sy nadeel erken het dat hy gevonnis was weens die aanranding, aangesien die Hof in 'n siviele aksie tot 'n beslissing op die feite voor hom moet geraak sonder inagneming van die verrigtinge in 'n ander hof. Kyk die saak *Mbali Masoke* versus *Bangimpi Mcunu* N.A.H. (N.O.) 1951 bl. 327 op bl. 330; asook "The Law of Evidence" deur C. Norman Scoble derde uitgawe op bladsy 185.

Soos reeds uitgewys was daar baie teenstrydighede in Eiser se getuienis wat dit aansienlik verswak het terwyl Verweerder en sy getuie beïndruk het met die wyse waarop hulle getuienis mekaar ondersteun het, dat dit 'n getrouer weergawe was van wat plaasgevind het en dat dit as meer waarskynlik aanvaar kon word dat Verweerder nie gewapen met 'n kierie

na Ndubane se tuin sou gegaan het met die doel om 'n bakleiery uit te lok nie. Verweerder het slegs tot selfverdediging oorgegaan toe hy die aanval probeer afweer het en het ook nie meer geweld gebruik as wat nodig was nie.

Volgens my mening slaag die appèl met koste. Die uitspraak van die Hof *a quo* word vernietig en dit word vervang met: "Judgment for Defendant as prayed with costs."

Yates en Moll, Lede, stem saam.

Namens Appellant: Mnr. E. F. Henning.

Namens Respondent: Geen verskyning.

King William's Town, 19 Oktober 1971.

IN THE SOUTHERN BANTU APPEAL COURT

B.A.C. CASE 49 OF 1969

MPUNGA versus G. AND N. MPUNGA

UMTATA: 18 June 1970. Before Yates, President, and Messrs Adendorff and Botha, Members.

JUDGMENT

Attachment—where writ is satisfied.

Summary: A judgment was given for 25 head of cattle or their value at R40 each plus costs and a warrant issued. Twenty-six head of cattle were attached by the Messenger of the Court and handed to the headman for custody as a permit was not immediately available for their removal. Subsequently three more were attached as there was a possibility that an interpleader might succeed and some of the cattle might have to be released. Of the 29 head attached three died, one was utilised to cover the costs and 25 handed to the judgment creditor. Plaintiff, also Judgment Debtor, claimed three head of cattle or their value which he alleged had been wrongly attached. Judgment was granted in Plaintiff's favour.

Held: When the Messenger took possession of the requisite number of cattle with the concurrence of the Judgment debtor the writ was satisfied and the risk passed to the Judgment Creditor.

Appeal from the Court of the Bantu Affairs Commissioner, Mqanduli.

Yates (President) delivering the judgment of the Court:

This is an appeal from a judgment of a Bantu Affairs Commissioner's Court for Plaintiff 1 (now Respondent) for three head of cattle or their value R30 each plus costs.

During the hearing of the case the claim by Plaintiff 2 was withdrawn and the claim of Plaintiff 1 was amended to one for three head of cattle or the value R150. Plaintiff averred in his particulars that Defendant (now Appellant) had in 1963 obtained a judgment against him and one Keke Mpunga, which was confirmed on appeal to the Bantu Affairs Commissioner's Court, for 25 head of cattle or their value R40 each, 50 sheep and 20 goats or their value at R6 each and that in execution of that judgment three of his cattle were attached which did not form part of the specific cattle claimed by Defendant.

Save for admitting executing Judgment in his favour by way of writ and admitting that the stock referred to in the judgment had been handed to him, Defendant specifically denied having caused Plaintiff's stock to be attached as alleged.

An appeal has been brought on the following grounds:

"(a) That the judgment is against the weight of evidence and probabilities of the case.

(b) That the judgment in effect negates a judgment and further obstructs the execution to finality of a judgment of the Southern Bantu Appeal Court, sitting in Umtata on 25 October 1967

in the matter of *Gongqongqo Mpunga and Keke Mpunga* (Appellants) versus *Tyiwa Mpunga* (Respondent), Case 49 of 1967 which dismissed the appeal with costs, thereby affirming the judgment of the Bantu Affairs Commissioner's Court, Elliotdale, for Plaintiff for stock or its alternative value.

(c) That the judgment in effect leaves present Appellant's judgment in Case 49 of 1967 unsatisfied in that it reduces the number of cattle received by Appellant by virtue of the Warrant of Execution in Case 49 of 1967 from 26 to 23.

(d) That the Court having come to the conclusion that the beasts claimed by present Respondents in the instant case were valued at R30 per beast, erred in holding that 26 head of cattle at the Court's valuation of R30 per beast could satisfy a judgment of 25 head of cattle at R40 per beast in terms of the judment in Case 49 of 1967.

(e) That the three head of cattle which died in the custody of the Headman included in the 29 head of cattle attached by virtue of the Warrant of Execution in Case 49 of 1967 (B.A.C. Court Case 77 of 1963) died to the prejudice of the Appellants in the case as the Messenger of the Court had not as yet accounted to the Respondent in Case 49 of 1967 who is Appellant in the instant case.

(f) That the Appellant in the instant case, who was Respondent in Case 49 of 1967 cannot by reason of the judgment in the instant case re-issue the Warrant of Execution in Case 49 of 1967 on which is endorsed the execution of the full judgment in the said case."

It is not disputed that a warrant of execution was issued against Plaintiff 1 and Keke in terms of the above judgment and that, excluding sheep and goats which are not here in question, the deputy Messenger of the Court attached on 29 February 1968, 20 head of cattle from Keke and six from Defendant 1, i.e. 25 to satisfy the judgment and one to cover the Messenger's costs, and that they were handed over to the Headman for custody as a permit was not immediately available for their removal. On 3 April 1968, the Messenger received a letter from Defendant's attorney directing him to attach five more cattle which Plaintiff was alleged to have hidden away and subsequently three were attached. Of the 29 head attached 25 were taken by Defendant, three died and one was for costs. Defendant contended that he had received 25 head in satisfaction of his judgment and was not responsible for the loss occasioned by the death of the other three which died under attachment.

Mr Muggleston who appeared for the Defendant did not press ground (d) of he appeal. However, he contended that the basis of the claim as set out in the plea was that the three cattle claimed belonged to Plaintiff and were not liable to attachment as the judgment on which the writ was based only related to specific cattle which did not include those belonging to Defendant. In other words the question to be decided on the pleadings was whether the three cattle belonged to Defendant or not. However, it is quite clear from the evidence led in the case, and the Commissioner's reasons for judgment and the notice of appeal, that the question whether the Plaintiff or the Defendant should suffer the loss occasioned by the death of the three cattle after attachment and before delivery to Defendant should be borne by the former or the latter was fully canvassed and was the point on which the case was decided.

The original judgment was, *inter alia*, for delivery of 25 head of cattle or their value at R40 each and when the Messenger took possession of the cattle in the presence and with the concurrence of the Defendant they were judicially attached vide Sub-rule 70 (4) of the Rules for Bantu Affairs Commissioners' Courts contained in Government Notice 2083 of 1967, and "The Civil Practice of the Magistrates' Courts in S.A." by Jones & Buckle, 6th Ed. at p. 653/4. The writ was satisfied and, as conceded in the last paragraph of the Notice of Appeal, it was of no further force and could not be re-issued.

An interpleader action was instituted by Plaintiff after the 26 cattle had been attached and the letter written to the Messenger by Defendant's attorney was obviously an attempt to have more cattle available should the interpleader claim succeed. He clearly had no right to instruct that more cattle should be attached nor should the Messenger have acted on his letter. See Jones & Buckle at p. 649 and the case of *Duba* and others versus *Ketsikili* & others, 1924, E.D.L. 332, and p. 343, in which it is stated: "Now in the case of *Clissold* versus *Cratchley* [(1912) (2) K.B.D., p. 244] it was held that upon payment of a judgment debt to a party authorised to receive it the judgment is *ipso facto* at an end and the subsequent issue of a writ and levy of execution was held to be an actionable trespass without proof of malice." In the instant case the Messenger was the person authorised to receive the judgment debt, i.e. the cattle, and the Headman held them as his agent. Immediately the Messenger took possession the cattle were held for the benefit of and at the risk of the judgment creditor, i.e. present Defendant. In this regard it is interesting to note that the money for the skins of the three cattle which died was paid to Defendant. The Plaintiff is therefore entitled to the return of the cattle seized over and above the requirements of the writ and the appeal is dismissed with costs.

Adendorff and Botha, Members, concurred.

For Appellant: Mr K. Muggleston.

For Respondent: Mr A. T. Berrange.

IN THE SOUTHERN BANTU APPEAL COURT

B.A.C. CASE 16 OF 1971

BHUNGE versus SOTYWAMBI

UMTATA: 25 August 1971. Before Yates, President, and Messrs Adendorff and Jordaan, Members.

EVIDENCE—REQUIREMENTS REGARDING FRAMING OF REASONS FOR JUDGMENT

Defamation—where the occasion is privileged Plaintiff can only succeed if malice is proved

Summary: Both Plaintiff and Defendant claimed ownership of a red stallion. At a police inquiry Plaintiff-in-reconvention indicated that Defendant-in-reeonvention had stolen it.

Held: A Commissioner must give reasons for arriving at conclusions. An appeal court will not reverse a judgment based on fact unless satisfied that it is wrong.

In defamation cases the words complained of must be set out in the vernacular together with a translation. A police inquiry is a privileged occasion and in order to succeed in a claim for damages for defamation thereat malice must be proved.

Appeal from the Court of the Bantu Affairs Commissioner, Elliotdale.

Yates (President), delivering the judgment of the Court:

In this matter the Plaintiff (now respondent) sued the Defendant (now Appellant) for the delivery of a red stallion or its value R100 and costs alleging that it belonged to him and that despite his demand Defendant refused to return it. Defendant denied the allegations and counter-claimed for damages of R200 alleging in his particulars of claim:

"2. In or about August 1970 and at Hobeni Trading Station in the presence of the Demonstrator Mqwalu, Batuni Qevu, Zinakile Biniza, Glen Turner, policeman and other persons present.

Plaintiff (now Defendant-in-reconvention) wrongfully and unlawfully made and published in Xhosa, the following malicious and defamatory statement concerning the Defendant (now Plaintiff-in-reconvention) namely: That the horse which Defendant (now Plaintiff-in-reconvention) possessed belonged to Plaintiff (now Defendant-in-reconvention) and that it had disappeared or been stolen from him about four years previously.

3. By the words set out in paragraph 2 above, the Plaintiff (now Defendant-in-reconvention) meant and was understood to mean that the Defendant (now Plaintiff-in-reconvention) had stolen his horse."

Plaintiff pleaded in reply: "In regard to paragraphs 2 and 3 Plaintiff admits that on or about the date stated and at Hobeni Store he did utter certain words being a statement to the police regarding the disappearance of his horse but he denies that any of them are malicious, defamatory or that these words were said to mean that Defendant was a thief as

alleged in paragraph 3 and puts Defendant to the proof thereof. Plaintiff says further all words he uttered were uttered on a privileged occasion and are not actionable."

The Assistant Bantu Affairs Commissioner gave judgment for Plaintiff as prayed in regard to the main claim and for Defendant (Plaintiff-in-reconvention) for R30 with no order as to costs in regard to the counter-claim.

Defendant has noted an appeal against the judgment in convention on the ground that it is against the weight of evidence, the facts proved and the probabilities of the case.

Plaintiff has appealed against the judgment in reconvention on the grounds that: "(a) The judgment is bad in law as there is no proof of *animus injuriandi;* (b) The judgment generally is against the weight of evidence and probabilities of the case and is not supported thereby."

In regard to the judgment in convention the only matter in question is the identification of the stallion. According to the evidence of the Plaintiff he bought a mare, about eight years previously, while it was in foal. The foal grew up and was trained at his kraal and disappeared about a year before the hearing of the case. The loss was reported to the police. Subsequently the horse was seen in the village of Elliotdale by two men who immediately informed the police. Plaintiff was later called and accompanied the police to a certain kraal at Hobeni where he picked the horse out from about nine others and claimed it as his.

Defendant also claimed it and stated he had bought it from a certain Mr Turner.

Plaintiff's evidence was supported by N. Maveleziqengqa and N. Mtukuse who lived in the same locality as he did and stated that they knew his stock and that he had lost a horse. They were in the village one day, saw the horse amongst others, identified it as that of Plaintiff and took the rider to the charge office where he said that he had borrowed the horse.

Defendant stated that Mr Turner left horses with one Gxonono for safe-keeping and some seven years before had sent four of them, including the stallion which was then a year old, to his (Defendant's) kraal. When it was three years old he bought it from Mr Turner and it had been with him ever since. Its mother which was also one of the four horses brought to his kraal by Mr Turner had died the previous week. His evidence was corroborated by Gxonono's son Jackson, who said the mare and foal had been handed over at the same time as two other horses after his father's death. He identified the horse in dispute as the same horse but stated that the foal was only six months to a year old when it went to Plaintiff, so that he could well be mistaken. A neighbour B. Qevu who stated that he was present when Defendant bought the horse also identified it as the one purchased from Mr Turner. The latter was not called as a witness but according to Plaintiff when he (Plaintiff) went with the police to claim the horse, Mr Turner said that he had sold the mother to Defendant and that the stallion in question was born thereafter; which was not entirely consistent with Defendant's evidence.

The Commissioner, in his somewhat sketchy judgment was obviously impressed by the fact that the horse had been correctly identified in the village by Plaintiff's neighbours who were so convinced that it was his horse that they had immediately notified the police. He gave no reasons for disbelieving the evidence for Defendant and made no comment in regard to demeanour of witnesses on either side. In this regard the Commissioner's attention is directed to the case of *Mcunu versus Gumede*, 1938 N.A.C. (N. & T.) 6, and the cases cited in Warner's "Digest of S.A. Native Civil Case Law" paragraphs 467-472. However, the Commissioner must have come to the conclusion that the weight of evidence and the probabilities were in Plaintiff's favour and that he had discharged the onus on him as is shown by his judgment.

Mr Rose who appeared on behalf of the Defendant argued that neither the two men who saw the horse in the village nor Plaintiff's son Ponono were at the inquiry at Hobeni to confirm that the one Plaintiff claimed as his was the same horse as the one they knew; but it is clear from all the surrounding circumstances and the fact that the horse in question was produced at court at a subsequent hearing where its identity was not challenged that it was the same horse.

It is trite law that where the appeal is one of fact and credibility an appeal court will not reverse a judgment unless satisfied that it is wrong and it would generally only come to such a conclusion if there are other circumstances in the case apart from credibility and demeanour which satisfy the Appeal Court that the decision was wrong. See *Atet Mine (Pty) Ltd versus Tamasi & Herceg*, 1968 (1) P.H.F. 23 A.D. and *Wessels* versus *Johannesburg Municipality*, 1971 (1) S.A. 479 at p. 482.

In the instant case this Court has not been persuaded that the Commissioner who had the advantage of seeing and hearing the witnesses give evidence was wrong in his finding.
The appeal against the judgment in convention is therefore dismissed with costs.

In regard to the claim in reconvention the Commissioner has not complied with Rule 9 (3) of the Rules for Bantu Appeal Courts (G.N. R2084/1967) as he has given no reasons whatever for his judgment but it is clear that despite Plaintiff's denial (Plaintiff-in-reconvention will continue to be referred to as Defendant and Defendant-in-reconvention as Plaintiff) he must have accepted Defendant's evidence that Plaintiff when claiming the horse had stated that he (Defendant) had stolen it. However, this in fact does not accord with the particulars in Defendant's counter-claim which merely allege that Plaintiff stated that his horse had disappeared or had been stolen and that the words were understood to mean that he (Defendant) had stolen it; i.e. Plaintiff did not directly accuse Defendant of having stolen it.

The counter-claim is further defective in that the words complained of were not set out in the vernacular together with a translation *vide* cases cited in "A Digest of S.A. Native Civil Case Law" by Warner at paragraphs 2267/8.

There is no doubt that Plaintiff did speak to the police about the disappearance of his horse at the store where it was recovered and he may well have said that it had been stolen.

However, even if he had indicated that Defendant, who was claiming it as his, was the thief, there is no doubt that this was a privileged occasion, as pleaded by him, *vide Kleinhans* versus *Asmar*, 1929 A.D. 121 at p.p. 126/7. That is a case practically on all fours with this one.

Plaintiff having established that the communication was made on a privileged occasion, Defendant can succeed only by proving affirmatively that the former was in fact actuated by malice. *Vide* Warner *supra* at paragraph 2325.

The cross-appeal is therefore allowed with costs and the judgment of the Bantu Affairs Commissioner's Court is altered to read: "For Defendant-in-reconvention with costs."

Adendorff and Jordaan, Members, concurred.

For Appellant: Mr P. Rose

For Respondent: Mr D. Koyana

IN THE SOUTHERN BANTU APPEAL COURT

B.A.C. CASE 23 OF 1971

SILOSINI versus MPIMPI

UMTATA: 26 August 1971. Before Yates, President, and Messrs Adendorff and Jordaan, Members.

JUDGMENT

Attachment of cattle—when writ is satisfied

Summary: A writ was issued for four specific cattle or their value plus costs. Five cattle including two of the specified cattle were attached and the two latter were handed to the judgment creditor. The remaining three died in the hands of the agent of the Messenger of the Court and the Messenger then attached a further three head. This attachment was set aside on the ground that the writ had been satisfied.

Held: (a) A judgement for specific cattle or their value is satisfied when the particular cattle described are attached.

(b) A judgment for a stated number of cattle or their value may well be satisfied when the requisite number of cattle have been attached.

(c) A judgment for specific cattle or their value when only some of the cattle in question have been attached is satisfied by payment of the value of the remainder to the judgment creditor.

Appeal from the Court of the Bantu Affairs Commisioner. Elliotdale.

Yates (President) delivering the judgment of the Court:

This is an appeal from a judgment of a Bantu Affairs Commissioner's Court setting aside an attachment of certain 3 head of cattle on 22 September 1970 with costs.

The relevant facts are set out in an affidavit made by the Messenger of the Court. Elliotdale, which reads:

"1. I am the Messenger of the Court for the Bantu Affairs Commissioner's Court for the District of Elliotdale.

2. In August 1970, Plaintiff (through his attorneys Meaker and Holmes)issued a warrant of execution in the above matter for 4 specified head of cattle or their value, plus costs amounting to R232,60.

3. On the 24 August 1970 my Deputy M. Nongo reported to me that he had attached the following cattle, viz:

(a) A black ngwevu cow; (b) a black heifer calf; (c) a gwangqa cow; (d) a red young heifer calf; and (e) a red young heifer.

(4) The said cattle were placed with the subhcadman Zwelitobile Maqundeni of Hobeni Bantu Township and on or about the 8 September 1970. I was advised that three of these cattle had died, viz. a black ngwevu cow, a black heifer calf and a light red young heifer calf.

5. At the time when these three head of cattle died I had not handed over or sold any of the cattle or in any way satisfied the Plaintiff's warrant.

6. I was thereafter instructed by the Plaintiff's attorneys to make a further attachment. On the 22 September 1970, I attached, through my Deputy, A. Ndeya, certain five head of cattle, viz:

(a) A red ox; (b) another red ox; (c) a yellow cow; (d) a red and white ox; and (e) a red heifer.

(7) I have now been advised that an Application will be heard before this Honourable Court on the 30 October 1970, for an order setting aside the attachment of certain three (3) of the cattle attached on the 22 September 1970, on the grounds that the three head of cattle which died (as set out in paragraph 4 above) were already handed over to the Plaintiff and that the loss and risk was therefore that of the Plaintiff."

When giving evidence, however, the Messenger did not dispute that the actual date of the first attachment was 22 and not 24 August 1970, i.e. the number of days which had elapsed from the attachment of the cattle until he was notified that three had died was 17 days.

An appeal has been noted on behalf of the Plaintiff on the grounds that the judgment is—

"(a) against the weight of the evidence, the facts proved and the probabilities of the case, more particularly in that the evidence of the Messenger of the Court showed that—

(i) no delivery to the Plaintiff of any of the cattle attached had taken place nor any sale in execution been held; and

(ii) there had been no satisfaction of the Warrant of Execution issued by the Plaintiff, either in part or in whole.

(b) Wrong in law in that—

(i) The Messenger of the Court is the Executor of the Law and is not the agent of the Plaintiff in making the attachment and subsequent death of some of the cattle attached cannot therefore be debited to the Plaintiff; and

(ii) The effect of the said judgment was to render unenforceable the judgment entered on the 12 February 1969."

The writ on which the action was based was issued on 4 August 1970, in Elliotdale Case 58 of 1969 and was for four specific cattle, i.e: (1) A red cow; (2) its nqabe calf; (3) a yellow cow; and (4) its gqanqa calf; or their value R200 plus costs of R32,60.

According to paragraph 3 of the Messenger's affidavit the Deputy Messenger on 24 August 1970 attached five head of cattle which included the yellow cow and its gwangqa calf, i.e. Nos. 3 and 4 above and referred to as (c) and (d) in the Messenger's affidavit *supra*. Ntabeni Lungisani, the "eye" of the judgment debtor's kraal who was present when the cattle were attached confirmed this. In the endorsement on the back of the writ the judgment creditor acknowledged receipt of these two cattle.

Apparently the Messenger was unable to attach the remaining two specified cattle and took three others to enable him to satisfy the writ which he could only have done by holding a sale and paying to the judgment creditor the balance due to him, i.e. R132,60.

As conceded by Mr Rose, who appeared for the judgment debtor, had all four specified cattle been attached then the writ would have been satisfied and the risk would have passed to the judgment creditor. In the instant case, however, as only two specified cattle were attached the writ remained unsatisfied to the extent of R100 and costs. The writ did not mention "any" cattle but "specific" cattle. It was incumbent on the Messenger therefore to sell the remaining attached cattle to raise the money required and unfortunately before he was able to do so they all died. In order to satisfy the writ the Messenger was then obliged to make a further attachment and it is this attachment of a further three head of cattle which, according to the notice of application (although the Messenger states in paragraph 6 of his affidavit that he attached five) is being contested.

It is incumbent upon the Messenger to comply strictly with the writ, see Jones & Buckle (6th Ed.) at p. 643 and the authorities there cited. Furthermore he is not the agent of anyone but is the executor of the Law, *vide* Jones & Buckle at p. 361.

Had the four specific cattle been attached the writ would have been satisfied.

Had the writ been issued merely for four head of cattle or their value it may well be that the writ would be considered as having been satisfied provided that the cattle attached were of an average type. See *Matolengwe* versus *Pateni*. 1 N.A.C. (S.D.) 106 (1949) and cases cited in "A Digest of S.A. Native Civil Case Law" by Warner at paragraphs 3528-30.

However, in the instant case as stated above the Messenger was required to pay the judgment creditor the value of the two specified cattle which were not attached. The attachment of further cattle was therefore justified and the Messenger was required to keep them for not less than 14 days prior to the sale [See Rule 70 (10) of the Rules for Bantu Commissioner's Courts. Government Notice 2083 of 1967].

Mr Matebese, who appeared on behalf of the Defendant, referred to the case of *G. & N. Mpunga* versus *T. Mpunga* from the District of Mqanduli in which an appeal was heard on 18 June 1970, and which has not yet been reported in support of his argument that the risk of loss in these circumstances was that of the judgment creditor but in that case the judgment was for 25 cattle or their value R40 each, i.e. the cattle were not each described specifically and it was held that the attachment of 25 head satisfied the writ.

The appeal is allowed with costs and the judgment of the Assistant Bantu Affairs Commissioner is altered to read "The application to set aside the attachment is refused with costs".

Adendorff and Jordaan, members, concurred.

For Appellant: Mr P. Rose.

For Respondent: Mr S. H. L. Matebese.

IN THE SOUTHERN BANTU APPEAL COURT

B.A.C. CASE 26 of 1971

QANA versus YEKO

KING WILLIAM'S TOWN: 13 October 1971. Before Yates, President and Messrs Adendorff and Van Rensburg, Members.

MUNICIPAL LOCATION—SPOLIATION

Mandament van spolie—Trading premises within the municipal area—Applicant entitled to occupation of premises subject to necessary authority being obtained

Summary: Applicant sued for the return to him of certain trading premises in the municipal area of Port Elizabeth. He established that Respondent who was the owner of the building had agreed to let him use the premises; that he was in possession and had been dispossessed.

Held: That he was entitled to possession and occupation provided he first obtained the necessary authority and licence to trade.

Appeal from the Court of the Bantu Affairs Commissioner, Port Elizabeth.

Yates (President) delivering the judgment of the Court:

The Applicant (Appellant) applied on 14 August 1970, for *a mandament van spolie* authorising the Messenger of the Court to take possession of the keys of premises situate at Kwazakele, Port Elizabeth, known as Eluxolweni Trading Store and to restore to the applicant's possession and occupation, ante omnia, the said premises including certain goods. An interim order was granted on 19th *idem*.

Respondent opposed the application and on 3 September the action was dismissed with no order as to costs.

An appeal was noted and on 14 September 1970, Respondent applied to the Bantu Affairs Commissioner's Court for an order directing that the judgment of the 3rd *idem* be carried into execution forthwith and the premises be restored to him. At the hearing on 29 September it was agreed that the parties with goods on the premises should be allowed to remove them under supervision and thereafter the keys were to be handed to the Respondent.

The appeal to this Court was successful and on 8 March 1971 the judgment was set aside and the case returned to the Court *a quo* for hearing to a conclusion. The evidence of Respondent and his witnesses was then heard and on 11 May 1971 the order was discharged with costs.

Against this judgment an appeal was noted on 3 June 1970, on the grounds:

"1. That the judgment is against the evidence and the weight of evidence in the following respects:

On the following grounds:

(a) The evidence shows that there was, in fact, an agreement between the Respondent and the Appellant, viz. that the Appellant would hire Respondent's premises.

(b) The evidence reflects that there was correspondence between the parties herein referring to the Agreement between the parties herein and the letter produced at the last hearing was admitted by the Respondent in his evidence. The interpretation of the said letter is the one which was handed in by the Appellant's attorney, attached hereto marked 'A'.

(c) Despite the Respondent's admission that, after the order had been discharged with costs at the first hearing, some stock containing groceries was handed over by him to Appellant, which stock was in the shelves of the shop in question, the learned presiding officer erred in finding that there was not a valid agreement between the parties herein.

(d) At the first hearing the Respondent's attorney averred that there was no stock in the said shop belonging to Appellant yet, the Respondent, in the second hearing, stated that he voluntarily allowed Appellant to take possession of his stock from the shop in question excepting the perished stock.

(e) The evidence of witness Helen Maqungo differs materially from the contents of her Affidavit, dated 24 August 1970.

2. That the presiding officer failed to take into consideration the only two requisites of spoliation proceedings, viz. whether or not—

(a) the Applicant was in peaceful and undisturbed possession of the premises;

(b) the Applicant was dispossessed of the premises without his consent and without recourse to law."

"Annexure A": Mr Qana. As I have agreed with you that you should occupy that shop I will ask you that it is necessary that we should withdraw our Agreement till we show each other properly because I have heard that Mr Tshiki was here. Thank you. (signed) A. T. Yeko."

Two factors are requisite to found a claim for restitution of possession on an allegation of spoliation. The first is that the Applicant was in possession and the second that he has been wrongfully deprived of that possession against his will.

In the instant case the Applicant based his claim to be in possession on his allegation that the Respondent had leased the premises to him. Respondent on the other hand claimed that Applicant was in his employ and at the time was engaged in cleaning out the shop.

It is common cause that the site belonged to the City Council of Port Elizabeth and that Respondent leased it for R24.18 a month. The buildings thereon belonged to Respondent and that he would sublet to Applicant for the same amount is improbable unless Respondent could indicate some other quid *pro quo*. Applicant made no mention of this in his supporting affidavit but in evidence stated that he had agreed to pay the outstanding debts of the business amounting to R1 000 in two instalments of R500 and his evidence to this effect is supported by the fact that on 7 August 1970 he paid to his attorney R500 as was shown by the receipt handed into court.

He was in desperate need of premises as he had been evicted from a building owned by one Lamani in February of that year and his stock put out into the street by the Messenger of the

Court. His statement that he was prepared to trade even without a licence indicates the urgency with which he regarded the matter.

That the parties had agreed to the lease of the premises is further supported by the fact that the invoices put in as exhibits indicate that between 3 and 7 August 1970, Applicant purchased trade goods to the value of over R400 which he would hardly have done had he no place in which to do business.

It is clear too that he began to trade in the premises in question on 6 August for both Helen Maquna and David Bam, who gave evidence for Respondent, admitted that they had seen customers in the shop. Helen also stated that after she closed the shop she was instructed to go back and give the takings to Applicant which assuredly would not have happened had Applicant been an employee only. Helen also admitted that Nonceba and the two other girls behind the counter were employed by Applicant and not by Respondent.

Respondent's statement that he employed Applicant at a salary of R40 a month was supported by Helen but this was not put to Applicant in cross-examination. Further it is unlikely that a man employed as Assistant Manager, as stated by Respondent, would have been required to spend two days cleaning out a shop in which Applicant had no intention of trading at that stage as he had no licence for the premises. The licence was only granted on 30 August 1970, after certain repairs had been effected. A perusal of the two letters sent to Applicant by Respondent also indicates, though not conclusively, that they had agreed that Applicant should take over the premises.

In his reasons for judgment in the first appeal the Assistant Bantu Affairs Commissioner found as a fact that Applicant had entered into an agreement with Respondent in terms of which the latter let the trading premises known as Eluxolweni to him at a monthly rental of R24 payable in advance for a period of 4 years from 6 August 1970, and this Court has not been persuaded that that finding was wrong.

It has been argued that Respondent would not have exposed himself to the risk of a prosecution for fraud, loss of his other trading licence, cancellation of his trading permit and forfeiture of his building erected on Council property, but it was not until attorney Tshiki visited his wife that he apparently became alarmed and sent Helen to close the premises and retain the key.

There is thus no doubt that Respondent had agreed to allow Applicant to use the premises and that he was in possession. The nature of the contract and its legality or otherwise is not here in question. There is also no doubt that Applicant was dispossessed and that Helen acted on instructions from Respondent's wife who managed his affairs when he was not there.

Mr Bendelstein also argued that because Applicant's original affidavit did not set out the true position the order should not be granted but it is clear that both parties were endeavouring to conceal the fact that they were attempting to evade the regulations governing trading in the area and that Respondent's affidavit was equally misleading.

Mr Bendelstein contended that Applicant could not succeed as the effect of a judgment in his favour would be to cause both parties to contravene the Municipal regulations contained in G.N. 1036 of 1968. However, it is clear that if Applicant is able to obtain the necessary permission to trade from the proper authorities any subsequent trading carried on by him would not be illegal.

In the result the Applicant is entitled to succeed but in view of the fact that the use of the premises is contingent on the approval of the Municipality, the judgment of the Court is that the appeal is allowed with costs. Possession and occupation of the premises are restored to the Applicant provided he first obtain the permission and consent of the Council and any other necessary authority to trade thereon.

Adendorff and Van Rensburg, members, concurred.

For Appellant: Mr D. Tshiki.

For Respondent: Mr L. H. Bendelstein.

King William's Town, 15 October 1971.

IN THE SOUTHERN BANTU APPEAL COURT

B.A.C. CASE 30 OF 1971

NDLANDLAZI MAXONGO versus NOVUMILE BHANAYI

UMTATA: 23 August 1971. Before Yates, President, and Messrs Adendorff and Botha, Members.

MANDAMENT VAN SPOLIE—NO EVIDENCE THAT RESPONDENT SPOILIATED THE HEIFER—RULE *NISI* DISCHARGED

Summary: Applicant claimed as his property a black heifer running at Respondent's kraal, alleging that it had been removed from his possession unlawfully and without his consent. Respondent stated that a black heifer belonging to him had disappeared but returned on its own.

Held: That proof was necessary that Respondent has spoliated the heifer before he could be ordered to return it.

Appeal from the Court of the Bantu Affairs Commissioner, Mqanduli.

Yates (President) delivering the judgment of the Court:

This is an appeal from a judgment confirming a rule *nisi* and ordering Defendant (now Appellant) to return to Plaintiff (now Respondent) a black heifer and its increase of a black heifer with costs.

In his affidavit supporting his application for a rule *nisi* calling upon Defendant to restore possession of a certain black heifer now running at his (Defendant's) kraal the Plaintiff stated that on 17 August 1969 when he was in peaceful and undisturbed possession thereof, the heifer was removed wrongfully and unlawfully and without his consent from his possession by two persons unknown to him. This affidavit was supported by one from the herd boy who stated that he had failed to recognise the two men who took the beast.

Defendant in his replying affidavit stated that he knew nothing about the alleged spoliation but admitted that a black heifer which was his lawful property had disappeared in a mysterious way and had returned on its own and he had kept it.

An appeal has been brought against the judgment on the grounds that it is not alleged that there was any act of spoliation on the part of the Defendant.

It is common cause that the heifer in question was in Plaintiff's possession, was spoliated and was later found in Defendant's possession. However, it is not known who took the heifer from Plaintiff and the question is whether in these circumstances Plaintiff is entitled to a mandament van spolie against the Defendant.

The requisites for a spoliation order as stated at p. 90 of Jones & Buckle (6th Ed.) are:

1. That Applicant was in peaceful and undisturbed possession of the property; and

2. That *Respondent* deprived him of the possession forcibly or wrongfully against his consent.

In Wille's Principles of S.A. Law (6th Ed.) at p. 195/6 it is stated "Spoliation Order. If a person has been deprived of possession by violence, fraud, stealth or some other illicit method, he may obtain from the Court a mandament van spolie, or spoliation order, commanding *the dispossessor* to restore the possession to himself, the Applicant. It is a fundamental principle that no man is allowed to take the law into his own hands. Consequently if a person without being authorized by a judicial decree, dispossesses another person the Court, without inquiring into the merits of the dispute, will summarily grant an order for restoration of possession to the Applicant, as soon as he has proved two facts; namely, that he was in possession, and that he was despoiled of possession *by the Respondent*."

According to Maasdorp "The Law of Things" Vol. II, 8th Ed. at p. 21 "In order to obtain an interdict it is necessary for the Applicant to show—

(a) that he has a clear right or that he has a prima facie case,

(b) that an injury has actually *been committed by the Respondent* or there is a well grounded apprehension that such an injury will be committed; and

(c) that there is no ordinary remedy which will give him the protection that he claims."

All the above authorities therefore stipulate that the order may only be granted against the person who has taken the law into his own hands.

I therefore came to the conclusion that because there is no allegation or proof that Defendant had anything to do with the spoliation of the heifer it is not competent to grant an order against him.

The appeal is allowed with costs. The judgment of the Bantu Affairs Commissioner's Court is set aside and for it is substituted "The rule *nisi* is discharged with costs."

Adendorf and Botha, members, concurred.

For Appellant: Mr D. Koyana.

For Respondent: Mr K. Muggleston.

IN THE CENTRAL BANTU APPEAL COURT

ALLISON SITHOLE versus LILY-ROSE GULE

CASE 11 of 1971

JOHANNESBURG: 29 June 1971. Before Cronje, President, and Thorpe and Bowen, Permanent Members.

MAINTENANCE

Maintenance Act, No. 23 of 1963—Jurisdiction—Section 4 (1) Meaning of "person in whose care."

PRACTICE AND PROCEDURE

Appeal—Late noting—Application for condonation.

Summary: On the complaint of the mother of illegitimate children a Maintenance Court in Johannesburg made an order for their maintenance. The mother was resident in Johannesburg but the children were resident in Swaziland. An application for rescission of the order was made to the Maintenance Court on the grounds that it had no jurisdiction as the children resided outside its area. Upon the application being refused, appeal was noted, the date of the noting being four months after the maintenance order had been made. Security for the other party's costs was not lodged until two months later. Application for condonation of the late noting was made; this was accompanied by an affidavit in which allegations were made concerning matters not on record such as an interview with the presiding officer. The affidavit was not served on the presiding officer.

Held: The fact that children in respect of whom maintenance is sought are resident outside the Court's area of jurisdiction does not necessarily deprive that Court of jurisdiction to hold an enquiry and make an order under section 5 (4) (a) of the Act;

Held, further: The mother of an illegitimate child is a person in whose care that child is for purposes of section 4 (1) of the Act, even though the child is not resident with her.

Held, further: A copy of the application for condonation of the late noting of the appeal and the accompanying affidavit should have been served on the officer who presided in the Court *a quo* to enable him to reply to allegations concerning matters not on record.

Held, further: As the explanation for the late noting of the appeal was unacceptable and there was no prospect of the appeal succeeding on the merits, the application for condonation should be refused.

References:

Section 5 of Matrimonial Affairs Act, No. 37 of 1953. Sections 4 (1) and 5 (4) (a) of the Maintenance Act, No. 23 of 1963.
Bantu Appeal Court Rules 5 (3) and 7 (a).
Steyn: "Die Uitleg van Wette," 3rd edition, at p. 139.
Wille: "Principles of S.A. Law," 4th edition, p. 139.
Seymour: "Bantu Law in South Africa," 3rd edition, pages 192 — 194, 217 — 226.

Union Govt. versus *Warneke,* 1911 A.D. 657, at 668.
Calitz versus *Calitz,* 1939 A.D. 56, at 63.
Ex parte Minister of Native Affairs, 1941 A.D. 53, at 59.
M'guni versus *M'tawli,* 1923 T.P.D. 368.
Van der Westhuizen versus *Rex,* 1924 T.P.D. 370.
Lourens versus *Lourens,* 1946 W.L.D. 309.
Fortune versus *Fortune,* 1955 (3) S.A. 348 (AD) at 353B.
Engar and Engar versus *Desai,* 1966 (1) S.A. 621 (T).
Estate Woolf versus *Johns,* 1968 (4) S.A. 492 (A.D.).

Appeal from the order of the Maintenance Court of the Bantu Affairs Commissioner, Johannesburg.
Thorpe, Permanent Member:

This is an appeal against a maintenance order made by the maintenance court of the Bantu Affairs Commissioner, Johannesburg, in terms of section 5 (4) (a) of the Maintenance Act, 1963 (No. 23 of 1963), (hereinafter referred to as the Maintenance Act.) The enquiry was instituted on the complaint of the Respondent to the appeal who will be referred to as the complainant.

It is common cause that the complainant resides in the District of Johannesburg, within the Court's jurisdiction; that she had five children by the Appellant; and that two of them—Gordon and Collin—reside with the complainant in Johannesburg, while the other three—Romero, Golda and Montgomary—have at all material times been residing with the complainant's mother in Swaziland. It is also common cause that the Appellant resides in Johannesburg.

The complainant caused two enquiries to be instituted. In the first she sought maintenance for all five children, but the Commissioner on 24 November 1969, after making an order by consent in respect of the two children Gordon and Collin, who were in Johannesburg, directed that the other three children be brought to court. The complainant said she would bring them. The Commissioner then recorded "Case of the 3 children ppd sine die."

Instead of bringing these three children to Johannesburg, the complainant caused a fresh enquiry concerning them to be instituted. A different judicial officer held the enquiry. After hearing evidence he ordered the Respondent (present Appellant) to pay the complainant R12 per month, through the office of the Bantu Affairs Commissioner, Johannesburg, for the maintenance of the three children Romero, Golda and Allison.

The reference to Allison in this order is an obvious error. Allison is the name of the Appellant and "Montgomery" should be substituted for "Allison".

This last order was dated the 6 August 1970. Thus far the Appellant had not been represented but the following day a letter was addressed to the Bantu Affairs Commissioner, Maintenance Court, Johannesburg, by Mr Pitje, who also represented the Appellant before us. The letter reads as follows:

"I confirm the conversation the writer hereof had with your goodself.

After perusing the record I am of the opinion that the Court should not have made an order for maintenance in respect of Romero, Golda and Allison. These children are at present in Swaziland. They are therefore out of the jurisdiction of this Court. If there is to be a maintenance order it must be made by

the Court where the children are. If there is any doubt about the matter I am willing to discuss same with you. I think there is some authority for my submission.

Meanwhile please defer the collection of the maintenance amount until I shall have discussed the matter with you.

I would not like to take the matter on appeal or review if there is a chance that we can sort it out.

Please confirm."

The letter appears to have been received on 11 August. On 25 August the judicial officer endorsed on the letter "Het Mnr. Pitje se kantoor op 3 geleenthede geskakel en is boodskap gelaat dat hy my moet terugskakel. Hy het dit egter nie gedoen nie. Die Hofbevel bly staan."

On 23 September Mr Pitje filed an application for "the variation of the maintenance order made on 6 August 1970."

The application was accompanied by an affidavit by the appellant in which he incorrectly deposed that on 6 August 1970, he had been ordered to maintain the five children. No such order was, of course, made.

He contended that as Romero, Golda and Montgomary were in Swaziland—and therefore outside the jurisdiction of the Court—and as they are not under complainant's care, the Court should have made no order in respect of them. Respondent therefore prayed the Court "to set aside or vary the order against me on 6 August 1970, and substitute therefor an order for maintenance in respect of Gordon and Collin." As there was already an order in respect of Gordon and Collin, it follows that the order as prayed could not be granted.

It is obvious that what was sought was the rescission of the order in respect of the three children in Swaziland. Mr Pitje informed us that he had perused the record before making the application to vary. He should have been more careful in preparing an affidavit for his client's signature, which resulted in his client swearing to an incorrect statement.

The application for rescission was eventually heard on 26 November 1970, when it was refused.

A notice of appeal dated 9 December was lodged reading: "Be pleased to take notice that Appellant hereby notes an Appeal to the Central Bantu Appeal Court, Johannesburg, against the Order made against Appellant by the learned Bantu Affairs Commissioner on the 6th day of August 1970, and confirmed on the 26th November 1970, on the following grounds:

(a) The Court erred in ruling that it had jurisdiction to grant an Order for maintenance in respect of children resident and living in Swaziland.

(b) The Court erred in law in finding that so long as the mother of the said children lives in Johannesburg it had jurisdiction to make an Order for maintenance in respect of her children no matter where they lived."

The date on which the notice of appeal was received by the Clerk of the Court is not endorsed thereon, as it should have been, though in an accompanying document the clerk of the Court states it was received on 9 December.

The notice of appeal does not state whether the whole or part only of the order of 6 August is being appealed against, as is required by rule 7 (a) of the Bantu Appeal Court rules. It is to be noted that this requirement has been held to be peremptory. Before us Mr Pitje stated that the appeal is against the whole of the order and we accepted this to be the position.

Another unsatisfactory feature of the manner in which the appeal has been noted is that security for the other party's costs was not lodged until 17 February 1971, more than two months after the notice of appeal. In this regard the requirements of another rule of this Court have not been complied with, the rule being rule 5 (3) which states that a party noting an appeal "shall *when delivering the notice of appeal*" give security.

The appeal has obviously been noted very late. Mr Pitje sought to take the blame and in an affidavit he refers to an interview with the judicial officer in which he states *inter alia* that it was agreed that he would defer noting an appeal on the understanding that, should he find satisfactory authority for his submission that the Court had no jurisdiction to make a maintenance order in respect of children resident outside the Court's area, the order would be set aside.

It must be stated immediately that it is irregular for a legal practitioner to informally approach a judicial officer out of Court with a view to persuading him to change a judgment, however laudable the practitioner's intention of saving costs might have been. It would also appear that the affidavit was not brought to the attention of the judicial officer concerned and that, although it was sent to the clerk of the Court, no steps were taken to ensure that the judicial officer was given an opportunity to reply to the statement about his alleged undertaking. Whenever allegations are made concerning what does not appear in the record a copy of the document containing them should be served on the judicial officer who heard the case. In any event a maintenance court has no power to set aside its own order, at the request of the person against whom it is made, on the sole ground that it was made under a misapprehension as to the law. The application to rescind was for this reason also not competent.

Even it were to be accepted that an application for rescission was competent, an explanation should have been offered for the delay of more than six weeks between the date of the order and the date of the application for its rescission, but none was put forward.

No reasons for judgment were requested and consequently appeal should have been noted within 21 days of 6 August 1970, that is by the end of that month. The appeal was not noted until after almost a further three months had elapsed and the explanation for the delay is unacceptable.

Even where the explanation for a delay is not satisfactory, prospects of the appeal succeeding on the merits must also be considered—see *Estate Woolf* versus *Johns* 1968 (4), S.A. 492 (AD), at page 497, from G—and these prospects will now be considered.

The appeal is noted on the grounds that the Court *a quo* had no jurisdiction to make an order in respect of children living outside its area. Mr Pitje conceded that he could find no authority for this submission.

The question of forum is dealt with in section 4 (1) of the Maintenance Act, which in so far as it deals with this issue reads as follows:

"4. (1) Whenever a complaint on oath is made to a maintenance officer to the effect that—

(a) any person legally liable to maintain any other person fails to maintain such other person; or

(b) sufficient cause exists for the substitution or discharge of a maintenance order,

the maintenance officer may, after investigating such complaint, institute an enquiry in a maintenance court, within the area of jurisdiction of which the person to be maintained or the person in whose care such person is, resides. . ."

Where the persons to be maintained are children, jurisdiction in terms of the Maintenance Act will thus be vested in a maintenance Court for the area within which either (a) the children reside, or (b) the person having care of the children resides. Naturally, if jurisdiction were dependent only on the place of their residence then a South African Court would not have jurisdiction to make any order in respect of the children in question in the present case, as they are resident in another country. But this is no reason why the second basis for jurisdiction should not apply if the person having care of the children resides in the area of jurisdiction of the Court *a quo*. As the bases (a) and (b) are expressed in the alternative the existence of one of them would be sufficient to found jurisdiction. That these bases must be treated independently of each other flows from one of the first rules for the interpretation of statutes, namely, that every word must be given a meaning and no word should be regarded as redundant—see Steyn "Die Uitleg van Wette," 3rd edition, at page 16. If the legislature had intended that only the Court in whose area the children reside should have jurisdiction the words referring to the residence of the person having care of the children would have been unnecessary. A Court would have jurisdiction in respect of children even in those cases in which the children do not reside within its area, if the person, "in whose care" they are, does so reside.

The word "reside" in section 4 (1) of the Maintenance Act has been used for purposes of conferring jurisdiction. In section 10 (3) of the Bantu Administration Act this word was used for the same purpose and the construction placed upon it in *Ex parte Minister of Native Affairs*, 1941 A.D. 53, would appear to be equally applicable to the word as used in the Maintenance Act. In that case it was said at page 59 that "a person resides at his home which he has temporarily left." If children resided in Johannesburg and were temporarily absent, they would still be regarded as resident in Johannesburg for purposes of the first basis for jurisdiction under the Maintenance Act. The second basis for jurisdiction would thus apply where the children are not merely temporarily absent but actually resident outside the territorial jurisdiction of the Johannesburg Court, and as already indicated, whether the children were resident in another part of the Republic or in a foreign country such as Swaziland would be immaterial.

As the second basis of jurisdiction is independent of the first, it follows that the person contemplated by section 4 (1) of the Maintenance Act as the person having care of a child must

be a person who can be said to have the care of a child even when it resides elsewhere. That person must therefore be one who has the legal right or duty to care for the child whether or not it stays with him or her. For convenience I shall refer to this legal right or duty as legal care.

In view of the fact that section 4 (1) of the Maintenance Act speaks of "the" person in whose care children are, it would seem that the legislature had in mind only one person who should be regarded as having care of the person(s) to be maintained—see *R. verus Madine*, 1961 (3) S.A. 29 (AD), at page 33, in regard to the use of the definite and indefinite article in legislation. In the case of minor children, liability to maintain could not then be the touchstone by which the identity of the person having care of them can be determined, as both the mother and the father are so liable. See *Union Government versus Warneke*, 1911. A.D. 657, at 668 (liability to maintain children of the marriage) and *M'guni versus M'twali*, 1923 T.P.D. 371 (liability to maintain illegitimate children).

In attempting to define the person who has legal care of a child only two categories of persons suggest themselves as possibly possessing this right or duty, namely guardians and custodians. If we accept, as it appears that we must, that the legislature had in mind only one person who should be regarded as having legal care of a child, a guardian as such would appear not to qualify, for two reasons. Firstly, in terms of section 5 (3) (b) of the Matrimonial Affairs Act, 1953, a child may possess more than one guardian, and secondly a guardian who once possessed legal custody may have been deprived of it by Court Order. Now, although there may be one guardian there can never be more than one custodian. It must be noted that the introduction by the Matrimonial Affairs Act, No. 37 of 1953, of the term "sole custody" does not indicate that legal custody under the common law can reside in more than one person at a time. Schreiner, J.A., in *Fortune* versus *Fortune* 1955 (3) S.A. 348, at 353B suggest that the use of the word "sole" before "custody" in section 5 of Act 37 of 1953 was simply to contrast the effect of an order for sole custody with the position while the parents who were married to each other were living together. Where sole custody has been awarded the additional power is conveyed of appointing by testamentary disposition a person to be vested with the sole custody of a minor; apart from this, legal custody under the common law can also be described as "sole custody" though that term is not used outside the Matrimonial Affairs Act, 1953. Where parents are married to each other the father is the person entitled to legal custody of a minor child—see *Calitz* versus *Calitz*, 1939 AD 56.

As with all statutes, the Maintenance Act is to be construed in consonance with the common law, except in so far as it is clear from the terms of the Act that the legislature had a contrary intention. The only reference in the Maintenance Act to Bantu custom is that contained in section 5 (6) which is to the effect that for the purposes of determining whether a Bantu is legally liable to maintain any person he shall be deemed to be the husband of any woman associated with him in a customary union. In the present case the Appellant contended that he was married to the complainant by Bantu custom. This was denied by the complainant. The Appellant had attempted to establish

his contention in another court but that Court had granted an absolution judgment. The appellant told the Court *a quo* that he would not be able to bring any further evidence regarding the alleged customary union and it must be accepted that the complainant was not married to the appellant by Bantu custom. It is consequently not necessary to determine whether section 5 (6) of the Maintenance Act has any bearing on the ascertainment of the person who must be regarded as having the care of a child not resident with him or her.

As in the present case the parents of the children in question are not married to each other by Bantu custom the expression "the person in whose care" in section 4 (1) must be construed according to the common law. It is clear that the parents are not married to each other in any way and the children are accordingly illegitimate. This means that the mother is their natural guardian—see *Dhababakium* versus *Subramanian and another* 1943 AD 160—although, as pointed out by the Appellate Division in that case at page 166, this would not be so if she were a minor. In the present case the age of the mother does not appear from the record but it seems that we can accept that she is a major especially as her eldest child by the Appellant was born in 1951. There is nothing in the record to indicate that she has been deprived by Court order of any of the rights of guardianship and we must accept that all those rights still vest in her, including that of legal custody. Therefore the children in Swaziland are in her care for purposes of section 4 (1) of the Maintenance Act. As she was resident within the territorial jurisdiction of the Court *a quo* it follows that it had jurisdiction to make the order appealed against.

It could be observed in passing that in *Van der Westhuizen* versus *Rex*, 1924 T.P.D. 370, it was held that where an illegitimate child does not reside with its father, but is in the charge or care of the mother, or of persons to whom the mother has entrusted it, the father will nevertheless be deemed to have the custody, charge or care of the child. This decision was however arrived at by virtue of section 21 (2) of the Children's Protection Act, No. 25 of 1913, which stated that "the father shall not be deemed to have ceased to have the custody of the child by reason only that he . . . does not reside with the . . . child." Furthermore, Act 25 of 1913 has been repealed and there appears to be nothing in the current Children's Act. No. 33 of 1960, corresponding to the provisions quoted. In any event, there is no deeming provision on this point in the Maintenance Act.

In the instant case the appellant was also resident within the territorial jurisdiction of the Court *a quo*, but it would seem that this fact is irrelevant.

In my view, therefore, the explanation for the lengthy delay in noting the appeal is unacceptable and the appeal has no prospects of succeeding. The application for condonation of the late noting of the appeal is consequently dismissed. As there was no appearance for the Respondent before us there will be no order as to costs.

Cronje, President, and Bowen, Permanent Member, concurred.

For appellant: Mr G. M. Pitje, Johannesburg.

For Respondent: No appearance.

IN THE CENTRAL BANTU APPEAL COURT

NDLOVU versus MNCUBE

CASE 12 of 1971.

JOHANNESBURG: 29 June 1971. Before Cronje, President, and Thorpe and Bowen, Permanent Members.

LEASE

Ejectment—Common law tenancy.

PRACTICE AND PROCEDURE

Appeal—Notice of appeal—Requirements.

Summary: After the expiry of a written lease, the Defendant remained in occupation of the premises and paid rental monthly. He was given a month's notice to vacate by the Plaintiff, his landlord, but he refused to do so on the grounds that he was entitled to remain in occupation by virtue of a verbal lease. Requirements for a notice of appeal discussed.

Held: The onus to prove the verbal lease was on the Defendant and that he had not discharged this onus.

Held, further: That the Plaintiff was entitled to an order for ejectment and ancillary relief.

Held, obiter: Judicial notice should be taken of the fact that the land in Soweto is owned by the Johannesburg municipality.

References:

Bantu Appeal Court Rule 7 (a).

Warner: Digest of South African Native Civil Case Law, 353 and 375.

Supplement (1963-1968) op. cit. 35.

Smith versus *Abbott* (1898) 13 E.D.C. 68.

Graham versus *Ridley*, 1931 T.P.D. 476.

Cope versus *Zeman and Another*, 1966 (1) S.A. 431.

Matador Buildings (Pty) Ltd. versus *Harman*, 1971 (2) S.A. 21.

Hlomuka versus *Wosiyana*, 1952 N.A.C. 277.

Wille: Landlord and Tenant in South Africa (4th ed.), p.71.

Appeal from the Court of the Bantu Affairs Commissioner, Johannesburg.

THORPE, Permanent Member:

The Defendant (now the Appellant) was sued by the Plaintiff (now the Respondent) for ejectment and damages for wrongful and unlawful occupation.

The gist of the summons as amended and as amplified by further particulars is that the Plaintiff is the registered owner of certain immovable property known as Manto House situated in Soweto, Johannesburg. It was further alleged that since 1 April 1970, the Defendant was in wrongful and unlawful occupation of a certain shop in those premises, such

occupation having become wrongful and unlawful by virtue of a letter dated 19 February 1970, addressed by the Plaintiff's attorneys to the Defendant and reading as follows:

"We have been instructed by our client, F. S. M. Mncube, to notify you that the notice given to you in terms of our letter, dated 31 October 1969, is hereby withdrawn.

Our client, has however, instructed us to give you as we hereby do. 30 (thirty) days notice of termination of your Agreement of Tenancy, and such notice shall be deemed to expire on the 31st day of March 1970, on which date you are required to vacate the premises."

It was further alleged in the summons as amended and amplified that by virtue of such wrongful and unlawful occupation, the Plaintiff is sustaining damages at the rate of R1,31 per day from 1 April, 1970, to date of ejectment, the amount of R1,31 per day being the occupational value of the shop in question. The prayer was for (a) ejectment. (b) for damages at the rate of R1,31 per day from 1 April, 1970, to date of ejectment limited to the sum of R1,000 and (c) for costs.

The Defendant's plea as amended and amplified by further particulars is to the effect that it was not admitted or denied that the plaintiff is the registered owner of the property in question and that the Defendant puts Plaintiff to the proof of this allegation. It was denied that the Defendant was in wrongful and unlawful occupation. The Defendant did not deny receiving the letter dated 19 February 1970, which gave Defendant thirty days notice to vacate. No issue was made of this point and it must be taken that the letter was received timeously. The Defendant averred however that when the Plaintiff raised the rental of the premises occupied by the Defendant during 1968, the Plaintiff informed the Defendant verbally in the Plaintiff's office at Manto House during December 1967, that the Defendant's lease would run for a period of five years from January 1968 to December, 1972. Defendant denied that the Plaintiff was sustaining any damages. In his replication the Plaintiff in effect denied the Defendant's allegations concerning a five year lease.

It is common cause that the parties entered into only one written lease in respect of the shop in question and that that lease was for the period 1 July 1961 up to 30 June 1962, the rental being R30 per month.

It is also not disputed that the deed of lease contained *inter alia* the following clauses:

Second—The Lessee shall at the conclusion of the above-mentioned period, be entitled to a renewal of this lease for a period of three years at a monthly rental of R30 (thirty rand) and otherwise on the same terms and conditions (except as regards renewals); provided that written notice of renewal be given by the Lessee to the Lessor at least one month beforehand.

Thirteenth:

(i).....

(ii).....

(iii).....

(iv).....

(v) Notwithstanding the provisions of Clause 2 above, should the Lessee, after the renewal period, contravene any clause of this lease document, the renewal period of the lease will automatically revert to a thirty days lease and will remain as such ad infinitem."

The above are the only clauses in the deed which provide for the continuation of any obligations concerning the occupation of the shop after 30 June 1962.

It is common cause that the Defendant has remained in occupation of the shop in question continuously since after 30 June 1962, and was still in occupation at the end of the trial in the Court *a quo*, and that an increased rental of R40 per month was paid from 1 January 1968 up to the end of March 1970. It is also common cause that nothing has been paid by the Defendant thereafter though it is not disputed that the Defendant did tender payment of rent after March 1970, such tender however being refused. It is also not disputed that R1,31 per day represents the occupational value of the premises in question.

The issues before the court *a quo* were therefore whether the Defendant's occupation of the premises in question had become unlawful after 31 March 1970, or whether the Defendant was entitled to remain in occupation by virtue of a five years lease which would not expire until 31 December 1972.

The only witnesses to testify were the Plaintiff and the Defendant. After hearing their evidence judgment was entered for the Plaintiff in terms of prayers (a), (b) and (c) which are set out above.

Appeal has been noted on the grounds that "the learned Commissioner erred in finding in favour of the Plaintiff when there was no good ground for doing so." To say the least of it, this is an unusual way of framing a ground of appeal. If it had been intended to appeal on the grounds that the Commissioner erred on the law then this should have been stated briefly.—*Warner's* "Digest of South African Native Civil Case Law," paragraph 375 where a number of authorities are quoted. Furthermore the notice merely mentions that appeal is noted "against the judgment of the Bantu Affairs Commissioner Johannesburg." without stating, as required by Rule 7 (a) of the Bantu Appeal Court Rules, whether the whole or part only of the judgment is appealed against. See the cases referred to in paragraph 353 of *Warner op cit.* and in paragraph 35 of the 1963-1968 Supplement to the same work. See especially *Hlomuka* versus *Wosiyana* 1952 N.A.C. 277 (*Warner* gives the year erroneously as 1953), where the appeal was struck off the roll because this rule had not been complied with.

At the conclusion of argument before us we drew attention to the unsatisfactory wording of the notice of appeal, neither counsel having mentioned the matter. Thereupon Mr Aneer, who appeared for the Defendant, applied to amend the notice to read that appeal was noted against the whole of the judgment of the court *a quo* on the grounds that—

> "The Commissioner erred in accepting the evidence of the Plaintiff. The Commissioner further erred in finding that the onus was on the Defendant and should have found that the Plaintiff had not discharged the onus and that on a balance of probabilities the Defendant had established a five year's lease."

Mr Beasley, who appeared for the Plaintiff, did not oppose the granting of the amendment and we reserved our ruling. In my opinion the application to amend should be granted for the reason that all the points covered in the amendment were fully argued before us. The purpose of a notice of appeal is to acquaint the Respondent to the appeal and the Appellate Court of the grounds on which the judgment in question is to be attacked. Counsel for an Appellant would then normally be restricted to the grounds mentioned in the notice of appeal. In the present case we are merely being asked to record the basis on which argument proceeded without the procedure being attacked.

At the outset Mr Ancer submitted to us that as the Plaintiff admitted the existence of a lease the onus was on him to prove that he was justified in terminating it. Although Mr Beasley conceded that this was so, Mr Ancer's submission is not in my view, correct, in that the Defendant was relying on a five year lease the existence of which the Plaintiff denied. The authority relied upon by Mr Ancer, namely *Matador Buildings (Pty) Ltd.* versus *Harman*, 1971 (2) S.A. 21 (e), is not in point, as that case deals with the question of onus where the Plaintiff admits the existence of an express agreement of lease, but alleges he was justified in terminating it. It is clear from the evidence that the Plaintiff's case is that there was merely a tacit tenancy in respect of which rent was paid monthly. Such a tenancy is terminable on a month's notice —see *Smith* versus *Abbott* (1898) 13 E.D.C. 68, mentioned in Wille's "Landlord and Tenant in South Africa," 4th edition, at page 57. Receipt of timeous notice was not denied and there was consequently no onus on the Plaintiff.

It is common cause on the pleadings and on the evidence that the Defendant had no right to be in occupation unless he had received such a right through the Plaintiff. The onus was clearly on the Defendant to prove the five years lease, the existence of which the Plaintiff denied.

In passing it is observed that the Commissioner, relying on *Graham* versus *Ridley*, 1931 T.P.D. 476, considered that the onus was on the Defendant for a different reason, namely, that the plaintiff was the owner of the premises in question.

That was the Plaintiff's evidence on this point and it was not attacked, except on the allegation, which was not proved, that he had sold the property. However, I think judicial notice should have been taken of the fact that the land on which the premises are built is owned by the Johannesburg municipality and that therefore the building erected thereon is also owned by that municipality. The Plaintiff is probably the site permit holder, in which event he would strictly speaking be in the position of a lessor *vis-a-vis* the municipality in respect of the building he erected and consequently the case of *Graham* versus *Ridley*, supra, in which it was held that where an owner of property sues for ejectment his real cause of action is simply the fact that he is owner, would not be applicable. The legal position of a site permit holder is set out in *Mahonge* versus *Nakanaka*, 1945 NAC (N & T) 21 at page 23.

It is clear that in terms of the second clause of the deed of lease an option to renew was available for only one period, namely for a period of three years expiring on 30 June 1965. The Defendant testified that he posted a

written notice of renewal timeously, but the Plaintiff denied receiving it and the Defendant could not produce a copy of the notice or any corroborative evidence that he had indeed posted such a notice or that the Plaintiff had received it. The onus was on the Defendant on this point and as he failed to discharge it we must hold that the written lease which expired on 30 June 1962, was not renewed. As already pointed out, there was no option for a further renewal after 30 June 1965, but the Defendant testified that the Plaintiff and he in fact agreed verbally on a further renewal of the lease for the period 1 July 1965 to 30 June 1968, and that this last mentioned lease was substituted by a further verbal lease which commenced in January 1968, and will not expire until the end of December 1972. The Plaintiff denied all these renewals and there was no evidence to corroborate the Defendant.

The defence sought to show that, despite there being no evidence to corroborate the testimony of the Defendant, the Defendant's evidence of the existence of a lease valid until 31 December 1972, should be believed because the Plaintiff was not a credible witness and because the probabilities indicated the existence of such a lease.

The defence submitted that the Plaintiff was not to be believed when he said his reason for requiring the Defendant to vacate the shop in question was that he wanted it for his own use, and submitted that the true reason was that the Defendant's dry-cleaning and cosmetics businesses had become or were becoming a threat to similar businesses which it is common cause were conducted by the Plaintiff in the same vicinity.

In regard to his dry-cleaning business, the Defendant stated that he started this in 1961 with the Plaintiff's consent and that he displayed articles that had been dry-cleaned. The Defendant further testified that the Plaintiff told him towards the end of 1967 that he (the Plaintiff) was going to start a dry-cleaning business nearby and that the Defendant must cease displaying dry-cleaned articles. The Plaintiff denied that he had given the Defendant permission to collect dry-cleaning and stated that although he knew that the Defendant was collecting dry-cleaning he was not supposed to do so. The Plaintiff said that he objected to the Defendant's collecting dry-cleaning because it was against the Health Regulations and contrary to what the shop had been leased for. There was no evidence to corroborate the Defendant's statement that he had been displaying dry-cleaned articles and that, as the Plaintiff frequently passes the Defendant's shop, the Plaintiff must have seen them. It was not denied that the Defendant had been acting contrary to the Health Regulations. It was not put to the Plaintiff in cross-examination that he objected only when he was about to open his own dry-cleaning business. On the other hand, the Defendant was not cross-examined on his assertion that this was the position.

It is clear that the Defendant wished the Court *a quo* to believe that the strongest reason why he considered the Plaintiff was denying the existence of any verbal lease and wished to eject him was that the Defendant had been doing a "fantastic" business in cosmetics, a line in which the Plaintiff also dealt. The probabilities on this point do not however appear to favour the Defendant, for two reasons. Firstly, the

Plaintiff, according to the Defendant, was the one who made the suggestion that the Defendant should go in for cosmetics, well knowing that there was good money to be made in this line. Secondly, it is common cause that the Plaintiff first gave the Defendant notice to vacate on 31 October 1969, the same month in which the Defendant presumably started trading in cosmetics, that being the month in which he received authority to apply for the necessary licence; this being so, it is not probable that in those few days he would have done such good business that the Plaintiff would have decided so soon to eliminate him as a competitor. The Plaintiff denied that he had ever suggested that the Defendant should go in for cosmetics and denied all knowledge that the Defendant had applied for or obtained a cosmetics licence. It was put to him that the Superintendent of the area would have consulted him before making a recommendation concerning the issue of the licence. The Plaintiff admitted that when another of his tenants had applied for a licence the Superintendent had consulted him, but the Plaintiff's assertion that there is no obligation on a Superintendent to consult "lessors" was not disproved, though one would expect that such consultation would take place. (I place the word "lessors" in inverted commas because strictly speaking the Plaintiff must have been, *vis-a-vis* the municipality, a site permit holder whose position is similar to that of a *lessee* and any contract of "lease" with the Defendant would in fact have been a sub-lease).

It was further put to the Plaintiff that a notice concerning the application for a cosmetics licence would have been displayed in the Defendant's shop window. The Defendant did not confirm that such a notice had been so displayed. It was put to the Plaintiff that he must have seen the notice. The Plaintiff however claimed that he is always so preoccupied that he would not have seen it if it had been there. To convey the degree of his preoccupation the Plaintiff said that if a man passed him he would not even notice that it was a man. This is hard to believe.

In cross-examination it was put to the Plaintiff that in June 1965, the Defendant had protected him from a bully called Clifton Makutu and that it was as a reward that the Plaintiff granted the Defendant a three year extension of the lease. The Plaintiff denied this though he added that when the Defendant came to see him after receiving the notice to vacate the Defendant stated that he regretted that he had not allowed Clifton Makutu to assault him. However, when the Defendant testified subsequently the only part of his evidence which had any relation to an assault on the Plaintiff reads "I again wrote a letter to Plaintiff—this was during April 1965. Plaintiff had been assaulted by one of his tenants and the assault case was before the Magistrate's Court. I was a witness in that case. I considered it necessary to write to Plaintiff . . ." The Defendant gave no evidence of a promise made by the Plaintiff out of gratitude for being protected from a bully.

It appears that the Plaintiff has wide business interests and experience. He possesses the M.A. degree, is a one time university lecturer, past chairman of the African Chamber of Commerce and present chairman of the Johannesburg Urban Bantu Council. It does seem strange that such a man who claims in addition to be meticulous in business matters should,

according to his own testimony, allow the Defendant to occupy premises in the Plaintiff's building from July 1962 to October 1969, without an agreement as to the terms of occupation, especially as the Plaintiff appears to be in that building daily, if not in his office on the first floor then in his store or his dry-cleaning shop which are on either side of the Defendant's premises. It would seem that the Plaintiff must have passed the Defendant's shop almost every day since July 1962, and there appears to have been plenty of opportunity for the Plaintiff and the Defendant to discuss the latter's occupation of the premises in question. On the other hand, the Plaintiff's evidence that he seldom visits the shops of his tenants is not disputed. Furthermore the Plaintiff's uncontroverted evidence that all his other tenants have written leases is consistent with his statement that if he had entered into an agreement of lease with the Defendant after the expiry of the four years provided in the original written lease (assuming for the moment that the Defendant had exercised his option to renew) such agreement would have been in writing. The Plaintiff stated that if the Defendant had wanted a further agreement it was for the Defendant to approach him but this the Defendant did not do.

It was put to the Plaintiff that the fact that the letter purporting to terminate the Defendant's tenancy referred to an "Agreement of Tenancy" indicated that an express lease was in existence, but there seems to be no reason why the Plaintiff's evidence on this score should not be accepted, namely, that although he had instructed his attorneys to give the Defendant notice he had not dictated the wording. It is to be noted that it was not alleged in the letter that any term of the "lease" had been breached which would entitle the Plaintiff to terminate an agreement; in fact no reason for the termination was given. This is in keeping with the Plaintiff's evidence that the "lease" was merely a common law (or tacit) tenancy on a monthly basis which had come about after the expiry of the written lease, through the Defendant's tender of rent and its acceptance from month to month. That a tacit monthly tenancy, terminable on a month's notice, would come about in such circumstances is borne out by *Cope* versus *Zeman and Another* 1966 (1). S.A. 431.

The Plaintiff testified that the Defendant came to him after notice was given in February 1970 and in the presence of the Plaintiff's wife and two others the Defendant made no mention of any five year verbal lease. The Plaintiff was not cross-examined on this evidence and the Defendant did not in his testimony deny its accuracy.

In all the circumstances there is no reason why the Defendant's evidence should be preferred to that of the Plaintiff and the Defendant has consequently not discharged the onus of showing that he is entitled to remain in occupation after the 31st March 1970.

The appeal is dismissed with costs.

Cronje, President: I concur.

Bowen, Permanent Member: I concur.

For Appellant: Adv Ancer i/b C. Ramusi, Johannesburg.

For Respondent: Adv Beasley i/b M. Cohen, Johannesburg.

IN THE CENTRAL BANTU APPEAL COURT

XABA versus XABA

CASE 13 OF 1971

JOHANNESBURG: 30 June 1971. Before Cronje, President, and Thorpe and Bowen, Permanent Members.

MAINTENANCE

Maintenance enquiry—inadequate investigation of facts.

Summary: A wife had left her husband taking the child of the marriage with her. In an enquiry under the Maintenance Act, 1963, it appeared that the wife could have left her husband without just cause. It was conceded that the husband had sent his wife money, though the amount was not proved. The wife had resigned from her employment but there appeared to be no justification for this. Although it was clear that the facts deposed to at the enquiry required further investigation, the Court *a quo* nevertheles made an order against the husband for the payment of maintenance for his wife and child. There was nothing on record to indicate that a maintenance officer was present during the Court proceedings. The husband appealed against the whole judgment.

Held: (a) A duty rests on the presiding officer in maintenance enquiries to investigate evidence where necessary and he should be assisted by a maintenance officer. An enquiry conducted in the absence of a maintenance officer constitutes an irregularity.

(b) A wife who deserts her husband without just cause is not entitled to maintenance while the desertion continues.

(c) A maintenance order can only be made against a person who, being legally liable to maintain another person, is not in fact doing so.

References:

Bantu Appeal Court Rule 22 (1).
Bing versus *Lauer and Van der Heever*, 1922 T.P.D. 279.
Pieterse versus *Pieterse*, 1965 (4) S.A. 344.
Buch versus *Buch*, 1967 (3) S.A. 83.
Hlabathi versus *Nkosi*, Roll 18 of 1970. Central Bantu Appeal Court. (in course of publication).

Appeal from the Maintenance Court of the Bantu Affairs Commissioner. Germiston.

Thorpe. Permanent Member:

This is an appeal against a maintenance order made by the Maintenance Court of the Bantu Affairs Commissioner. Germiston.

The matter was heard on 13 January 1971, only the Complainant and the Appellant giving evidence.

The Complainant testified that she and the Appellant are married by civil rights, that they have a minor child and that the Appellant had failed to maintain her and the child. She stated that when she applied for maintenance she was staying in

Natalspruit, Germiston, with the Respondent but that on the 9th December 1970, the Appellant sued her for divorce and that she then left the common household. She stated that she is living with her parents in Orlando and that she pays them R25 per month for board and lodging. She testified that she had resigned from her employment and would be leaving work at the end of January 1971.

The Appellant in his evidence stated that the Complainant had been ordered by the Divorce Court to come home to him and that he had sent his wife about R40 before Christmas, the last remittance being on 11 December 1970. The Appellant submitted that he was not obliged to support his wife whilst she is staying at her parents' home.

On this evidence the Commissioner made an order that the Appellant must pay R15 per month as maintenance in respect of the complainant and the minor child.

An appeal has been noted on the following grounds:

"1. The said Judicial Officer erred in ignoring the facts that the Respondent stated that the Applicant had maliciously deserted him, and that the said fact was *res judicata*.

2. That the said Judicial Officer erred in ignoring the fact that the Respondent stated that he had caused divorce proceedings to be instituted against the Applicant in the Central Bantu Divorce Court, Johannesburg, on the grounds aforementioned and which action was pending.

3. The Court erred in rejecting the admission of four registered post slips which were addressed to the Applicant as evidence that the Respondent has sent four registered letters to Applicant.

4. The Court erred in failing to take into account the fact that the Applicant was in employment."

Attached to the notice of appeal was an affidavit by the Appellont in which he refers to himself as the Respondent (in the maintenance enquiry). The affidavit reads as follows:

"1. I am the Respondent in the above matter.

2. I attended the Bantu Affairs Commissioner's Maintenance Court, Germiston, on 13 June 1971, in response to a summons received by me and in which maintenance was claimed for Maria Xaba and a minor child, Daniel. I informed the Presiding Officer that the Applicant, Maria Xaba, had maliciously deserted me and that the matter had been decided in the Central Bantu Divorce Court. I further told the Presiding Officer that I had instituted divorce proceedings against the said Maria Xaba on the grounds of her malicious desertion and which had been proved in a previous action which she had brought against me.

3. The Presiding Officer stated that he was not interested in any proceedings which may have taken place in any other Court and that all he was concerned about was to see that Maria Xaba and the minor child were being supported. I then told the Presiding Officer that I was supporting the child and tendered proof in the form of registered slips that I had sent R40 for the support of the child. The Presiding Officer refused to accept the registered slips as evidence, and rejected the said proof. I have been prejudiced by the rulings made by the Presiding Officer and pray that the proceedings conducted by him on 13 January 1971, be set aside."

This affidavit, although purporting to bring the proceedings into review, does not comply with Rule 22 (1) of the Bantu Appeal Court Rules in that it is not addressed to the judicial officer concerned and should therefore be ignored. Mr S. Helman who appeared for the Appellant conceded that the Rule had not been complied with and abandoned the review application.

In his reasons "in reply to the notice of appeal" the Commissioner stated *inter alia* that the facts referred to in the first paragraph of the Appellant's affidavit "could not have been considered as the Court had no knowledge of it" and that "the only evidence of divorce proceedings were placed before the Court by the Applicant." (By "Applicant" the Commissioner was referring to the Complainant). The Commissioner went on to state:

"The Court took into account the fact that although summons claiming a decree of divorce had been issued no evidence existed to the satisfaction of the Court that the action would be pursued by the Respondent" (the "Respondent" being of course the present Appellant).

It is not clear to what the Commissioner is referring when he mentions the first paragraph of the Respondent's affidavit; perhaps he is referring to paragraphs 1 and 2 of the Notice of Appeal and to the whole of the affidavit. In any event, from what was recorded the Commissioner was clearly wrong in assuming that no action had been taken in the divorce proceedings as the Appellant had stated that the Divorce Court had ordered that the Complainant should return to him, and this was not disputed. It is true that the evidence is sketchy. However, this was not an ordinary civil case but an enquiry under the Maintenance Act, 1963, and it has been laid down that a duty rests on the presiding officer to investigate evidence where necessary. In this of course he should be assisted by the Maintenance Officer—*vide Pieterse* versus *Pieterse* 1965 (4) S.A. 344 and *Buch* versus *Buch* 1967 (3) S.A. 83. (There is nothing in the record to indicate that a maintenance officer was present at the enquiry. If none was present this constituted an irregularity—see *Hlabathi* versus *Nkosi*, Roll 18 of 1970 of this Court, in course of publication. However, no appeal has been noted on this point and the matter can be allowed to rest there. If a maintenance officer was present during the Court proceedings the Presiding Officer should have recorded this fact).

On the evidence before it the Court *a quo* was obliged to accept that an order had been issued by a court of competent jurisdiction against the complainant that she should return to the Appellant, in other words that the said Court had found that she had deserted without just cause. That being so she was not entitled to maintenace while the desertion continued—see the authorities quoted by Hahlo in "The South African Law of Husband and Wife" 3rd edition, page 109 note 64. The position is set out clearly *inter alia* in *Bing and Lauer* versus *Van der Heever*, 1922 T.P.D. 279 at 283.

The first and second grounds of appeal are thus well taken in so far as they refer to the order to maintain the Complainant.

The fourth ground of appeal, namely, that the Court *a quo* failed to take into account the fact that the Complainant was in employment, also appears to be well taken in that the

Complainant was on her own evidence employed at the time of the hearing. It is true that she stated that she had resigned to look after the child but she gave no reason why this was necessary. It would appear that she was in receipt of a salary out of which she could afford to pay R25 per month to her parents, and she has given no indication as to why the child who was already more than six years old required her personal full-time care. She mentioned that she was staying with her parents and normally in such circumstances the parents care for the child. It would seem that the Complainant was in a position to contribute towards the maintenance of the child.

The fact that the Complainant had been found to be the deserting party does not of course mean that the Appellant is exonerated from contributing towards the maintenance of his child but it has not been proved that he has not been sending sufficient money as a contribution towards its support. At the hearing the Complainant did not testify that the Respondent was not supporting her and the child. On the contrary, under cross-examination she admitted that she had received some money since she had left her husband, although she claimed that it was only R20 whereas the Appellant alleged it was R40.

The Commissioner did not find that the Appellant was not maintaining his wife and child but seemed to adopt the view that the mere fact that a husband and father was in a position to pay maintenance was sufficient grounds for making a maintenance order. He appeared to overlook the fact that, as section 4 (1) of the Maintenance Act, 1963, provides that a maintenance enquiry can be held only if a complaint is made that a person legally liable to maintain another has not been doing so, it follows that a maintenance order cannot be made unless the evidence establishes a failure to maintain.

The evidence before the Court *a quo* did not justify the making against the Appellant of an order to maintain either the Complainant or the child and the appeal must succeed. Mr Pitje, who appeared for the Complainant, rightly conceded that a proper enquiry had not been held.

The appeal was noted late but good cause having been shown, the application for the late noting of the appeal is granted.

The proceedings are set aside and the judgment of the Court *a quo* is altered to read:

"No order made."

There will be no order as to costs.

Cronje, President, and Bowen, Permanent Member, concurred.

For Appellant: Mr S. Helman, of Henry Helman, Johannesburg.

For Respondent: Mr G. M. Pitje, Johannesburg.

IN THE CENTRAL BANTU APPEAL COURT

MOKOBODI versus MOKOBODI

CASE No. 15 OF 1971

JOHANNESBURG: 30 June 1971. Before Cronje, President, and Thorpe and Bowen, Permanent Members.

MAINTENANCE

Enquiry under the Maintenance Act, 1963.

Summary: The facts appear from the judgment.

Held: That an enquiry under the Act, conducted in the absence of a maintenance officer is irregular.

Held, further: That evidence must be given under oath and the parties must be given an opportunity to cross-examine.

Held, further: That before a maintenance order is made there should be a specific finding, if warranted by the evidence, that there has been a failure to maintain.

Appeal from the Maintenance Court of the Bantu Affairs Commissioner, Johannesburg.

Cronje, President:

On 15 February 1971, the Court, having conducted an enquiry under the Maintenance Act, 1923 (Act 23 of 1963) ordered Respondent (now Appellant) to pay maintenance at the rate of R5 per week in respect of his wife (complainant, now Respondent) and his three year old child Stephina.

The Respondent has appealed against the quantum of maintenance ordered on the following grounds:

1. The amount ordered is far in excess of the amount usually ordered in such cases.

2. The said order does not seem to take account of the earnings of the complainant.

According to complainant's sworn statement she is the wife of Respondent; they have one child, Stephina, born on 6 April 1968. She stated that "My said husband is legally liable to maintain me and the said children and has failed to do so."

Before taking evidence, the Additional Bantu Affairs Commissioner made what appears to be a "summary" as follows:

"Both the parties are present. They are married and still stay together. There is one child and the Complainant claims R5 per week for the maintain of herself and the child. The Respondent states that he stopped to give her money because of her drinking habbits."

It is not disclosed from what source this information was gathered, whether it was put in court to the parties and whether they agreed to the correctness of these alleged facts. Normally these facts are furnished by the maintenance officer. There is no indication on the record that that officer was present in court.

In *Hlabathi* versus *Nkosi* (heard at Johannesburg on 29 October 1970, and not yet reported) this Court held that the absence of the maintenance officer at the hearing of a maintenance enquiry can be prejudicial to either party and constitutes, therefore, a fatal irregularity in the proceedings.

Although the absence of the maintenance officer was not taken as a ground of appeal, the proceedings were on that account irregular.

There were, however, further irregularities. The parties do not appear as required by section 5 of the Maintenance Act, 1963, to have given their evidence on oath, the only entries on the record being "By the complainant" and "By the Respondent." Furthermore, neither of the parties appears to have been given an opportunity to cross-examine. In these respects, also, the proceedings are fatally defective.

In the premises the proceedings will be set aside. It is, accordingly, not necessary to consider the grounds of appeal.

I would remark that even if it is presumed that the proceedings were not irregular, there are still no grounds upon which the Commissioner could have ordered the respondent to pay maintenance in respect of his child, the complainant's evidence being that "The Respondent gives money to his mother, for the maintance of a child." He has, therefore, not failed to maintain the child. Nor—it should be pointed out—has the Commissioner made such finding. In his "Facts found proved" he found only "that the Appellant had failed to maintain his wife since October 1970."

The appeal is allowed. The proceedings are set aside and the Commissioner's order is altered to read: "No order made." The matter is referred back to the Court *a quo* if warranted.

As the judgment was not based on any of the grounds of appeal there will be no order as to costs.

Thorpe and Bowen, Permanent Members, concurred.

For Appellant: Mr G. M. Pitje, Johannesburg.

For Respondent: In person.

IN THE CENTRAL BANTU APPEAL COURT

PETSANE versus MASINYE

CASE 16 OF 1971

JOHANNESBURG: 1 July 1971. Before Cronjé, President, and Thorpe and Bowen, Permanent Members.

EVIDENCE

Concession made by legal representative during argument—effect of.

PRACTICE AND PROCEDURE

Default judgment—rescission of—good cause—meaning of.

Summary: According to the Messenger's return the summons was served personally on the Defendant. At the request of a person describing herself as the Defendant's wife, an attorney, Mr Rittoff, entered an appearance to defend but no plea was filed. After being served with a notice of bar Mr Rittoff informed the Plaintiff's attorney that he was no longer acting for the Defendant but did not formally withdraw. Thereafter the Plaintiff sought and obtained judgment by default. A writ of execution was served upon the Defendant, who then applied for rescission of the default judgment, stating in his supporting affidavit that he had not received the summons and was unaware of the judgment. Mr Rittoff also filed an affidavit in which he said, *inter alia*, that the Defendant had not seen him "again" until after service of the writ. No affidavit was filed by the Defendant's wife and the failure to do so was not explained. Apart from an affidavit from the Messenger of the Court confirming that he had served the summons personally, no affidavit was filed by or on behalf of the Plaintiff. During argument in the rescission proceedings Mr Rittoff stated that he would accept that the Defendant had received the summons. The application for rescission was refused, with costs. On appeal:

Held: That where a notice of bar has been duly served on a Defendant's attorney and he informs the Plaintiff's attorney that he is no longer acting for the Defendant, the practice is for a copy of the notice of bar to be then served on the Defendant.

Held, further: That a concession made by an attorney during argument is not binding on his client.

Held, further, on the facts (Cronjé, President, and Bowen, Permanent Member): That the Defendant was in wilful default.

Held (Thorpe, Pemanent Member): That even if a Defendant is not proved to be in wilful default he must show "good cause" for rescission and this means that he must, *inter alia*, furnish an acceptable explanation sufficiently full to enable the Court to understand how the default came about and to access his conduct and motives.

Held (Thorpe, Permanent Member): That good cause had not been shown.

Held, unanimously: That the appeal should be dismissed with costs.

Appeal from the Court of the Bantu Affairs Commissioner, Johannesburg.

Bowen, Permanent Member:

This is an appeal against the refusal of the Bantu Affairs Commissioner, Johannesburg, to rescind a default judgment granted against the Appellant (Defendant in the Court *a quo*) in favour of the Respondent (Plaintiff in the Court *a quo*). The parties will be referred to as Plaintiff and Defendant.

The Plaintiff, whose rights arose by virtue of a cession, issued a summons against the Defendant on 5 June 1970, claiming an amount of R550,10; the details of the claim are not necessary for the purposes of this judgment. On 17 August 1970, the summons, according to the return of service of the Messenger, was served personally on the Defendant at his place of employment at the National Cash Register Office, 6/8 Bertha Street, Braamfontein. On 31 August 1970, an appearance to defend was received by the Clerk of the Court from J. Rittoff, Attorney for Defendant. On 17 September 1970, a notice in terms of Rule 43 (2) of the rules for Courts of Bantu Affairs Commissioners (hereafter referred to as a notice of bar), calling on the Defendant to deliver his plea within 48 hours, was served by Plaintiff's attorney at the office of Defendant's attorney. The bottom portion of the notice was duly receipted by a signature while the following endorsement appears under the signature "for Defendant's Attorneys without prejudice to your letter of 17 September 1970". I shall deal with the acceptance "without prejudice" later in this judgment.

On 25 September 1970, no plea having been delivered, an application for default judgment was filed. The matter came before the Commissioner on 19 October 1970, who required evidence or an affidavit on the question of damages claimed. An affidavit was duly filed by Plaintiff's attorney and on 29 October 1970, the Commissioner granted default judgment for Plaintiff as prayed with costs, viz. R550,10 with costs. It is common cause that no plea was ever filed.

An application for a rescission of the default judgment signed by Mr Rittoff, Defendant's attorney, was delivered on 25 January 1971, accompanied by affidavits by the Defendant and Mr Rittoff. In his affidavit the Defendant alleged that he was not aware of the fact that "a summons had been issued and served on my wife during my absence from home" and that his wife had not informed him that the summons had been served on her. He further alleged that it would appear that his wife on receipt of the summons, had consulted an attorney, Mr Willen, and instructed him to enter an appearance to defend. Mr Willen had than referred her to Mr Rittoff to handle the matter on his behalf. Defendant further stated in his affidavit that Mr Rittoff had informed him that his (Defendant's) wife had delivered the summons to him (Mr Rittoff) and requested him to enter an appearance to defend which he had done. According to Defendant, his wife had never informed him about the matter and has since left the common home. Defendant further denied having received certain two letters addressed to him at his place of employment by Mr Rittoff. He alleged that Mr Rittoff had informed

him that when he had received the notice of bar, he had written to Plaintiff's attorney pointing out that he was no longer acting in the matter for Defendant and that the notice of bar should be sent direct to Defendant and that it had originally been aeeepted on Defendant's behalf without prejudice. Defendant further denied having received a notice of bar. In regard to the default judgment, Defendant stated that he became aware of the judgment on 13 January 1971, when a writ of attachment was served on him by the Court Messenger. He further indicated that he had a *bona fide* defence to the action and had paid the sum of R26.70 as security into Court.

In his affidavit Mr Rittoff confirmed that a Bantu female identifying herself as Mrs Petsane, had handed him the summons and instructed him to enter an appearance to defend on behalf of her husband, the Defendant. This was on 21 August 1970. Mr Rittoff agreed to do so and it was arranged that her husband would meet him at 8.30 a.m. on 24 August 1970, at his office. As the Defendant failed to keep the appointment, Mr Ritoff wrote him a letter on 26 August 1970, informing him that if he failed to deposit the sum of R50 on account of fees, not later than 31 August 1970, Mr Rittoff would withdraw from the case. He also drew Defendant's attention to the fact that he had failed to keep the appointment on 24 August 1970 Mr Ritthoff further alleged that on 14 September 1970, during his absence on vacation, a notice of bar had been served at his offiee and accepted on his behalf "without prejudice". On his return he had communicated with Plaintiff's attorney informing him that he had withdrawn from the matter and suggested that the notice of bar be served personally on Defendant; at the same time he had written to Defendant informing him of his withdrawal from the matter. Copies of these communications were not handed into Court. Mr Rittoff concluded his affidavit by stating that he did not see Defendant *again* until 13 and 14 January 1971, when Defendant handed him a taxed bill of costs and also interviewed him on an attachment by the Court Messenger which had been made in pursuance of the default judgment.

I pause at this stage to deal briefly with the acceptance of the notice of bar, allegedly "without prejudice". As mentioned earlier, the said notice was endorsed "without prejudice to your letter of the 17th September 1970". The position is that the period of 48 hours allowed in the notice of bar would have expired on 19 September. Plaintiff's attorney's letter of 17 September, however, required a plea by 22 September, i.e. three days after the expiry of the period allowed in the notice of bar. To allege, therefore, as was done by Defendant and his attorney in their affidavits that the notice of bar was accepted "without prejudice" is misleading and calls for censure by this Court.

The application came before the Court *a quo* on 3 February 1971. No replying affidavits were filed and the Commissioner, after hearing the addresses by the attorneys for Defendant and Plaintiff, postponed the hearing to 17 February 1971, to enable Plaintiff's attorney to file an affidavit from the Court Messenger. An affidavit was duly filed and the Messenger confirmed therein that he had served the summons personally on Defendant at the offices of the National Cash Register Company, 6/8 Bertha Street, Braamfontein. The Defendant never disputed that at all material times he was employed at the National Cash Registers, 6/8 Bertha Street.

On 17 February a further postponement was granted to enable the Defendant to rebut the Messenger's affidavit. At the resumed hearing on 19 February, Mr Rittoff indicated that he had seen the Defendant who appeared confused and Mr Rittoff states that he would accept that there had been personal service of the summons. No replying affidavit was accordingly filed by the Defendant. According to the record attention was then also drawn to the fact that Mr Rittoff's notice of withdrawal as Defendant's attorney of record had not been filed with the Clerk of the Court.

After hearing further argument the Commissioner refused the application for the rescission of the default judgment and it is against this ruling that the appeal was noted on the following ground:

"The Honourable the Commissioner erred in finding that the Appellant was wilful and negligent in not having filed a plea after a notice of bar was accepted without prejudice during the absence of Defendant's attorney, the Defendant having been unaware of the service of the notice of bar."

In view of what I have said above, I reject the averment in the ground of appeal that the notice of bar was accepted "without prejudice".

The Commissioner found the Defendant to have been in wilful default. The learned authors of Jones and Buckle: "The Civil Practice of the Magistrate's Courts in South Africa" (Sixth Edition) (hereinafter referred to as Jones and Buckle) at page 678 state that one of the elements of wilful default is that the person concerned must have knowledge that the action is being brought against him.

The question is, therefore, whether in the instant case the Defendant was aware of the summons. The Commissioner found that in material respects certain paragraphs of Defendant's affidavit were false. The paragraphs concerned read as follows:

"2. I was not aware of the fact that a summons had been issued and served on my wife during my absence from home, and my wife at no time notified me that a summons had in fact been served on her.

3. It would appear that on receipt of the said summons my wife, without my knowledge, consulted an attorney, Mr L. Willen, and requested him to enter an appearance to defend the action, and that the said Mr L. Willen in turn requested Mr Attorney J. Rittoff to handle the matter on this behalf.

4. From information given to me by Mr J. Rittoff it appears that my wife delivered the summons to him for the purpose of entering an appearance to defend, which appearance to defend was duly entered. My wife, however, did not tell me what she had done."

This apparently improbable statement unless corroborated simply invites rejection and the circumstances obviously called for an affidavit by the wife confirming the allegations, if these in fact were true. Although she has allegedly left the common home, it was not averred that she was not available to make a statement. In view of the return of service of the summons, and the Messenger's subsequent affidavit that the summons had been served on the Defendant personally, it was essential to obtain an affidavit from the wife verifying the Defendant's statement, this was not

done. Thus arose the position that Mr Rittoff, at the resumed hearing on 19 February told the Court that he would file no affidavit rebutting that of the Messenger, and would accept that there had been personal service. Admissions made in argument even on factual issues are not usually binding on a client—*R. V. Papangelis* 1960 (2) S.A. 309 (0) at page 310 G. In the circumstances Mr Rittoff's admission amounted to no more than a concession that on the evidence it would appear that the summons had been served. In my view, however, on the evidence the Commissioner correctly found the Defendant's affidavit to be false, bearing in mind also that the Defendant had further denied receiving any of the two letters addressed to him at his place of employment by his attorney.

The Defendant must at some time or other have seen Mr Rittoff. Mr Rittoff in his own affidavit states "I did not see the Defendant *again* until the 13th January 1971". Moreover during the addresses to this Court at the hearing of the appeal Mr Rittoff conceded that he had interviewed the Defendant concerning the action. Furthermore the notice of appeal does not take the point that the summons never came to the notice of the Defendant.

The conclusion that the Defendant had knowledge that the action had been brought against him, is therefore inescapable.

Quoting authority, the learned authors of Buckle and Jones at page 678 state as follows:

"If it is once proved that the summons had been brought to the notice of the Defendant and that he has not appeared, then in the absence of any explanation on his part which could be accepted, it seems to me that a presumption arises of wilful default, and unless that presumption is rebutted by the Defendant, the Court must take it that wilful default is proved."

The onus was therefore on the Defendant to give an acceptable explanation why he did not appear. He merely states that his attorney had advised Plaintiff's attorney that the notice of bar served on him should be directed to Defendant. He (Defendant) had not received it. In regard to the notice of bar, the Commissioner found that it had been correctly served on Defendant's attorney. The Commissioner based his decision to refuse to rescind partly on his finding that Mr Rittoff was still the attorney of record for the Defendant on 17 September 1970, the date on which the notice of bar was received by Mr Rittoff's office and that the service thereof was therefore in order. He seemed to adopt the view that the service was therefore binding on the Defendant. This, however, is not necessarily so. When an attorney is acting for a party it will be assumed that he is able to obtain a response from his client, but if it is shown that the assumption is incorrect then it is standard practice to require that process be delivered to the client direct, and this is so even where, as in the instant case, the attorney had not formally withdrawn at the time the notice was served on him.

During the hearing of arguments however, in this Court, Mr Rovetti, who appeared for the Plaintiff, handed in copies and originals of certain communications which had passed between his office and Mr Rittoff as well as memoranda on certain telephonic conversations. With the consent of Mr Rittoff these papers were admitted in this Court, a somewhat unusual procedure. However, these papers were referred to at the hearing in the Court *a quo* and should have been handed in then to form part of the

record. From these documents it is abundantly clear that Plaintiff's attorney had made every effort to persuade or exhort Defendant's attorney to have a plea filed. Indeed Mr Rittoff admitted this to be the position and moreover he conceded that he was still Defendant's attorney after the notice of bar had been received by him. He further conceded that he had endeavoured to get Defendant to interview him so that a plea could be filed but that Defendant was most unco-operative and this was after the notice of bar had been served on him. Mr Rittoff further conceded that he himself had suggested, after failing in his efforts to persuade Defendant to move in the matter of his defence, to Plaintiff's attorney that he go ahead and obtain a default judgment. On 25 September 1970, Mr Rittoff wrote to the Defendant as follows:

"Further to the above matter I regret that your conduct makes it impossible for me to act for you. Accordingly I am withdrawing from the matter and I have advised Plaintiff's attorney accordingly."

It seems very evident that Defendant had decided to let matters slide as far as the defence of the action was concerned. It was only after he had found himself faced with a writ of attachment and bill of costs that he decided that he must move in the matter. In the result the Defendant has not succeeded in rebutting the presumption that he was in wilful default.

In all the circumstances the Commissioner, in my view, properly found that the notice of bar had been correctly served and that Defendant was in wilful default. That being so, the matter was finished, the Court had no discretion to entertain the application which, in consequence, fell to be dismissed—see Jones and Buckle at pages 677/678.

The appeal is accordingly dismissed with costs.

Cronjé, President: I concur.

Thorpe, Permanent Member:

I agree that the appeal should be dismissed, with costs, but I am unable to concur with the *ratio decidendi* adopted in the majority judgment, namely, that the Defendant was in wilful default. The onus to prove this was on the Plaintiff—see *Du Plessis* versus *Tager* 1953 (2) S.A. 275, at 278F—and I am not satisfied that this onus has been discharged. Appearance to defend had been entered, but judgment was granted on 29 October 1970, by default, because the Defendant had failed to deliver a plea, notwithstanding service of notice of bar on the office of his attorney. In support of the Defendant's subsequent application for rescission, the Defendant filed an affidavit explaining that the reason why he had not delivered a plea was that he knew nothing of the case until after judgment had been given. The Defendant's attorney also filed an affidavit. The Plaintiff filed no affidavit in reply, apart from the affidavit of the Messenger of the Court relating to service of the summons. Instead, the Plaintiff's attorney adopted the irregular procedure both in the Court *a quo* and before us of relying on notes and correspondence in his file for the submission that the Defendant's failure to file a plea was wilful. It does not appear that the Defendant was given the opportunity of replying personally to this attack, as he could have if there had been a replying affidavit. The reaction of the Defendant's Attorney was equivocal. He did not object

to the Plaintiff's attorney addressing the Court in this manner but he made no specific admissions, though he did not deny the allegations. His attitude was apparently that the Defendant did not know of the notice of bar and everything else was irrelevant. He also made the point that the Plaintiff had not delivered a replying affidavit. There was no evidence or admission that the Defendant ever received any message or letter from Mr Rittoff. Furthermore it is not clear to me whether the Defendant had seen Mr Rittoff prior to his being barred from pleading. If he had, the probability is that he would have mentioned his defence to Mr Rittoff, in which event he would not have been in wilful default.

I feel that the appeal should be dismissed but for the reason that good cause for rescission has not been shown. That good cause has not been shown is borne out to some extent by the majority judgment. I shall endeavour to elaborate further.

In so far as they require consideration, the rules of the Bantu Affairs Commissioner's Courts dealing with applications for rescission of default judgments are Rule 77 (2) and Rule 77 (5). They read:

"77. (2) Every such application shall be on affidavit which shall set forth shortly the reasons why the Applicant did not appear and the grounds of defence to the action or proceeding in which the judgment was given or of objection to the judgment.

77. (5) The Court may on the hearing of any such application, unless it is proved that the Applicant was in wilful default, and if good cause be shown, rescind or vary the judgment in question and may give such directions and extensions of time as may be necessary in regard to further conduct of the action or application."

In dealing with similarly worded rules of the Magistrates' Courts it was said in *Du Plessis* versus *Tager supra* from page 278F:

"Alhoewel volgens hierdie reël die bewyslas op die Respondent is om te bewys dat die Appellant opsetlik in gebreke gebly het moet die Appellant aller eers gegronde rede vir sy nie-verskyning aanvoer."

In other words for a Defendant to succeed in an application for the rescission of a judgment granted against him by default the first requirement is that he must show good cause. In my view the Defendant has not shown good cause.

It is absolutely essential that good cause be shown, and this is something more than the absence of wilful default and the presence of a good defence. In *Cavalinias* versus *Claude Neon Lights S.A. Ltd,* 1965 (2) S.A. 649 (T), an appeal heard by Bekker and Clayden, J. J., the Court did not disagree with the Magistrate's view that the Defendant was not himself in wilful default and that his defence to the claim on which the judgment was given was a substantial defence and that it was advanced in good faith (at 652A). Nevertheless the Court found that good cause had not been shown and for this reason alone dismissed the appeal against the Magistrate's refusal to rescind a judgment granted in default of a plea. In *Cavalinias* the further point was made at 652E that good cause must be shown whether or not that issue is raised by the other party. It should be mentioned that *Cavalinias* dealt with the interpretation of rules also worded similarly to Rules 77 (2) and 77 (5) of the Bantu Affairs

Commissioner's Courts, quoted above. Good cause must not merely be alleged but must also be proved. The Appellate Division in *Silber* versus *OZEN Wholesalers (Pty) Ltd,* 1954 (2) S.A. 345 at 352G, when dealing with a rule of the Magistrates' Courts worded similarly to Rule 77 (5), stated the law as follows:

"It seems clear that by introducing the words "and if good cause be shown" the regulating authority was imposing upon the Applicant for rescission the burden of actually proving, as opposed to merely alleging, good cause for rescission, such good cause including but not being limited to the existence of a substantial defence [cf. *Du Plessis* versus *Tager,* 1953 (2) S.A. 275 at p. 278 (O)]. The position under the subrule is thus that if the Defendant fails to show good cause for relief or if the Plaintiff shows that the Defendant was in wilful default the Magistrate is not entitled to rescind the judgment; if good cause has, and wilful default has not, been shown the Magistrate apparently has a discretion, but it is unnecessary to examine this aspect of the matter.

The meaning of "good cause" in the present subrule, like that of the practically synonymous expression "sufficient cause" which was considered by this Court in *Cairn's Executors* versus *Gaarn,* 1912 A.D. 181, should not lightly be made the subject of further definition. For to do so may inconveniently interfere with the application of the provision to cases not at present in contemplation. There are many decisions in which the same or similar expressions have been applied in the granting or refusal of different kinds of procedural relief. It is enough for present purposes to say that the Defendant must at least furnish an explanation of his default sufficiently full to enable the Court to understand how it really came about, and to assess his conduct and motives."

To show good cause an Applicant for rescission of a default judgment must therefore, at the least, furnish an explanation sufficiently full to enable the Court to understand how the default came about. In the present case the Defendant's explanation is by no means full. To enable the Court to assess the acceptability of his explanation it was of the utmost importance that the Defendant should have informed the Court of the date or approximate date when his wife left his home, but he contents himself with the mere statement in his affidavit, which was dated 20 January 1971, that she had left. It is also obvious that the Defendant should have furnished an affidavit by his wife or explain why it was not possible to do so. The absence of such an affidavit is not explained: The Defendant did not say that his wife's whereabouts was unkown to him or that he was unable to obtain an affidavit from her. Then the Defendant stated that he first became aware of the judgment on 13 January 1971, but does not say he was unaware of the case before then. That the Defendant is probably not being frank on this point appears from the last paragraph of Mr Rittoff's own affidavit where he says "I did not see the Defendant again until the 13th January". When we asked Mr Rittoff about the use of the word "again", my recollection is that Mr Rittoff stated that he thought he saw Defendant before that date but was not one hundred per cent certain. Mr Rittoff furthermore in the Court *a quo* accepted that there had been personal service of the summons on the Defendant; this is tantamount to his saying that he was prepared to accept that the Defendant's explanation was false. It is quite clear

that the Defendant has not given an acceptable explanation for his default and, consequently, good cause for a rescission has not been shown.

In short, although the Defendant may have been in wilful default in failing to deliver a plea, I feel that the Plaintiff has not discharged the onus of proving this. On the other hand, it seems quite clear that the Defendant has not shown good cause why the application for rescission of the default judgment should be granted. Consequently, while agreeing with the other members of this Court that the appeal should be dismissed with costs, I would prefer to base this decision on the Defendant's failure to show good cause.

For Appellant: Mr J. Rittoff, Johannesburg.

For Respondent: Mr E. Rovetti, of Sidney P. Franklin, Johannesburg.

IN THE CENTRAL BANTU APPEAL COURT

KUTOONE versus STOFFILE

CASE 18 OF 1971

JOHANNESBURG: 2 September 1971. Before Cronje, President, and Thorpe and Bowen, Permanent Members.

MAINTENANCE

Enquiry under the Maintenance Act, 1963—Maintenance of child.

Summary: The facts appear from the judgment.

Held: That where paternity is denied, the Commissioner should take evidence on all material aspects, such as the date of birth of the child.

Held: That it is essential that a maintenance officer be present during an enquiry and his presence should be recorded by the presiding officer.

Held: That no order should be made unless there is evidence that the Respondent has failed to maintain the child.

Appeal from the Maintenance Court of the Bantu Affairs Commissioner, Vereeniging.

Cronje, President:

The Commissioner, after holding an enquiry, found the Respondent (now Appellant) to be the father of Complainant's (now Respondent's) child and ordered him to pay maintenance at the rate of R4 per month in respect of the child until it becomes self-supporting. I shall presume that the enquiry was held in terms of the Maintenance Act, 1963, although that is not apparent from the record, which indicates (per antiquated form J495) that the proceedings concerned a "Complaint" under section 18 (2) of Act 33 of 1960, Act 7 of 1895 (C), Act 10 of 1896 (N), Ordinance 44 of 1903 (T) or Ordinance 51 of 1903 (OFS); of these enactments only Act 33 of 1960 (The Children's Act) is still in force.

The Commissioner should ensure that a proper form is used and a Maintenance Order made by him should state specifically that it is made in terms of the provisions of the Maintenance Act, 1963.

An appeal has been noted "against the whole of the maintenance order made herein, by the Maintenance Officer on the 20th day of April 1971, on the ground that the said officer erred in fact and/or in law *inter alia* in accepting the evidence adduced as sufficient to prove that the Respondent is legally liable to maintain the said child in his capacity as the father thereof."

I shall accept, with great reluctance, that by this ambiguous and ineligantly drafted document Respondent's attorney intended to bring an appeal on the ground that the evidence was insufficient to prove that Respondent was the father of the child.

Complainant testified that she was unmarried and the mother of a 10 months old child of whom Respondent was the father. She stated that they had been lovers ("vryers") from 1968 to 1969, that they often had intercourse either at her or at his parents' home. Under cross-examination she stated that he had taken her to his parents' home during the day-time to have intercourse with her; that nobody saw them and that they had parted company some two years ago. The enquiry was held on 20 April 1971, and it would, therefore, appear that the child was born in July or August 1970, and that the Complainant and Respondent might have parted as long ago as April 1969. If that were so then the Respondent could obviously not have fathered the child.

This being a matter in which paternity was denied by Respondent, the Commissioner should have taken more complete evidence such as eg. the month during which Complainant missed her periods, the exact date of the birth of the child, whether she had informed the Respondent of her pregnancy and what his attitude had been. Both parties were unrepresented and it was the duty of the maintenance officer or the presiding officer to make all necessary enquiries—*vide Buch* versus *Buch* 1967 (3) S.A. 83.

There is nothing on the record to indicate that a maintenance officer was present at the enquiry. It would appear from the scanty nature of the evidence and cross-examination as if such an officer did not attend the proceedings. His presence—which should be recorded by the presiding officer—is essential not only for the validity of the enquiry, but also to ensure that it is properly conducted in that all the relevant facts should be placed before the Court and the parties and their witnesses should be properly examined or cross-examined by that officer, if necessary.

The Respondent's evidence was even briefer than that of the Complainant. Whilst admitting that he and Complainant had been lovers ("vryers") during 1968, he denied that he was the father of the child. Complainant, he stated, had not notified him when she was pregnant and had not even sent him a message. He was not asked, either during cross-examination or by the presiding officer, whether he had ever had sexual intercourse with the Complainant.

After the Respondent had given evidence the enquiry was adjourned to 20 April 1971, when Complainant's father and one, Annett Mphapang, gave evidence for the Complainant.

The evidence of Complainant's father, Daniel Moabi, takes the matter no further. Apart from stating that defendant had regularly visited his daughter at home, where they were left very much to themselves, he did not corroborate Complainant's evidence of the alleged intercourse. When he did go to speak to Respondent's mother, the Respondent rode away on his bicycle. His further evidence that "Ek het met Verweerder gepraat. Verweerder het geweier dat hy verantwoordelik is". is, therefore, not convincing as he did not state that he saw the Defendant subsequently.

Annett Mphapang testified that she had accompanied Complainant's father to Respondent's home and confirmed that upon their arrival the Respondent rode away on his bicycle.

It is not apparent from the record for what reason witnesses on behalf of Complainant were called after Respondent had testified, but such procedure was undesirable.

In the result there was no corroborating evidence, that is evidence consistent with that given by the Complainant and inconsistent with the innocence of the Respondent who had denied paternity—*Bekker* versus *Westenraad* 1942 W.L.D. 197. The appeal should. therefore, succeed.

As regards the maintenance order made, I would observe that Complainant did not testify that respondent had failed to maintain the child.

The enquiry appears to have been conducted in a perfunctory manner. In the circumstances the appeal is upheld. The proceedings in the Court *a quo* are set aside. The enquiry is remitted for hearing *de novo* before another judicial officer. There is no order as to costs.

Thorpe and Bowen. Permanent Members, concurred.

For Appellant: Mr Moss Friedman, Vereeniging.

For Respondent: Miss D. M. Finca of G. M. Pitje, Johannesburg.

SENTRALE BANTOE-APPÈLHOF

PHETLA versus MOLOI

SAAK 20 VAN 1971

JOHANNESBURG: 2 September 1971. Voor Cronje, Voorsitter, en Thorpe en Bowen, Permanente Lede.

ONDERHOUD

Ondersoeke ingevolge die Onderhoudswet, 1963.

Opsomming: Die feite blyk uit die uitspraak.

Beslis: Dat 'n valse bewering deur 'n Respondent nie noodwendig as stawende getuienis beskou kan word nie.

Beslis, verder: Dat waar 'n inkriminerende dokument onder die aandag van die voorsittende Kommissaris kom en dit nie aan die Respondent gestel is nie, die versuim om dit te doen rede kan uitmaak waarom die verrigtinge ter syde gestel moet word.

Beslis, verder: Dat die hou van 'n ondersoek in die afwesigheid van 'n onderhoudsbeampte onreëlmatig is.

Beslis, verder: Dat dit die plig is van die onderhoudsbeampte om aspekte wat dit verg te ondersoek.

Appèl teen 'n bevel van die Onderhoudshof van die Bantoesakekommissaris, Vereeniging.

Cronje, Voorsitter:

Nadat die Kommissaris 'n ondersoek gehou het, het hy bevind dat die Respondent (die huidige Appèllant) die vader is van 'n kind aan wie Klaagster (tans Respondente) geboorte gegee het en hy het die Respondent gelas om maandeliks tot die onderhoud van die kind by te dra.

Teen dié bevinding kom die Respondent in hoër beroep op die grond dat die uitspraak teen die oorwig van die getuienis en die waarskynlikhede is.

Die Klaagster het getuig dat sy getroud was, maar dat haar man op 3 Augustus 1968 oorlede is; dat sy en Respondent sedert Augustus 1969 "vryers" was, baie bymekaar geslaap het en geslagsgemeenskap gehad het, meestal in Respondent se motorkar. As gevolg van dié gemeenskap het sy swanger geraak en op 6 Junie 1970 geboorte geskenk het aan 'n seun, Sydney Moloi. Respondent het aan haar gesê om haar vader van haar swangerskap te vertel, wat sy ook gedoen het. Daarna het die Respondent verdwyn en het sy hom nie weer gesien nie.

Die Respondent het ontken dat hy en Klaagster "vryers" was en dat hy ooit met haar geslagsgemeenskap gehad het. Hy het verklaar dat hy Klaagster net een keer in sy motor gehad het en dit was toe sy hom na iemand in Sebokeng geneem het wat goed by hom wou koop.

Omdat die Respondent onder eed die gemeenskap ontken het, moes daar getuienis *aliunde* wees wat met Klaagster se getuienis strook en wat strydig is met Respondent se onskuld voordat die Kommissaris kon bevind dat Respondent die vader van die kind is—sien ondermeer *Bekker* versus *Westenraad* 1942 W.L.D. 214. Die enigste getuie vir Klaagster was haar suster Doris Moeketsi wat ondermeer getuig het dat sy Klaagster en Respondent dikwels bymekaar gesien het en dikwels in sy motor gesien ry het,

maar nooit gesien het dat hulle bymekaar slaap nie. Uit haar getuienis kan nie afgelei word dat gemeenskap in die motor plaasgevind het nie. Sy weerspreek ook die Klaagster op 'n belangrike punt. Sy getuig: "Nadat Klaagster se kind gebore was het jy Klaagster met die kar gedurende die aand gaan haal." Soos hierbo vermeld het Klaagster getuig dat Respondent "verdwyn" het nadat sy haar vader van haar swangerskap vertel het en dat sy hom nooit weer gesien het nie.

Al sou die Respondent se bewering dat die Klaagster nie meer as een keer saam met hom in sy motor was nie, onwaar wees, sou so 'n valse bewering nog nie as stawende getuienis beskou kon word nie—*Maharaj* versus *Parandaya*, 1939 N.P.D. 241.

Klaagster se getuienis is derhalwe nie gestaaf nie en die Respondent is gevolglik geregtig op uitspraak in sy guns.

Ek moet ook daarop wys dat in die saakomslag 'n dokument is gemerk "Interview Form" waarop die volgende aantekeninge verskyn "Sources of Information: Peter Phetla . . . Peter Phetla admits paternity of the child."

Hierdie dokument was nie tydens die ondersoek ingehandig nie, en daar was ook nie daarna verwys nie en ook was die beweerde erkenning nie aan die Respondent gestel nie. Alhoewel die Kommissaris nie na dié vorm verwys nie, moet dit aangeneem word dat dit wel onder sy aandag gekom het en moontlik sy bevinding kon beïnvloed het. Op grond daarvan sou die verrigtings ter syde gestel kon word.

Dit is nie genotuleer dat 'n onderhoudsbeampte die verrigtings bygewoon het nie; blykbaar was hy nie teenwoordig nie. Dit is 'n onreëlmatigheid. In sy betoog het mnr. Dennett ondermeer na die beslissings in *Pieterse* versus *Pieterse*, 1965 (4) 344 en *Buch* versus *Buch*, 1967 (3) 83 verwys en daarop gewys dat daar sekere aspekte van die huidige saak is wat verder ondersoek moes gewees het en dat dit die plig was van die onderhoudsbeampte om dit te doen.

Die verklaring van die Respondent as vader en die bevel teen hom vir onderhoud hou ernstige gevolge vir die Respondent in en so 'n bevinding moet nie ligtelik gemaak word nie. Gevolglik behoort die Kommissaris ondersoeke betreffende onderhoud te hou volgens die riglyne bepaal in, ondermeer, bogenoemde gewysdes.

Die appèl word gehandhaaf en die bevel van die hof *a quo* word gewysig om te lees: "Geen bevel gemaak nie."

Thorpe en Bowen, Permanente Lede, het saamgestem.

Namens Appellant: Adv. W. F. Dennett, i.o.v. B. A. Dlamini, Johannesburg.

Namens Respondente: In persoon.

IN THE CENTRAL BANTU APPEAL COURT

MOFOKENG versus RAMAKURA

CASE 21 OF 1971

JOHANNESBURG: 3 September 1971. Before Cronje, President, and Thorpe and Bowen, Permanent Members.

PRACTICE AND PROCEDURE

Lapsing of a summons.

Summary: The summons was served on the Defendant, who entered an appearance to defend and asked for further particulars, which were furnished about 22 months later. There was nothing in the record to show that in the interim the Plaintiff had taken any further steps in the prosecution of the action. Subsequently a notice of bar calling upon the Defendant to lodge his plea was served upon the Defendant's attorney, but no plea was delivered. A request for default judgment having been made, the Commissioner ruled that the summons had lapsed and refused the request. On appeal—

Held: That the summons had lapsed and that the appeal should be dismissed.

Appeal from the Court of the Bantu Affairs Commissioner, Johannesburg.

Cronje, President:

The issue in this matter is whether a summons which had been issued and served had or had not lapsed at the time when a request for default judgment was lodged.

In this case Plaintiff (now Appellant) issued a summons on 11 December 1968, that was served on the Defendant (now Respondent) on 18 December 1968. Defendant entered an appearance to defend and asked for further particulars by a document dated 31 December 1968, and served on Plaintiff's attorneys on 3 January 1969, and on the Clerk of the Court on 6 January 1969.

The further particulars were furnished on 10 November 1970—some 22 months later. There is nothing in the record to indicate that during the said period of 22 months any further steps in the prosecution of the action were taken by the Plaintiff.

On 10 December 1970, a notice of bar calling upon the Defendant to lodge his plea was served on Defendant's attoneys, a copy being filed with the Clerk of the Court on 14 December 1970. During February 1971, a new firm of attorneys became attorneys of record for the Plaintiff; the relevant notifications were duly delivered.

On 30 April 1971, a request for default judgment was filed with the Clerk of the Court: the Defendant had on that date not yet delivered a plea. An affidavit by Plaintiff in support of his claim accompanied the request for default judgment.

The request was, on the day of receipt, referred to the Bantu Affairs Commissioner who, on the same day, made the following entry: "The Court finds that the Plaintiff did not take further steps to prosecute the action (by furnishing the further particulars requested) within a period of 12 months from the date of issue of the summons and that the summons has consequently lapsed in terms of Court Rule 95. In the circumstances the request for default judgment is refused." On the cover of the record the following judgment is recorded: "Summons has lapsed—request for default judgment refused."

Against the whole of that judgment an appeal was noted on the following grounds:

"1. The learned Commissioner erred in his interpretation of Rule 95 of the Rules of this Honourable Court in holding that the Plaintiff could not obtain judgment by default as the summons had lapsed.

2. The learned Commissioner erred in finding that the summons had lapsed taking into account that the Defendant had entered an appearance to defend and requested further particulars and the Plaintiff's attorneys of record accepted service of the Defendant's Notice of Intention to Defend and Request for further particulars before the expiry of 12 months after the issue of summons.

3. The learned Commissioner erred in not finding that once an appearance to defend has been entered particularly in a case, such as in this matter, where the Defendant is legally represented. Rule 95 of the Rules of this Honourable Court has no application."

Rule 95 reads as follows:

"95. If summons in an action be not served within twelve months from the date of its issue or, having been served, the Plaintiff has not within that time taken further steps in the prosecution of the action, the summons shall lapse, provided that where the Plaintiff or his attorney files an affidavit with the Clerk of the Court before the expiration of such period setting out—

(a) that at the request of the debtor an extension of time within which to pay the debt or any portion thereof has been granted to him;

(b) that in terms of the agreement, judgment cannot, save in case of default, be sought within a period of 12 months from the issue of summons;

(c) what the period of the said extension is;

the summons shall not lapse until 12 months after the expiration of the period of extension."

It is common cause that no affidavit concerning any agreement between the parties was filed.

As regards the first ground of appeal Mr Cohen stated that the drafting was somewhat inelegant and that it was not intended to aver that judgment can be obtained on a summons that has lapsed and that this ground of appeal might, therefore, well be disregarded.

The second ground of appeal is to the effect that the summons had not lapsed because the Plaintiff had within 12 months after its issue accepted service of the Defendant's appearance to defend and his request for further particulars. There is no merit in this contention. The so-called "acceptance" of service of the process concerned does not constitute a further step in the prosecution of the action by the Plaintiff within the meaning of rule 95. The Plaintiff had no option but to accept legal process served at the address furnished by him for service, if such service was tendered in terms of the rules.

The question of what is meant by taking further steps in the prosecution of an action was considered in *Kagan & Co.* versus *Gunther's Store*, 1955 (2) SA 618. De Villiers, J., at page 620, remarked as follows: "in the case of *Pettersen* versus *Burnside* 1940 NPD 403 at page 406 Broome, J., as he then was, said in dealing with rule 54:

'In my opinion a step in the proceedings is some act which advances the proceedings one stage nearer completion;' and applying this definition it has been held in Natal that entry of appearance would not be such a step (*Winship N.O.* versus *Johnsson's Executors and Others*, 1924, NPD 43) for the reason that it was merely an act done with the object of qualifying the Defendant to put forward his defence."

By the same reasoning a request for further particulars by the Defendant is merely an act done with a view to qualifying him to put forward his defence.

Mr Cohen argued that once an appearance to defend has been entered, the *onus* to prosecute the action no longer rests solely on the Plaintiff. He contended that it was within the power of a Defendant to prevent the Plaintiff from holding the action in abeyance indefinitely in that, where the Plaintiff does not give notice of trial, a Defendant may either in terms of rule 54 (5) apply for the dismissal of the action or in terms of rule 55 (1) himself give notice of trial. However, in terms of the rules these rights are conferred on a Defendant only after the pleadings have been closed which is not the position in the instant case. But there is no *onus* on a Defendant to avail himself of any of these remedies, nor is he penalised by the rules if he prefers not to do so.

In any event, whatever a Defendant's rights may be, rule 95 makes it clear that it is a Plaintiff who must take "further steps" to prevent a summons from lapsing, and there is nothing on record to show that the present Plaintiff had, within the meaning of Rule 95, taken any further steps to prosecute the action after the issue of the summons.

Rule 95 is similar to Rule 10 of the Magistrates' Courts' rules, the only difference being that, where the summons has been served, the period of 12 months runs in the former instance from the date of issue of the summons whereas in the latter it runs from the date of service of the summons. The effect of the latter rule was considered in *Claude Neon Lights S.A. Ltd* versus *Bourbon-Leftley*, 1971 (1) S.A. 345 (C), in which the facts were similar to those in the present case. In the *Claude Neon* case the summons had been served, and the Defendant had entered appearance to defend and had asked for further particulars which were furnished by Plaintiff more than two years later.

The Defendant, some six months afterwards, filed an application for an order declaring that the summons had lapsed. The Magistrate granted the application. An appeal was noted against the order, but was dismissed. The court of appeal at page 348 *inter alia* made the following remarks:

"Rule 10 takes away from the Magistrate any discretion. If a Plaintiff has stood by for 12 months and has taken no further steps in the prosecution of the action, then the summons lapses. The Magistrate has no discretion to revive the summons. The rule sets out the steps that can be taken to prevent the summons lapsing. If a Plaintiff fails to take such steps the summons lapses, and no further action can be taken on it. This, of course, does not prevent the Plaintiff from issuing a fresh summons. But the original summons has lapsed."

Obviously, therefore, the second ground of appeal must fail.

In regard to the third ground of appeal Mr Cohen submitted that rule 95 applies only where no appearance to defend has been entered. He stated further that the rule is for the protection of a Defendant who is not legally represented, and who may thus be unaware of his remedies. A litigant represented by an attorney can use the services of his attorney to put the rules into force. In my view Rule 95 clearly applies irrespective of whether the Defendant is or is not legally represented. The practical effect of the entry of an appearance to defend has already been covered in this judgment. Consequently the third ground of appeal also fails. Mr Cohen asked this Court to draw a strong inference that the reason for the Plaintiff's apparent inactivity, especially his failure to furnish further particulars, might have been due to the fact that negotiations for a settlement were taking place between the parties. This matter was not raised as a ground of appeal and consequently need not be considered by this Court. However, it seems doubtful whether there can be any merit in the point. The inference contended for is by no means the only inference that could be drawn, but even if there had been negotiations they would no doubt have been directed towards reaching an agreement that the Defendant should make some payment and the proviso to Rule 95 makes it clear that only if agreement had been reached could the life of the summons have been extended, and then only if an affidavit had been filed by the Plaintiff before the expiration of the 12 months' period. As already mentioned, no affidavit was filed.

Mr Cohen referred to the Commissioner's remark in his reasons for judgment that "the Court was not given the benefit of any legal argument on the point at issue viz. whether or not the summons had lapsed," and stated that the Commissioner could have had such argument for the asking. Where a court considers giving judgment on a point which it raises *mero motu*, it is of course always desirable that the parties, or at least the party against whom the Court is thinking of giving judgment, should be given an opportunity to put forward their or its views. In the present case, however, nothing the Plaintiff could have said would have assisted the Commissioner, in view of the further remarks in *Claude Neon's* case, *supra*, at page 348:

"The magistrate, as I have said, has no discretion in extending the life of the summons, but, in terms of Rule 10, the magistrate must try the question of whether the summons has in fact lapsed, and this he can try upon application. He is entitled in terms of the rule to decide the matter on affidavit. In fact, he

is entitled to decide the matter without affidavit, where there is no dispute on the facts; the dates of the filing of the various documents in the matter would be sufficient proof as to whether there have not been any further steps taken by the Plaintiff in prosecuting the action."

In the premises the appeal is dismissed.

Thorpe and Bowen, Permanent Members, concurred.

For Appellant: Mr J. Cohen of Deneys Reitz, Ridsdale & Guinsberg, Johannesburg.

For Respondent: In default.

IN THE CENTRAL BANTU APPEAL COURT

CASE 23 OF 1971

KHETSI versus DITLOPO

JOHANNESBURG: 28 October and 2 December 1971. Before Cronje, President, and Thorpe and Bowen, Permanent Members.

APPEAL

Late noting—Application for condonation—Factors to be considered.

EVIDENCE

Written statement by a third party that the Respondent in the enquiry had admitted paternity—When such statement is admissible in terms of the Civil Proceedings Act 1965.

MAINTENANCE

Enquiry under the Maintenance Act 1963—*Denial of paternity of the child—Evidence that should be adduced.*

Summary: The Complainant caused an enquiry under the Maintenance Act, 1963, to be instituted with the object of obtaining an order against the Appellant for the maintenance of a child conceived in July 1967 and born in March 1968. She alleged that the Appellant was the father and this he denied. An uncle of the complainant handed in a document purporting to be a statement by two relatives of the Appellant that the Appellant had admitted paternity. The makers of the statement were not called as witnesses. The Appellant denied making any admission. The complainant said she had no witness to any act of intercourse, but her relatives testified that they had seen her and the Appellant together. However their evidence was vague and could mean that they had last been seen together many months before she conceived. The Appellant denied ever having been with the Complainant as alleged and stated he knew her by sight only. The Commissioner made a maintenance order against the Appellant, who noted an appeal six months late.

Held: That in an application for condonation of the late noting of an appeal the factors usually relevant are the degree of lateness, the explanation therefor, the prospects of the appeal succeeding if condonation were to be granted, the importance of the case and the interest of the Respondent in finality, but that none of these factors are individually decisive.

Held, further: That where in a maintenance enquiry paternity is an issue, the complainant's evidence requires corroboration *aliunde* and to constitute corroboration such other evidence must be consistent with that of the Complainant and inconsistent with the Respondent's innocence.

Held, further: That a written statement by a third party is, generally, inadmissible unless the signatory thereof is called as a witness.

Held, further: That where paternity is denied and there is no evidence of an admission prior to the enquiry, the quest for corroboration should centre on the time of conception.

Held, further: That false evidence by the Respondent in a maintenance enquiry does not necessarily constitute corroboration of the Complainant's evidence on the paternity issue.

Held, on the facts: That the late noting of the appeal should be condoned, the order of the court *a quo* set aside and the case remitted for further hearing.

Appeal against an order of the Maintenance Court of the Bantu Affairs Commissioner, Johannesburg.

Thorpe, Permanent Member:

By complaint dated 15 July 1970, the Complainant, Respondent in this appeal, caused a maintenance enquiry to be insituted against Thomas Nkosi, who is now the Appellant, on the allegation that the latter was legally liable to maintain her child Pearl and that he had not done so. Appellant denied liability on the grounds that he was not the father. After hearing certain evidence the Commissioner on the 6th November 1970, ordered that the Appellant should pay maintenance for the child Pearl at the rate of R3 per month until she attains the age of 18 years.

At the enquiry the Appellant was represented by Attorney Madinga but on its conclusion he turned to the firm of Henry Helman, Johannesburg, which represented him thereafter.

A notice of appeal was lodged by the firm of Henry Helman on 31 May 1971. There had been no request for reasons and consequently, in terms of rule 4 of the Bantu Appeal Court rules, the notice should have been delivered within 21 days of the order, that is, by 1 December 1970.

The appeal has thus been noted six months late, and cannot be considered unless we are prepared to condone the late noting in terms of the last clause of the rule mentioned above, which is to the effect that the Court of appeal may at the hearing of an appeal extend the period laid down on application "and upon just cause being shown."

An application for condonation has been filed. It is accompanied by affidavits deposed to by the Appellant and by Mr Sholto Helman. From these it appears that the Appellant instructed Mr Helman on 12 November 1970, to note an appeal. Two days later the Clerk of the Court was asked by letter for a copy of the record. On 19 February 1971, a further letter was despatched, this time to the maintenance officer, drawing attention to the fact that no reply had been received and asking that the matter receive urgent attention. On 4 March Mr Helman's office was informed that a copy of the record had been forwarded (apparently on 30 November) but, as no trace thereof could be found. Mr Helman sent a further letter on 10 March asking for the required copy. On 22 March a letter was received by Mr Helman in which it was stated that a further copy of the record would be furnished on receipt of 70 cents in revenue stamps. The stamps were apparently sent by letter dated 23 March and a copy of the record was posted to Mr Helman under cover of a letter dated 29 March,

which was received by Mr Helman on 12 April. On the last mentioned date a message was sent to the Appellant calling him to Mr Helman's office. How the message was sent, and when the Appellant received it, is not disclosed, but he states that it was only on 20 April that he had "the opportunity of consulting" Mr Helman and that he "then" instructed the latter to proceed with the appeal and the application for condonation. The application for condonation is dated 26 April and the supporting affidavits, as also the notice of appeal, are dated four days after that. The notice of appeal and the application are both endorsed with the inscription "served by messenger", but whether service was so effected on the Complainant is not clear as no return of service has been included in the record on appeal. Miss Finca of the firm which was instructed by the Complainant on about 29 September 1971, and who appeared before us for the Complainant, admitted that the notice and the application had been received. The papers were eventually lodged with the Clerk of the Court on 31 May 1971.

No replying affidavit was filed on behalf of the Complainant, but Miss Finca opposed the application for condonation.

The practice of this Court, in keeping with the terms of rule 4, is for such an application and the appeal itself to be set down for hearing on the same day, when the explanation for the delay is considered as well as the merits of the appeal, full argument on both aspects being allowed. This is what happened in the present matter.

Guidance on how this Court should exercise its discretion to condone may be obtained *inter alia* from *Melane* versus *Santam Insurance Co. Ltd*, 1962(4) S A 531, at p.532, where Holmes, J.A., enumerated 'among the facts usually relevant', the degree of lateness, the explanation therefor, the prospects of success and the importance of the case. A Respondent's interest in finality was also mentioned. The degree of lateness (six months) has already been referred to and I propose now to deal with the other factors *seriatim*.

In regard to the explanation for the delay, the Appellant took the first step expeditiously enough in that, more than two weeks before the expiry of the period allowed for the noting of an appeal, he gave the necessary instructions to the firm of Henry Helman. Also, it is understandable that that firm should wish to peruse the record before framing the grounds of appeal. What is not understandable is why it should have persued by post its quest for a copy of the record. The firm has its offices in the same town as the Court *a quo* and any correspondence should have been delivered by hand, especially in view of the imminent expiration of the period within which appeal had to be noted. Indeed, as the record of a maintenance enquiry is a public document and is invariably in long-hand, as this one was, there should not have been any difficulty in perusing the original record at the Court *a quo*, if it appeared that a copy could not be obtained in time. Be that as it may, when the copy of the record was not received in time for the Appellant's attorney to note an appeal by 1 December 1970, he should have insisted on seeing the record, which after all was at a Court not far from his office. If he had then encountered difficulty this could have been mentioned in his affidavit. Mr Helman should have known that any appeal should have been noted by 1 December 1970.

and his letter of 14 November should have been so pended that he would have been in a position to take further steps timeously to inform himself of the evidence adduced before that date in the event of the copy of the record not earlier coming to hand. In his affidavit Mr Helman offered no explanation for his delay of three months in following up his letter of 14 November. It would seem that we must assume that this was due to an oversight in his office. Although the matter had become extremely urgent by 19 February 1971, the Appellant's attorney continued to pursue his request for a copy of the record by post. When he heard on 4 March that a copy had been prepared for him but had apparently gone astray he could safely have assumed that a carbon copy was available which he could peruse at the Court *a quo*. He did not attempt to do this, but let a further period elapse before posting another letter, again asking for a copy. When he was told that a second copy would be supplied on receipt of 70 cents in revenue stamps, he did not send the stamps by hand but yet again posted them. The delays from 12 April to 31 May are also not satisfactorily explained. It seems that Mr Helman quite wrongly adopted the attitude that if he wrote letters from time to time it did not matter how long he took to note the appeal and that condonation would be granted automatically if this court could be persuaded that the appeal itself was well founded. In the present instance it must take the major part of the blame for the delay which can but be ascribed to gross disregard of the rules.

In appropriate cases unreasonable delay by an attorney may result in condonation being refused even where an appeal would succeed on the merits. The warning issued by Steyn, C. J., in *Salooje and another NN.O.* versus *Minister of Community* Development, 1965(2) S.A. 135 (A D) at 141, should be taken to heart:

"It has not at any time been held that condonation will not in any circumstances be withheld if the blame lies with the attorney. There is a limit beyond which a litigant cannot escape the results of his attorney's lack of diligence or the insufficiency of the explanation tendered. To hold otherwise might have a disastrous effect upon the observance of the rules of this court. Considerations *ad misericordiam* should not be allowed to become an invitation to laxity . . . The attorney, after all, is the representative whom the litigant has chosen for himself, and there is little reason why, in regard to condonation of a failure to comply with a rule of Court, the litigant should be absolved from the normal consequences of such a relationship, no matter what the circumstances of the failure are."

The Appellant would also appear to be not altogether free from blame. He should have enquired from his attorney as to the progress of the appeal, but for five months he apparently did nothing. Such passivity could also jeopardise an appeal. In this regard the learned Chief Justice said in *Salojee's* case, also at p.141:

"If . . . the stage is reached where it must become obvious also to a layman that there is a protracted delay, he cannot sit passively by, without so much as directing any reminder or inquiry to his attorney . . . and expect to be exonerated of all blame; and if . . . the explanation offered to this Court is patently insufficient, he cannot be heard to claim that the insufficiency

should be overlooked merely because he has left the matter entirely in the hands of his attorney. If he relies upon the ineptitude or remissness of his own attorney, he should at least explain that none of it is to be imputed to himself."

The explanation for the delay in the present case is unsatisfactory but, as was pointed out in *Estate Woolf* versus *Johns* 1968(4) SA 492 (A D) at 497G:

"This conclusion, while certainly not conducive to the granting of condonation, is not necessarily fatal to the application . . . good prospects of success may transcend deficiencies in an application for condonation and warrant the granting of the application, nothwithstanding the presence of such deficiencies."

In that case Ogilvie Thompson, J. A., as he then was, in giving the unaminous judgment of the Court, had found that there had been a gross disregard of the rules relating to appeals in that there had been a delay of ten months, much longer than in the instant case. The prospects of the appeal succeeding if condonation were to be granted must therefore now receive attention.

The appeal is noted against the whole of the judgment, the grounds reading as follows:

"(a) The judgement was bad in law in that:

(i) The Presiding Officer admitted hearsay evidence against the Appellant.

(b) The findings of the Commissioner are against the evidence and the weight of the evidence in that—

(i) there was no corroboration of any physical relationship between the Appellant and the Respondent and the learned Commissioner should not have found that there had been such relationship without corroboration;

(ii) the learned Commissioner did not go fully into the financial circumstances of the enquiry with regard to:

(a) The income and expenditure of the Respondent;

(b) the income and expenditure of the Appellant.

The learned Commissioner should have found that there was not sufficient evidence and accordingly should have made no order in so far as the paternity of the child's dispute was concerned."

The Complainant herself gave evidence and two uncles, Jacques Modikoe and Ernest Ditlopo, as well as her aunt Violet Ditlopo, also testified on her behalf.

The complainant testified that she and the Appellant had been lovers since 1964. She met him when she was staying at Baragwanath hospital as a student nurse and he used to fetch her from there almost daily. Since 1964 they would have sexual intercourse two or three times a month either in his car while parked in the veld near the S.A.N.T.A. hospital or in a bus at a bus terminus. They would also meet at the house of a friend in Diepkloof and at other places including the house of her uncle (meaning apparently her uncle Ernest Ditlopo, though she did not mention his name), while she was staying with him. She last menstruated on 11 July 1967. Whether she was then staying at the hospital, at her uncle's house or at some other place is not clear. The child Pearl was born on the 18th March 1968. She informed the Appellant when she became pregnant and in due

course told him of the birth of the child and that he was the father. On each of these occasions the Appellant told her that he was happy. He denied paternity for the first time when they appeared at the Court *a quo* on 28 September 1970. A certain Emele Modise, whom the Complainant described as an aunt of the Appellant (but whom the Appellant said he did not know) brought clothes for the baby. After the child's birth the Appellant continued seeing the Complainant, apparently as regularly as before, until December 1968, after which, it would seem, he did not see her. The Complainant asked the Appellant to maintain the child but this he refused to do. It was not until 15 July 1970, that she complained to the maintenance officer about the Appellant's failure to maintain.

There is nothing inherently improbable about the Complainant's evidence except possibly the fact that she waited more than two years after the birth of the child before taking steps to compel the Appellant to pay something towards the maintenance of the child. Her explanation is that her people advised her to wait "as they still wanted to discuss the matter with the people of the Respondent." This is not convincing as the only witness to mention discussions was Jacques Modikoe who alleged that after a certain R40 had been paid (which may have been in October 1967) "we decided to discuss the matter at a later stage" and there is no evidence of any attempt at discussion thereafter. It is, of course, well known that Bantu generally do not press claims for damages expeditiously, but this was not such a claim. The Complainant was a nurse or student nurse in an urban area where claims by Bantu for maintenance are a daily occurrence. Maintenance orders are not usually made with retrospective effect and the longer the delay the more a Complainant is likely to lose.

In any event, the Complainant would be entitled to a finding that the Appellant is the father of the child in question *provided* there is on record corroboration of her evidence. Such corroborative evidence must obviously be admissible; it must furthermore be not only consistent with her evidence but also inconsistent with the Appellant's innocence on the paternity issue—see *Bekker* versus *Westenraad*, 1942 WLD. 214.

For corroboration the Complainant relied in the first place on an alleged admission of paternity made by the Appellant to his parents. The only person to testify to this alleged admission was the Complainant's uncle Jacques Modikoe who said that the Appellant's parents told him that the Appellant did not deny responsibility for the Complainant's pregnancy. This evidence was entirely hearsay. It should not have been admitted and no cognizance can be taken of it.

In a further endeavour to furnish corroboration Jacques Modikoe identified a document, dated 14 October 1967, as having been received by him from "the Respondent's people."
This document forms an exhibit in the case and will be referred to as such. In translation it reads:

"Payment in lieu of gate-crashing into someone's kraal without permission.

I have agreed to pay members of Ditlopo's family money to the amount of R40 for entering their kraal without permission or having had agreed with them.

I am: 1. Johannes Kgetsi. 2. Emele Modise

Witnessed: J. Modikoe. Godfrey Ditlopo."

The document purports to be signed by "Johannes Kgetsi" and "Emele Modise." Neither the Appellant nor the Complainant is mentioned in the exhibit and the nature of the "gate-crashing" is not indicated. Nevertheless the Commissioner apparently regarded the exhibit as containing a statement by certain persons that they had heard the Appellant admit paternity of the child in question. Though the exhibit is obviously hearsay, the question arises whether it would be admissible in terms of part VI of the Civil Proceedings Act, 1965, which would apply to a maintenance enquiry in terms of rule 9 of the maintenance court rules published in Government Notice R. 97 of 22 January 1965. The circumstances in which a written statement would be admissible are set out in section 34 of that Act, one of them being that the person who made the statement should be called as a witness. unless he is "not available", non-availability being circumscribed in section 34 (1), though section 34 (2) confers a discretion on the judicial officer to dispense with the calling of the maker of the written statement, even where he is available, if to call him would cause "undue delay or expense." There is nothing on record to show that the makers of the statement in question are not available or that undue delay or expense would be occasioned if at least one of them were to be called. In any event, as pointed out by May in section 73 of his "S.A. Cases and Statutes on Evidence" 4th edition (1962), where he deals with the English Evidence Act 1938 on which our 1965 Act is modelled:

"It has been held that the Act should not be invoked where there is an acute controversy of fact and where the person who made the statement ought to be cross-examined before the Court."

In the present case there is such a controversy, the Appellant having denied that he ever made the admission contended for, and the exhibit should not therefore have been admitted, as it was, without one of the makers of the statement being called as a witness.

The only other evidence given by Jacques Modikoe was that he received payment of R40, but, assuming this to be true, there is as yet no acceptable evidence as to the purpose for which it was paid.

No corroboration in the legal sense is thus to be found in the evidence of Jacques Modikoe or in the document handed in.

There remains the evidence of the Complainant's uncle Ernest Ditlopo and of her aunt Violet Ditlopo. Ernest Ditlopo said he saw the Appellant at his house but the only year he mentioned is 1966, the year before the Complainant conceived. His evidence may mean not only that he saw the Appellant for the first time in his house in 1966 but also that the last occasion was during that year. The evidence of Violet Ditlopo is equally vague. She mentioned no year at all and said nothing to indicate when it was that she saw Appellant and the Complainant together. The two occasions she referred to may have been in 1964, which, according to the Complainant, was the year in which she and the Appellant met and became lovers. The evidence so far given by these witnesses is not inconsistent with the Appellant's innocence and therefore does not constitute corroboration.

The Appellant in denying paternity testified that he knew the Complainant only by sight, having twice seen her at Baragwanath hospital when he visited his girl friend Cecelia Sithole, who had introduced the Complainant to him. He said that he had been visiting Cecelia once a week since 1967 but that she had returned to the Cape Province during 1969. He said that he and Cecelia were very much in love, often having sexual intercourse together, and that she gave him her address but that he had lost it and "also forgotten it." He denied that the Complainant had reported her pregnancy to him. He stated that his parents were alive but that they had never discussed the matter with him and had not told him of a visit from the Complainant's people. Concerning the signatories to the exhibit, the Appellant stated that he did not know Emele Modise, though he did have a brother by the name of Johnny Khetsi. The Appellant was not asked to identify the last named's signature. He stated that he did not know the witness Ernest Ditlopo. He did not say and he was not asked whether he knew Violet Ditlopo. Much of this evidence may be false, but no specific opportunity for intercourse between the Appellant and the Complainant has been proved and in these circumstances a false statement unrelated to such a proved opportunity does not provide corroboration of the Complainant's testimony. As stated by Hoffmann, "South African Law of Evidence", 2nd edition (1970), at p. 420:

"The fact that the . . . Defendant is proved to have told a false story . . . in evidence . . . cannot in itself constitute corroboration. It provides no new item of evidence, but merely weakens or destroys the evidence he has given."

The Appellant was not asked whether he admitted or denied that R40 had been paid to Jacques Modikoe. If he had been asked he may well have disclaimed all knowledge of the alleged payment; such a disclaimer would have been in keeping with the general tenor of his evidence. The fact that the Appellant's attorney did not ask him what he had to say about this allegation did not absolve the Commissioner from seeing that the question was put—see *Pieterse* versus *Pieterse*, 1965(4) S.A. 344, and *Buch* versus *Buch*, 1967(3) S.A. 83. A similar situation obtains in regard to his not having said anything concerning the allegations that he had been instrumental in arranging the funeral of one of the Complainant's relatives and that he drove a 1957 Chevrolet car; he should have been questioned by the Maintenance Officer or the Commissioner.

There was no obligation on the Appellant to call any witnesses to deny the evidence of Jacques Modikoe, who did not name the persons who are alleged to have admitted liability on the Appellant's behalf. This evidence was hearsay; it should not have been admitted and no adverse inference can be drawn from the Appellant's failure to rebut it.

It must also be borne in mind that in an enquiry under the Maintenance Act, 1963, it is incorrect to speak of there being an onus on a party to call witnesses. Where it appears to the Maintenance Officer, or the presiding Judicial Officer, that certain persons could give material evidence, and they are not called by the parties, he should see that they are called to testify, irrespective of whether it appears that their evidence would assist the Complainant or the Respondent at the enquiry. This applies even where a party is legally represented—see *Buch* versus *Buch*, 1967(3) S.A. 83, from 87B.

There is on record no corroboration as required by law of the Complainant's evidence and, if condonation of the late noting of the appeal were to be granted, the appeal must for this reason succeed.

There is the further ground of appeal, namely, that the Commissioner did not go fully into the financial circumstances of the enquiry with regard to the income and expenditure of the Complainant and the Appellant, but it is not necessary to consider this submission, though it could be mentioned that it has been laid down that these are, amongst others, factors that should be investigated before a maintenance order is made.

The next factor to be considered in connection with the application for condonation is the importance of the case. The child in question was less than two years old at the time the order was made that maintenance of R3 per month should be paid until the child attains the age of 18 years. At this rate the total amount to be paid under the order would be approximately R590 and, of course, the quantum could be increased on application at a later stage. The case is therefore of some importance.

The last aspect on the condonation issue is the Complainant's interest in finality. The Complainant though legally represented filed no affidavit in answer to those filed in support of the Appellant's application for condonation. The Clerk of the Court was notified a few days after judgment had been given in the Court *a quo* that an appeal was envisaged and for all we know she became aware of the notification and thereafter acquiesced in the delay. There is nothing to indicate that, if condonation were granted and the case remitted for further hearing, witnesses available to the Complainant at the time of the enquiry would not still be available.

As will be seen from the foregoing the most serious factor against the granting of condonation is the unsatisfactory nature of the explanation for the delay. However, as pointed out in *Melane supra loc. cit.* no factor is individually decisive and "the importance of the issue and strong prospects of success may tend to compensate for a long delay."

The equities favour condonation. If we do not condone the late noting of appeal the effect may be that the Appellant will have to maintain a child that is not his. On the other hand, if condonation is granted and the matter remitted for further evidence, the Complainant would suffer little prejudice as her case should be provable, if she is telling the truth.

In all the circumstances condonation should be granted, and the appeal should be upheld.

The next question for consideration is the nature of the Order that should be made. It would seem that corroborative evidence could be forthcoming. The case should for this reason be remitted for further hearing, and all that need be set aside is the Order made by the Court *a quo*.

The following remarks may be of assistance in the further conduct of the case. The names of the persons who told the witness Jacques Modikoe that the Appellant had admitted paternity should be ascertained and those persons should be called as witnesses, if available. Who those persons are is not disclosed in the record. They are not necessarily the persons who signed the document referred to above. If evidence of an admission of paternity could be adduced then the Complainant's case on that issue would be proved.

If no evidence of an admission is obtainable, further enquiry should centre on the time the Complainant conceived. It is desirable that a Complainant should state whether the pregnancy was full term or not and furnish proof of the date of birth of the child, if possible, so that her evidence as to the date of conception can be checked. The Complainant could be asked where she was staying at the time she conceived, as this could form a basis for further enquiry as to possible witnesses. Evidence that the Appellant had been seen in the Company of the Complainant at about the time she conceived, or thereafter, may in the circumstances of this case afford sufficient corroboration—see Seymour, "Bantu Law in South Africa," third edition (1970) at page 337 and the case cited there in note 57. One or more of the witnesses who have already testified may be able to give this evidence, or there may be other witnesses who could be called. If the Commissioner feels after further enquiry that a maintenance order is indeed justified in conformity with what has been said above, then it should be made effective as from the date of the original order, namely 6 November 1970. I say this because a maintenance enquiry is not an ordinary civil case. The conduct of a Complainant's case is not entirely in her hands, as is evidenced by the Government law advisers' opinion that a person in whose favour a maintenance order is to be made is not entitled to legal representation—see the Justice Code "Maintenance Orders." Where therefore, as in the present case, there is not sufficient evidence on record to justify a maintenance order, but the absence of such evidence does not appear to be due to the fault of the Complainant, and it appears that on further enquiry the requisite evidence will probably be forthcoming, then there seems to be no reason, where this Court sets aside a maintenance order and remits the case for further investigation and such investigation shows that the Complainant was at the time of the original order entitled thereto, why it should not direct that any new order the Court *a quo* may make is to be retroactive to the date of the original order. This reasoning would appear to be particularly valid where it eventually transpires that the Respondent in the enquiry has endeavoured to escape liability by a false denial of paternity and where the Complainant has been kept out of her judgment by a substantial delay in the noting of the appeal.

Finally, there are two unsatisfactory features in the record calling for attention at the reopened hearing. The first is that there is no evidence to justify the Commissioner's finding that the parties are Bantu. Evidence on this point should always be recorded, as a Commissioner has no jurisdiction if the parties are not Bantu. In a court of limited jurisdiction jurisdiction cannot be assumed. The second point is that where there is a denial of paternity there should be a specific finding by the Commissioner that the man is the father of the child in question, born to the Complainant on such and such a date, before a maintenance order is made against the alleged father. No such finding was made.

In *Buch's* case *supra* at page 88E it was held that a court of appeal is entitled to make an order as to the costs of appeal. In the present case the Complainant acted reasonably in resisting the Application for condonation, which constitute the major part of the hearing before us, and in my view the Appellant should pay the costs incurred by the Complainant in that hearing—see *Regal* versus *African Superslate (Pty) Ltd*, 1962(3) S.A. 18.

In the premises the Application for condonation of the late noting of the appeal is granted. The Appellant is to pay the costs of opposition in this Court, on both the application and the appeal.

The Order of the Court *a quo* is set aside and the matter is remitted for further hearing and a fresh order, if justified, in the light of this judgment.

Cronje, President: I concur.

Bowen, Permanent Member: I concur.

For Appellant: Henry Helman, Johannesburg.

For Respondent: Miss Finca of G. M. Pitje, Johannesburg.

IN THE CENTRAL BANTU APPEAL COURT

CASE 24 OF 1971

RAMOKHOASE versus RAMOKHOASE

JOHANNESBURG: 28 October and 2 December 1971. Before Cronje, President and Thorpe and Bowen, Permanent Members.

MINOR

Guardianship—Rights of widow of a civil marriage.

PRACTICE AND PROCEDURE

Application for an order to hand over children—Jurisdiction of a Bantu Affairs Commissioner's Court.

Summary: The Appellant applied to the Court of the Bantu Affairs Commissioner, Koppies, for an order on the Respondent, her father-in-law, to hand over to her certain four children, being her children by her late husband, to whom she had been married by civil rites, alternatively that the messenger be authorised to seize the said children and to hand them to the Appellant. The children lived with the Respondent in the District of Koppies and were apparently being well cared for by him. The Respondent dit not oppose the making of an order to hand over the children, but stated that they had been placed in his care by the Appellant's husband with her consent. The Complainant was in possession of a medical certificate that she had received treatment at Sterkfontein Hospital, but was now fit to look after her children. The Commissioner refused to hear the application on the grounds that he had no jurisdiction to make an order for the seizure of children and that the matter should be referred to a Children's Court. On appeal—

Held: That the Court *a quo* had jurisdiction to hear the matter and that the possibility that the making of an order in terms of the alternative prayer may be beyond its jurisdiction did not preclude that Court from making an order in terms of the main prayer.

Held, further: That the Appellant was *dominus litis* and could therefore bring her action in any Court of competent jurisdiction and that the opinion of the Commissioner that another Court would be a more suitable forum was irrelevant.

Held, further: That, after the death of the male spouse of a civil marriage, the custody, control and education of her children belong to the mother unless a Court sees fit to direct otherwise.

Held, further: That an order should be granted that the Respondent hand over the children to the Appellant forthwith.

Appeal from the Court of the Bantu Affairs Commissioner, Koppies.

Thorpe, Permanent Member:

The appeal was noted late and the initial explanation furnished was not satisfactory. However, on receipt of further affidavits this Court decided that in all the circumstances, and particularly because the order made by the Court *a quo* was patently incorrect, the lateness of the noting should be condoned.

This matter had its origin in the Court of the Bantu Affairs Commissioner, Koppies, in which Court the Appellant brought an application that her father-in-law, Respondent, should be ordered to hand over to her certain four children, being her children by her late husband who had died on the 25th February 1967, alternatively that the messenger be authorised to seize the said children and to hand them to the applicant, with costs.

The children are Jemina (born 2 December 1953), Molefe (born 14 April 1957), Thete (born 15 August 1959) and Senele (born 28 April 1963) It is common cause that the Appellant married Peter Ramokhoase, the father of the four children in Johannesburg by civil rites on 4 April 1953, that the said Peter Ramokhoase died on 25 February 1967, that the Respondent lives in the District of Koppies and that the children are with him. It is also common cause that the Appellant and the Respondent are Bantu.

It appears from a photostat copy of a certificate furnished by Dr G. Fernstea, Sterkfontein Hospital, Krugersdorp and dated 29 August 1969, that the Applicant was a patient in this hospital from 20 February 1967, until discharged as fit on 13 September 1967. In the certificate the doctor also mentions that he had seen her again on 29 August 1969, and that she remains well and is fully capable of caring for herself and the children. The Appellant stated in her affidavit that at the time of the death of her husband she was at Sterkfontein hospital, that on her discharge from the said hospital she returned to Johannesburg and did not find her children at her home. Her affidavit continues as follows:

"I went to the office of the Bantu Affairs Commissioner, Johannesburg, where a report was made to me. In consequence of the said report I went to Koppies on the 31st December 1967, to fetch my children from the Respondent. I saw the children who were in his possession. The Respondent refused to hand them to me. I returned to Johannesburg and made a report to the Bantu Affairs Commissioner. The Bantu Affairs Commissioner asked me to obtain a certificate from the hospital where I had been at the time of my husband's death."

This is the medical certificate already referred to.

In his affidavit the Respondent admitted that the Appellant had called on him after her discharge from hospital, but he denied that the Appellant on that occasion or on any other occasion asked for her children. The Respondent also denied having received any communication from Appellant's attorney concerning custody of the children.

The Respondent stated that before his death his son Peter Ramokhoase and the Appellant visited him on a farm at which he stayed, presumably at Koppies, and that his son with the co-operation and consent of the Appellant handed the children over to him with the request that he look after them. The Respondent further stated that the first three children were handed over to him on one occasion, while the youngest was handed over to him about two years before his son's death. The Respondent went on to say in his affidavit that at the time of his son's death there was nobody to care for the children and that he tacitly accepted that his care of the children meets with the approval of the Appellant. The Respondent concluded his affidavit with the statement that he is quite prepared to hand over the children to the Appellant, but he is not prepared to pay the costs of her application to court, as he had received no prior demand. The applicant did not file a replying affidavit.

The matter came before the Court on 10 February 1970, on which date the presiding officer who signed himself as Landdros, postponed the matter "vir kwessie van jurisdiksie in Kinderhof". Nothing further transpired beyond postponements until 16 June 1970, when the presiding officer struck the matter off the roll.

The presiding officer was asked for reasons why the case should not be heard in the civil court and in response to this request he put forward the view that the case should possibly have been brought more properly in the Children's Court since it concerned the seizure and delivery of children. He stated that there was nothing in the Magistrates' Courts Act, 1944, or the Bantu Administration Act, 1927, or the regulations which in any way gave the Court jurisdiction to order the seizure of children. The presiding officer signed his reasons as "Landdros/Bantoesakekommissaris".

An appeal has been noted on a number of grounds but it will be sufficient to mention only the following, namely, that the Court erred in finding that it did not have jurisdiction in respect of the cause of action, that the Court failed to take into account that the Respondent was prepared to hand the children to the Appellant and that he objected only to the payment of costs.

Although the order made by the Bantu Affairs Commissioner reads "Geskrap van rol", it is clear from his reasons that the Commissioner intended thereby to give a final judgment on the question of jurisdiction and the order is consequently appealable.

The first point to consider is that of jurisdiction. That the matter was properly before the Court of the Bantu Affairs Commissioner at Koppies will emerge from what follows.

The question of jurisdiction has to be determined in the light of the statutory provisions concerning such a Court. These provisions are contained in section 10 of the Bantu Administration Act of 1927, as amended, subsection (1) of which provides that Courts of Bantu Affairs Commissioner shall

have jurisdiction in respect of all civil causes and matters between Bantu and Bantu. Certain causes are excluded, namely, matters in which—

(a) the status of a person in respect of mental capacity is sought to be affected;

(b) is sought a decree of perpetual silence,

(c) namptissement is sought;

(d) the validity or interpretation of a will or other testamentary document is in question, unless the value of the property which will be affected by the provisions of such will or document does not exceed three hundred pounds, or unless all persons whose rights may be affected by the decision of the Court submit to its jurisdiction or have had an opportunity to object to its jurisdiction and have failed to do so; or

(e) a decree of nullity, divorce or separation in respect of a marriage is sought.

The present matter is obviously not excluded from the jurisdiction of a Bantu Affairs Commissioner's Court.

Subsection (3) of the same section provides that a Court of the Bantu Affairs Commissioner shall have jurisdiction if the Respondent in the case resides within the area of jurisdiction of the Court. It is common cause that the Respondent resides within the area of jurisdiction of the Court *a quo*.

Subsection (4) of section 10 provides that the Governor-General may make regulations relating *inter alia* to the manner of execution of process of Courts of Bantu Affairs Commissioner. It is true that there is nothing in the regulations under subsection (4), known as the rules of Courts of Bantu Affairs Commissioner, whereby a messenger of the Court is authorised to seize children. However, it is not necessary for the purposes of this judgment to deal further with this point. If the Bantu Affairs Commissioner were correct in holding that he had no jurisdiction to make an order that children be seized by a messenger of Court, this would be no justification for holding that he had no jurisdiction to hear the matter, as the first part of the prayer (that the Respondent should be ordered to hand over the children to the Applicant), could have been made independently of the alternative.

Still on the question of jurisdiction, the Bantu Affairs Commissioner was of the opinion that the case would be more properly brought in a Children's Court. It is not necessary to consider this opinion because even if a Children's Court has jurisdiction to deal with an application by a guardian for delivery of her children, this does not affect the question of the jurisdiction of a Court of Bantu Affairs Commissioner. The Applicant is *Dominus litis*. Consequently she can bring her action in any Court which has jurisdiction, and that Court cannot refuse to hear the case on the grounds that in its opinion another forum would have been more suitable.

The next question to consider is whether the case should be remitted to the Court *a quo* with the direction that it give a decision on the merits. I do not think this is necessary.

There is no material dispute on the papers and there is no opposition to the order; nor is there any necessity for the calling of evidence. In these circumstances this Court is in as good a position as the Court *a quo* to decide the matter on the merits.

The issue is whether the Appellant is entitled to any relief, and, if so, what is the order that should be made. After the death of the male spouse of a civil marriage, the custody, control and education of her children belongs to the mother unless a court sees fit to direct otherwise—see *In re Dolphin* (1894) 15 N.L.R. 343, cited by Lee in "Introduction to Roman-Dutch Law", fourth edition, page 37, note 2. A surviving parent has a natural right to the personal control of a minor child—see Grotius 1.7.8 and 1.9.9, cited with approval by Roper, J. (as he then was) in *Goodrich* versus *Botha and Another*, 1952 (4) S.A. 175, at 180A. See also *Bloem and Another* versus *Vucinovitch*, 1946 A.D. 501.

There is no suggestion in the papers that the Applicant's rights have been diminished by virtue, for example, of anything done under section 5 of the Matrimonial Affairs Act, 1953, nor does there appear to be any reason why a Court should prevent the mother from obtaining personal control of the children. She has been medically certified fit for that task. The children are not presently "in need of care", as defined in section 1 (x) of the Children's Act, 1960. Nor is there any reason to suppose that they will be "in need of care" if taken under the wing of their own mother. The children are apparently well cared for at present by their paternal grandfather, but this is not sufficient reason to refuse to allow their mother to exercise her right to look after them. Unless the children have been given in adoption—which we must assume is not the case, as nothing has been said on this score—the fact, if fact it be, that their mother before their father's death agreed to the grandfather caring for the children does not deprive her of the right at a later stage, when she has become their guardian, of taking them into her physical care and control.

In my view the Appellant was entitled to an order, but as there would appear to be no opposition to the handing over of the children the order should not be made in the form asked for, and it would be sufficient to merely order that the Respondent hand over the children to the Appellant—see *Horsford* versus *De Jager and Another*, 1959 (2) S.A. 152 (N), at 159A.

Mr Helman, who appeared before us on behalf of the Appellant, stated that he did not ask for costs either in this court or in the Court *a quo*.

The appeal is upheld with no order as to costs and the judgment of the court *a quo* is altered to read:

"The Respondent is ordered forthwith to hand over to the Applicant the children Jemina (born 2 December 1953), Molefe (born 14 April 1957), Thete (born 15 August 1959), and Senele (born 28 April 1963). No order as to costs."

Cronje, President: I concur.

Bowen, Permanent Member: I concur.

For Appellant: Mr Henry Helman, Johannesburg.

For Respondent: No appearance.

B.A.C. CASE 37 OF 1970

IN THE SOUTHERN BANTU APPEAL COURT

TEMBA QANA versus ARCHIBALD T. YEKO

KING WILLIAM'S TOWN: 8 March 1971. Before Yates, President, and Messrs Adendorff and Bouchier, Members.

Application for mandament van spolie—legality or otherwise of contract not an issue—non-disclosure of irrelevant facts not a basis for rejection of supporting affidavit.

Summary: Applicant was dispossessed against his will of premises on which he proposed to trade illegally.

Held: That as he was in peaceful and undisturbed possession and was dispossessed against his will he was entitled to re-instatement and whether or not the prior contract by which he obtained possession was legal was not a factor to be considered at that stage.

Held further: That the non-disclosure in the supporting affidavit of facts in regard to the prior contract did not justify its rejection.

Appeal from the Court of the Bantu Affairs Commissioner, Port Elizabeth.

Yates (President) delivering the judgment of the Court:

This is an appeal from a judgment of a Bantu Affairs Commissioner's Court dismissing an application for an *ex parte* order for mandament van spolie. No order was made as to costs. The appeal is brought on the following grounds:

"1. That the decision of the Presiding Officer when he delivered the judgment was against the evidence and the weight of evidence on the following grounds:

(a) That the decision of the Presiding Officer that Respondent should not give evidence first was wrong in that, on the papers before the Court, it was clear that Appellant, as at the issue of the *ex parte* order, was in possession of the premises in question and, in the circumstances, the Respondent is the party who should have discharged the onus.

(b) That the Presiding Officer erred in finding that the agreement between the parties herein were, *ab initio,* illegal, by reason of the fact that—

(i) that Appellant stated in his evidence that Respondent that the latter wrote a letter stating that he referred to the parties' agreement and even suggesting that a kitchen should be built for Appellant's watchman that boys can be engaged to watch the premises;

(ii) that it is clear that, in the letter which was handed by Appellant, there was a valid agreement between the parties herein;

(iii) Respondent is the owner of the premises in question which premises are situate in the Municipal land and, in the premises, only Respondent had the right to give occupation of the premises to Appellant.

(c) That the Presiding Officer failed to take into consideration the two factors to be decided, viz.—

(i) that Appellant was, up to eviction, in peaceful and undisturbed possession of the premises;

(ii) that, on 7 August 1970, he was deprived of his possession forcibly or wrongfully against his consent."

On 14 August 1970, Applicant (now Appellant) applied for a mandament van spolie authorising the Messenger of the Court to take possession of the keys of premises situate at Kwazakele, Port Elizabeth, known as Eluxolweni Trading Store, and to restore to the Applicant's possession and occupation *ante omnia* the said premises including certain goods.

He alleged in his supporting affidavit that on the 1st August he had hired the premises from Respondent, on the 5th he had gone to the local labour bureau and the location superintendent to make the necessary arrangements for him to carry on business in the said premises; he then purchased goods and started trading on 6th idem. On the 7th whilst he was in peaceful and undisturbed possession Respondent had unlawfully and without his consent locked the premises and taken the key away with him.

On the 19th idem an interim order was granted and on the 24th Respondent filed an application to discharge the order. In his affidavit he denied that he had leased the premises to Applicant but averred that he had engaged him as an employee. He also denied that Applicant was ever in possession of or had the use or occupation of the premises and stated that on the 6th he was there merely to clean them out. He admitted that the premises had been locked by an employee, Helen Maqungo, and stated further that no one except himself was allowed to occupy the site or trade on the premises without the authority of the Council; that Applicant did not have such authority and that if the application was granted the Court would be assisting the Applicant to occupy the premises and trade there illegally.

At the hearing the onus was placed on the Applicant to prove possession and illegal dispossession. An appeal was noted against this decision but in view of what follows need not be considered here.

After the close of the case for Applicant the Commissioner came to the conclusion that Respondent had agreed to lease the premises to Applicant who was not licenced as a "General Dealer" nor as an "Independant Contractor" and that both parties had attempted to mislead the authorities. He held further that Respondent did lock the premises without recourse to any legal process. He came to the conclusion, however, that the agreement was illegal and that the Court was bound to take notice of the illegality and refuse to enforce the agreement.

However, he has overlooked the fact that the instant proceedings were not founded on the contract or agreement. Its legality or otherwise is not in question at this stage. All that the Court was asked to decide is—

(1) whether Applicant was in peaceful and undisturbed possession of the premises;

(2) whether Respondent deprived him of the possession forcibly or wrongfully against his consent.

Vide Jones & Buckle. The Civil Practice of the Magistrates' Court in S.A., Sixth Edition at p. 90. Whether or not Applicant's possession is male fide or its legality is in dispute or doubtful is immaterial, vide cases cited at p. 91, Buckle & Jones (*supra*).

In the instant case despite Mr Anderson's argument to the contrary it is clear that on the evidence so far adduced Applicant was in possession of the premises and was dispossessed wrongfully againt his consent.

Mr Anderson referred to the case of Spilg *v.* Walker, 1947 (3) S.A. 495 and contended that Applicant had not disclosed all the facts in regard to the illegality or otherwise of the contract and that in applications of this nature the utmost good faith must be observed and all the relevant facts disclosed. He argued further that had all the facts been disclosed the interim order in the instant case would not have been granted. However, as stated in that case the non-disclosure must be in regard to facts which would or might have influenced the decision. Here the legality or otherwise of the contract is not in question.

The appeal therefore is allowed with costs.

As the judgment was given at the close of Applicant's case and the Respondent has not been heard the judgment of the Court *a quo* is set aside and the case returned for hearing to a conclusion.

Adendorff and Bouchier, Members, concurred.

For Appellant: Mr D. Tshiki.

For Respondent: Mr M. Anderson.

King William's Town, 25 March 1971.