G.P.-S.603—1949-50—500.

DECISIONS

OF THE

NATIVE APPEAL COURT

(North-Eastern Division)

1949

Volume I

Part III

Cases 1—7)

PRINTED IN THE UNION OF SOUTH AFRICA BY THE GOVERNMENT PRINTER, PRETORIA
1949

CASE No. 1 OF 1949.

MUNTUKAHLONYULWA BUTELEZI (Appellant) *v.* WABAYI BUTELEZI (Respondent).

(N.A.C. Case No. 26/2/48.)

VRYHEID: Monday, 3rd January, 1949. Before Cowan, Acting President; Oftebro and Craig, Members of the Court (North-Eastern Division).

Practice and Procedure—Tender—Costs allowed to plaintiff up to time of tender. Native Custom—" Ukungena *union"—Property in house accrues to* ukungena *heir. Heir—Appointment of—to a house.*

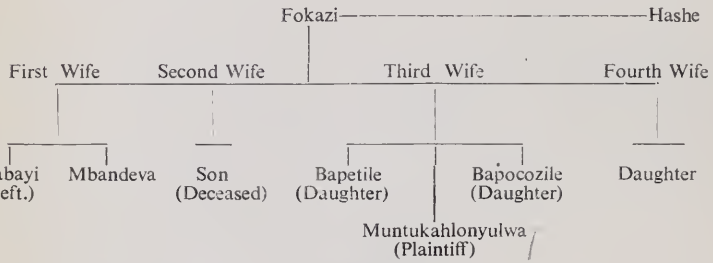
Held: That general heir is obliged to refund to *ukungena* heir such property as he (general heir) had not already legitimately spent in his capacity as interim heir.

Held: Nothwithstanding discrepancies in evidence, plaintiff's story receives its strongest corroboration from the attitude taken up by the defendant in that, although Hashi died in 1939, he made no effort to take charge of the estate but left plaintiff in full enjoyment thereof and permitted him to dispose of the stock as he chose and defendant only claimed after plaintiff instituted his action.

Appeal from the Court of the Native Commissioner, Louwsburg (Ngotshe).

Cowan, Acting President (delivering the judgment of the Court):—

The following tree sets out the relationship of the parties in this case:—



On the death of Fokazi, his third wife entered into an *ukungena* union with his brother, Hashe, and Muntukahlonyulwa (plaintiff) and Bapocozile were the issue of that union. The defendant, Wabayi, is the eldest son of Fokazi's first wife.

In his summons the plaintiff claimed twenty-two head of cattle (or their value, £110), being the lobolo of the two girls, Bapetile and Bapocozile, which he alleges were wrongfully and unlawfully received by the defendant. He also claimed the sum of £20 being the value of his horse which he alleges died as the result of being illegally ridden by the defendant.

The defendant in his plea admitted having received the lobolo of both Bapetile and Bapocozile. He denied that the plaintiff was entitled to the lobolo of Bapetile as she was not the issue of the *ukungena* union and maintained that by agreement with the plaintiff, both he and the plaintiff had each received five head of Bapocozile's lobolo and that the plaintiff had subsequently handed over his five head to the defendant. He tendered the ten head in respect of Bapocozile against payment of his counterclaim.

He admitted having ridden the plaintiff's horse, but denied that such riding was wrongful and unlawful and denied further that the horse died as the result of such riding.

He maintained that he was the heir of the late Hashe and counterclaimed for delivery of 90 head of cattle, being 30 head advanced to the plaintiff by Hashe for lobolo purposes and 60 head which formed portion of Hashe's estate and which were taken possession of by the plaintiff.

The plaintiff pleaded to this claim in reconvention denying that he had taken possession of 60 head of cattle or that he had been advanced 30 head for lobolo purposes. He pleaded that 20 head were gifted to him by Hashe before his death and that Hashe had also gifted to him 11 head for his (plaintiff's) first wife.

On the claim for the girls' lobolo, the Native Commissioner held that as Bapetile was the issue of Fokazi himself, the defendant, as Fokazi's eldest son, was entitled to her lobolo. He, however, awarded the lobolo for Bapocozile to the plaintiff as she was born of the *ukungena* union. In view of the tender made by the defendant, he gave costs against the plaintiff on this claim.

On the second claim he rightly found that there was no evidence to connect the riding of the horse by defendant with its death and he accordingly gave judgment for the plaintiff. This claim was not pressed in this Court.

On the counterclaim, he found that the plaintiff (defendant in reconvention) had failed to establish that he had been appointed Hashe's heir and he therefore gave judgment in this claim for the defendant (plaintiff in reconvention) for 20 head of cattle which he found comprised the assets of Hashe's estate at the time of his death.

An appeal was noted against this judgment on the ground that it is against the weight of evidence and the three following further grounds of appeal were subsequently filed:—

(1) That the Native Commissioner should have found that the appellant (plaintiff) was pointed out to take the Estate of the late Hashe Butelezi.
(2) That in any event, appellant (plaintiff) is entitled to the property of the late Hashe Butelezi.
(3) That the Native Commissioner erred in ordering plaintiff to pay costs up to the date of defendant's tender of ten (10) head of cattle.

In regard to the claim for the lobolo of the girl, Bapetile, the Native Commissioner has overlooked the judgment of this Court in the case of M. Mpungose *v.* M. Mpungose, 1946 N.A.C. (T. & N.), p. 33. It is clear from that judgment that the property in that house accrued to the plaintiff and the defendant is obliged to refund to him such property as he had not already legitimately spent in his capacity as *interim* heir. The record does not disclose when the lobolo was received, i.e., whether before or after the birth of the defendant, nor whether any of it has in fact been expended by the defendant, and this Court had considered returning the case to the lower Court for evidence on these points to be taken. After consulting his client, however, the defendant's Counsel intimated that no good purpose would be served by adopting this course, as the defendant admitted that the cattle were received after the birth of the plaintiff and that he had used them for his own purposes.

The appeal on this claim must therefore succeed.

As regards the claim for the lobolo of Bapocozile, plaintiff's Counsel contended that the plaintiff should have been awarded costs up to the time of the defendant's tender. This was conceded by the latter's Counsel and is indeed the least to which the plaintiff is entitled.

This Court is unable to agree with the Native Commissioner's finding that the plaintiff (defendant in reconvention) failed to establish that he had been appointed Hashe's heir. It is true, as was pointed out by the Native Commissioner and stressed by Counsel for the defendant (plaintiff in reconvention), that there are discrepancies in the evidence of the plaintiff's witnesses regarding the time when the declaration by Hashe is alleged to have been made. The majority of the witnesses, however, stated that the declaration was made in 1933 (the year of Solomon's death) and after this lapse of time, discrepancies are only to be expected. The plaintiff's story, however, receives its strongest corroboration from the attitude taken up by the defendant himself. Hashe died in 1939 leaving a relatively large number of cattle in his estate. It is most significant that the defendant made no effort whatever to take charge of this estate. He left the plaintiff in full enjoyment of it and in fact permitted him to dispose of the stock as he chose. It is only now, when faced by the claim of the plaintiff for the lobolo of the girls, that he lays claim to the estate. The reason he advances for this delay is most unconvincing. He says, "I did not demand the cattle when Hashe died. I claim them to-day because plaintiff started fooling first. Plaintiff is my child. I did not want to worry him."

This Court is forced to the conclusion that a declaration was made by Hashe appointing the plaintiff his heir, that the defendant was aware of it and acquiesced in the position created.

Whether or not Hashe was legally entitled to dispose of his estate in this manner, it is clear that the defendant acquiesced in Hashe's wishes being given effect to and this Court must hold, following the case of M. Ndabazita *v.* S. Ndabazita, 1924 N.H.C. 33, that he is estopped from contesting the validity of the declaration. On this claim the appeal succeeds as well.

The Native Commissioner's judgment is altered to read:—

"*On the claim in convention.*—For plaintiff for twenty head of cattle in respect of the lobolos of the girls, Bapetile and Bapocozile, with costs. For defendant with costs in respect of the claim for damages for the death of the horse.

"*On the claim in reconvention.*—For defendant in reconvention, with costs."

The respondent to pay costs of this appeal.

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

For Respondent: Mr. W. E. White, of Messrs. Conradie & White, Vryheid.

Cases referred to:

Mpungose *v.* Mpungose, 1946 N.A.C. (T. & N.) 33.
Ndabazita *v.* Ndabazita, 1924 N.A.C. 33.

CASE No. 2 OF 1949.

ZACHARIAH MADUNA (Applicant/Appellant) *v.* MALAWU GWALA (Respondent).

(N.A.C. Case No. 8/6/48.)

PIETERMARITZBURG: Monday, 17th January, 1949. Before Cowan, Acting President; Israel and Schmidt, Members of the Court (North-Eastern Division).

Practice and Procedure—Default of parties—Rescission of judgment in interpretation of word "party".

Held: Although the Regulations do not interpret the word "party" to include the Attorney appearing for any such party—and in this respect, differ from the Magistrates' Court Rules—nevertheless in terms of Section 16 of Act No. 38 of 1927, Advocates and Attorneys are entitled to appear in Native Commissioners' Courts and this Court must hold that as his Attorney was present, the judgment was not given "in the absence of the party".

Appeal from the Court of the Native Commissioner, Estcourt.

Cowan, Acting President (delivering the judgment of the Court):—

This is an appeal against, and an application for the review of, an order made by the Assistant Native Commissioner of Estcourt.

A summary of the facts as disclosed by the record and the affidavits filed by the parties is as follows:—

At the time and on the date set down for the hearing of his claim, the plaintiff failed to attend, and his Attorney applied for the dismissal of the summons. The summons was dismissed with costs.

Another case, in which the defendant's Attorney was also engaged, was then proceeded with, and when it concluded, the Plaintiff's attorney intimated that the plaintiff had now arrived and asked the Court to rescind its order dismissing the summons and tendered £1 as security for costs. The defendant's Attorney objected to the application being heard and contended that the Court had no authority to deal with the matter as it was *functus officio.* After intimating that he was required in the Magistrate's Court and that he must be excused, he left the Court.

An amount of £2. 10s. was then paid into Court to cover the costs awarded when the summons was dismissed, and the Court then proceeded to hear the application in the presence of the defendant, but not his Attorney.

After hearing the applicant, who stated that his train was late, and his Attorney, who gave corroborating evidence, the Native Commissioner made the following order:—

"Application granted for rescission of judgment. Amount paid into Court to cover costs and security, viz., £3. 10s., to be refunded to Mr. Reitz. Costs to be costs in the cause. In view of the fact that the defendant is not represented, case is postponed to 31.12.48."

The reasons for the appeal, which are contained in a document headed "Notice of Appeal and Review", are as follows:—

1. That the Native Commissioner was *ex functus* when he heard the application of the plaintiff.
2. That he has no power to set aside a dismissal of a summons such not being a "judgment", nor to cancel his order as to costs.
3. That he has in any event no power to hear a verbal application without summons, a gross irregularity.
   notice and the whole proceeding constituted, after dismissal of the
4. That as far as the proceedings are concerned, the affidavit of Attorney J. C. van Rensburg is annexed and will be relied upon in argument.
5. That the appellant prays that the appeal be allowed upon points of law and the review be heard upon grounds of irregularity.

In this Court, however, appellant's Counsel made it clear that the appeal was based on three grounds, viz.:—

(1) That the order made was not in effect a "judgment" and that the Native Commissioner had therefore no authority to set it aside.

(2) That even if the order was a "judgment" it was not granted in the absence of the plaintiff and could therefore not be rescinded by the Native Commissioner in terms of Rule 30 of the Native Commissioners' Courts' Rules.

(3) That the application should not have been heard without formal notice.

Now the order "Summons dismissed with costs" is clearly a judgment which a Native Commissioner's Court is in certain circumstances entitled to give. In the opinion of this Court the first ground of appeal is entirely without substance and it must fail.

As regards the second ground of appeal, Rule 30 (1) provides that the Court may rescind or vary any judgment granted by it *in the absence of the party against whom it was given*. Now although he himself was not present, the plaintiff was represented in Court by his Attorney and, according to his affidavit, it was the plaintiff's own Attorney who asked the Court to dismiss the summons.

Although the Regulations do not interpret the word "party" to include the Attorney appearing for any such party—and in this respect, differ from the Magistrates' Court Rules—nevertheless in terms of Section 16 of Act No. 38 of 1927, Advocates and Attorneys are entitled to appear in Native Commissioners' Courts and this Court must hold that as his Attorney was present, the judgment was not given "in the absence of the party".

It follows that the Native Commissioner was in error in purporting to rescind the judgment under Rule 30 (1).

On this ground the appeal must succeed, and it is unnecessary to consider the third ground of appeal.

The appeal will accordingly be allowed with costs and the judgment of the Native Commissioner will be altered to read: "Application for rescission of judgment dismissed with costs."

For Appellant: Mr. J. C. van Rensburg, of Messrs. Hellet & De Waal, Estcourt.

For Respondent: In default.

Statutes, Proclamations, etc., referred to:

Act No. 38 of 1927, Section 16.

Government Notice No. 2253 of 1928, Section 30 (1).

CASE No. 3 OF 1949.

BANTUBANJANI SITOLE AND OTHERS (Appellants) *v.* **SIBARA NGIDI (Respondent).**

(N.A.C. Case No. 22/6/48.)

PIETERMARITZBURG: Monday, 17th January, 1949. Before Cowan, Acting President; Israel and Schmidt, Members of the Court (North-Eastern Division).

Delicts—Damages for assault with fatal results—Proof of damages for dependents.

Held: That in cases of assault with fatal results, the following, amongst others, be proved: age of deceased for estimation of his expectation of life or for length of time deceased would probably continue employment; the age of widow(s) and possibility of remarriage; of any sources of other income, e.g., cattle owned and lands.

Appeal from the Court of the Native Commissioner, Msinga.

Cowan, Acting President (delivering the judgment of the Court):—

This is an application for condonation of the late noting of an appeal against a judgment of the Native Commissioner of Msinga delivered on 6th June, 1948. The appeal was noted on the 15th September, 1948. The excuse given for the delay—lack of funds—is neither convincing nor sufficient, and on this ground the application would fail.

Following its usual practice this Court, nevertheless, heard argument to ascertain whether there was any other just cause *ex facie* the record for granting the indulgence sought.

The claim is one by the guardian of the dependents of the late Mlondeni Ngidi for £200 damages in respect of his death.

The Native Commissioner found the following facts proved:—

(1) That the 15 defendants did take part in a faction fight in September, 1947.

(2) That Mlondeni Ngidi who formed part of the opposing faction was killed in that fight by defendants' faction.

(3) That both factions received six months' imprisonment for the faction fight.

(4) That Mlondeni Ngidi has two wives and three minor children, and that he was their sole supporter.

He gave judgment in the plaintiff's favour for £200 against the defendants jointly and severally.

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

(1) That the judgment is against the weight of evidence.

(2) That the Native Commissioner erred in accepting that plaintiff was the legal guardian of the family of the late Mlondeni Ngidi.

(3) That there was no proof that defendants were responsible for the death of plaintiff's son, Mlondeni.

(4) That in any event the award of the Native Commissioner is excessive under the circumstances.

There was sufficient evidence on the record to justify the Native Commissioner in arriving at his first three findings and Grounds Nos. 1 and 3 of the appeal must fail. Ground No. 2 was not relied upon by the appellants' Counsel and indeed there is no substance in it.

The only evidence regarding the loss suffered by Mlondeni's dependents through his death is that given by their guardian. It is as follows: "Mlondeni had two wives and three children. Maponjwana is the eldest, a female aged about ten years (under) Dumeleni comes after the first about two years younger a girl Mzonjani a boy at about two years old. Mlondeni was the sole supporter of those dependents. Since his death they have been deprived of this support. I am too old to work for them. I have another son with his own family. Mlondeni was a worker and before his death he was working at the General Hospital, Johannesburg, where he earned £7 a month. He habitually worked in Johannesburg for periods of a year at a time and only came back for six months at a time. I looked after his family. He used to send me money—the money for his dependents. He used to send £12 each two months. His family relied on this money."

Can it be said on this evidence that the plaintiff has succeeded in establishing that calculable pecuniary loss in an amount of £200 has actually been sustained by the deceased's dependents?

There is no indication of the deceased's age and it is therefore impossible to even estimate his expectation of life or the length of time he would probably continue in employment. The ages of his widows are not given, nor is the possibility of their remarriage referred to: Nor is this Court prepared to accept the bald uncorroborated statement of the witness that the deceased earned £7 a month and remitted £12 home every other month for the support of his family. The family is resident in a rural Native reserve and the probabilities are that it possesses both fields and cattle, but the record is silent on this point. If this is

indeed the case, the claim that the deceased contributed £6 a month to their support is extremely improbable. As the defendants were not represented in the Court below, the Native Commissioner should have endeavoured, by examining the witness, to establish to what extent his widows and children were in fact dependent on him.

On the evidence as it stands, this Court must hold that the plaintiff has failed to establish what loss, if any, was suffered by the deceased's dependents and in view of this the Native Commissioner should have entered an absolution judgment.

In the Court below the Plaintiff's attorney addressed the Court on the question as to whether a right of action lay with the dependents of a person killed in the circumstances disclosed in this case, and the Native Commissioner found in his reasons for judgment that such a right of action did lie. In view of this and as the defendants were not represented in the lower Court, this Court permitted argument on this point, although it did not form one of the grounds of appeal.

As on the facts it has found that the plaintiff has failed to prove his case, this Court is relieved of the necessity of giving a decision on this question.

The delay in noting the appeal is condoned; the appeal is allowed with costs, and the judgment of the Native Commissioner altered to one of absolution from the instance with costs.

For Appellant: Adv. James, instructed by Messrs. Bennett & Myburgh, Vryheid.

For Respondent: Adv Seymour, instructed by Messrs. Nel & Stevens, Greytown.

CASE No. 4 OF 1949.

MDHLUDHLO MCUNU (Appellant) *v.* **IZIAH NGUBANE (Respondent).**

(N.A.C. Case No. 34/7/48.)

PIETERMARITZBURG: Tuesday, 18th January, 1949. Before Cowan, Acting President, Israel and Schmidt, Members of the Court (North-Eastern Division).

Practice and Procedure—Native Chiefs' and Native Commissioners' Courts summons —Amendment of summons in Native Commissioner's Court by substitution of the names of the parties to reflect true position of parties in Chief's Court.

Held: It is not an uncommon practice in Native Chiefs' Courts for a father to sue in his own name on behalf of his minor son, as ordinary Natives do not understand the difference between minors duly assisted, and the father or guardian being cited as a party.

Held further: The amendments made in this case were essential in order to reflect the true position as it was before the Chief when he heard the case, and to bring the proceedings in the Native Commissioner's Court in line with the proceedings as they appeared in the Chief's Court. Interests of justice were not prejudiced in any way by these amendments.

Appeal from the Court of the Native Commissioner, Bulwer.

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

This is an appeal against the decision of the Native Commissioner, Bulwer, in an action for damages for assault, wherein Iziah Ngubane was cited as plaintiff and Mdhludhlo and others as defendants, and wherein, on application by plaintiff's Counsel, the Native Commissioner, in terms of Rule 27, and before taking any evidence, allowed the Notice of Appeal to be amended as follows:—

(1) By the substitution of the plaintiff's name, Isiah Ngubane, by that of "Esau Ngubane, duly assisted by Iziah Ngubane".

(2) By the deletion of the names of the 1st, 2nd, 4th, 5th and 6th defendants, leaving the 3rd defendant, Norman Ngcobo, as the sole defendant, duly assisted by his guardian, Allison Ngcobo.

(3) By altering the amount of the claim and judgment to £5 (instead of £15).

This application was opposed by defendant's Counsel on the grounds that the identity of the parties and the amount of the claim could not be altered at that stage, and that the amendment, if allowed, would create a new action, and that the appeal was out of order, and that the Court should refuse to hear it because the summons was grossly irregular and prejudicial to defendants.

It would seem that in the Chief's Court the plaintiff had instituted his claim against the six defendants mentioned, but as two of them were not accompanied by their respective guardians, and as these guardians themselves were cited amongst the defendants, but were in default, the Chief proceeded to hear the case against the only defendant left, namely, Norman Ngcobo, and gave judgment against him for £5, which is the judgment the latter then appealed against to the Native Commissioner. It will be observed that Norman Ngcobo was cited as being duly assisted by Allison Ngcobo, who, in addition, was also cited as the 4th defendant, but on application of plaintiff's Counsel, his (Allison Ngcobo's) name was deleted as such, so that by the time this case was ready to be dealt with by the Native Commissioner on its merits, the position was as follows:—

Plaintiff: Esau Ngcobo, duly assisted by Iziah Ngcobo.

Defendant: Norman Ngcobo, duly assisted by Allison Ngcobo.

Claim before the Chief: £5 for damages for assault.

Chief's judgment: For plaintiff for £5 and costs.

As regards the amendment of plaintiff's name, it is not an uncommon practice in Native Courts for a father to sue in his own name on behalf of his minor son. This procedure cannot be regarded as being out of place in a Native's mind, and as pointed out by the Native Commissioner, the ordinary Native does not understand the difference between minors being duly assisted and the father or guardian being cited as a party. In dealing with this point, the Native Commissioner has referred to the case of Butelezi *v.* Tshabalala, N.A.C. (N. & T.), 1942, p. 41, which allowed a somewhat similar amendment and laid down that judicial officers should hear cases on their merits, avoiding technicalities, etc., where this can be done without prejudice.

Under Rule 27 the Native Commissioner may at any stage of the proceedings, postpone the hearing or amend any claim, application or counterclaim or reply which is vague, embarrassing or inconsistent with the evidence adduced or other reasons appearing to the Court to be sufficient, provided that the interests of justice are not prejudiced thereby.

It is felt that the amendments made in this case were essential in order to reflect the true position as it was before the Chief when he heard his case, and to bring the proceedings in the Native Commissioner's Court in line with the proceedings as they appeared in the Chief's Court. This is necessary in order to avoid complication during the hearing.

I fail to see that the interests of justice were in any way prejudiced by these amendments. This case had been heard by the Chief, and the defendant knew what case he had to answer.

It is ordered that the appeal be, and the same is, hereby dismissed with costs.

For Appellant: Adv. J. D. Stalker, instructed by Mr. H. Bulcock, of Bulwer.

For Respondent: Adv. J. H. Niehaus, instructed by Messrs. C. C. C. Raulstone & Co., Pietermaritzburg.

Cases referred to:

Butelezi *v.* Tshabalala, N.A.C. (T. & N.) 1942, p. 41.

Statutes, Proclamations, etc., referred to:

Rule 27, Government Notice No. 2253 of 1928.

CASE No. 5 OF 1949.

ENOCK GWAMANDA (Appellant) *v.* **NSIZWANA NDIMANDE (Respondent).**

(N.A.C. Case No. 21/5/48.)

DURBAN: Wednesday, 2nd February, 1949. Before Cowan, Acting President; De Vries and Hassard, Members of the Court (North-Eastern Division).

Practice and Procedure—Rixa *cannot for first time be taken in Appeal Court.*

Defamation—Words "Pour medicine into this beer so that I can drink and die as you hate me so" only amounted to unmeant invitation or challenge.

Held: Rixa should be specially pleaded in Court below.

Held further: The evidence suggests ill-feeling between the parties and that on the occasion considerable drinking had been indulged in by both, that they were probably " in their cups " when the exchange of words took place and that the words as used by defendant amounted in practically his own words to nothing more than an irresponsible utterance containing an unmeant invitation or challenge that " if you hate me so, why don't you put medicine (poison) into my beer so that I can drink it and die? "

Appeal from the Court of the Native Commissioner, Mapumulo.

De Vries, Member of Court (delivering the judgment of the Court):—

In this action plaintiff is suing the defendant for the sum of £20 as damages for alleged defamation of character arising. from the words " Pour medicine so that I can drink and die " alleged to have been uttered by defendant towards plaintiff in the presence and hearing of others at a beer drink at the kraal of one Mango Sibisi during October, 1947.

In his plea defendant denies that the words were used, contends that in any event they were not defamatory and that plaintiff suffered no damage. It is difficult to appreciate why defendant should deny in his plea having used the words complained of, when in his evidence-in-chief he openly states that he said to plaintiff: " Very well, pour medicine into this beer, so that I can drink it and die, as you hate me so."

It is common cause that the offending words or words to that effect were uttered by defendant in the presence and hearing of a number of other men and it thus only remains to find whether a defamatory meaning could and was placed on them so as to defame the plaintiff.

The Native Commissioner found *inter alia* that the said words were not defamatory *per se* and were not understood to be so by those who heard them, that they were abusive and uttered in *rixa* and that on these grounds the action had to fail.

Appellant's Counsel conceded at the outset that the words were not defamatory *per se,* but argued that they contained a defamatory innuendo that plaintiff possessed, in fact had with him there, poison or something, which he could put into the defendant's beer pot and which would cause him to die if he were to drink it and that plaintiff was the type of person who was likely to do such a thing.

The point was rightly taken that to avail as a reason for judgment *rixa* should have been specially pleaded in the Court below. He referred to a number of authorities distinguishing abuse from defamation, but contended that here the words as used went further than mere abuse and amounted to actual defamation in that to a Native's mind they would impute evil to plaintiff and convey that he was an " Mtakati ".

The evidence suggests ill-feeling between the parties and that on the occasion considerable drinking had been indulged in by both, that they were probably " in their cups " when the exchange of words took place and that the words as used by defendant amounted in practically his own words to nothing more than an irresponsible utterance containing an unmeant invitation or challenge that " if you hate me so, why don't you put medicine (poison) into my beer so that I can drink it and die? "

For these reasons the Court cannot agree with the learned Counsel for appellant that the said utterance conveyed any suggestion that appellant was an " Mtakati " or evildoer.

The appeal is accordingly dismissed with costs.

For Appellant: Adv. B. D. Burne, instructed by Messrs. Stewart, Smith & Howard.

Respondent: In default.

CASE No. 6 OF 1949.

LYNTJIES NKAMBULA (Appellant) *v.* GODFREY LINDA (Respondent).

(N.A.C. Case No. 76/1/48.)

PRETORIA: Monday, 7th March, 1949. Before Ramsay, Acting President, Holtzhausen and Bourquin, Members of the Court (North-Eastern Division).

Law of persons—Husband and wife—Man contracted Native customary union with one woman and subsequently a civil marriage with another woman.

Native Law and Custom—Desertion—Return of lobolo.

Held: Common Law marriage does not terminate prior customary union with another woman or justify latter's desertion on ground that civil marriage permits of only one wife. *Bonos mores.* Conflict of Common and Native Law. Material rights of wife by customary union.

Appeal from the Court of the Native Commissioner, Ermelo.

Ramsay, Acting President (delivering the judgment of the Court):—

In this case defendant's daughter, Lena, entered into a customary union with plaintiff, lobolo being paid.

Subsequently plaintiff contracted a civil marriage with another woman. A year after the civil marriage Lena deserted her husband who claims her return or, failing that, the return of the lobolo paid for her.

Defendant admits that his daughter has left the plaintiff, but pleads that her action was justified because plaintiff has married another woman under the Common Law.

The Native Commissioner gave judgment for plaintiff as prayed.

Defendant now appeals against this judgment.

Counsel for appellant (defendant) very ably pleaded that Lena was entitled to leave her husband when he married another woman under Common Law.

He argued that respondent, by contracting a civil marriage, had abandoned Native Law in this respect and so lost his rights in Lena, who, by such subsequent marriage, was placed in the position of leading an adulterous life with her Native-custom husband. The civil marriage wife could at any time sue her husband for divorce on the ground that he was living in adultery with Lena. The whole position was *contra bonos mores.* Lena was being forced into the impossible position of being a possible co-respondent as the civil marriage implies exclusive cohabitation between one man and one woman. She was also placed in an untenable position as, despite the fact that by Native Law, she was the Great Wife, the second woman, by virtue of the civil marriage, had greater rights than she. The Court's order that she return to this adulterous union was immoral and cannot stand.

If the position of Lena is untenable, so is that of her father, the appellant. As Lena was justified in refusing to live under the conditions described, so her father could not be ordered to return the lobolo as Lena had done no wrong in leaving the respondent. Thus argued Counsel for the appellant.

There are no children of the union between Lena and the respondent.

This case is an interesting example of a conflict between Common and Native Law.

Statute Law does not forbid the marriage of a man by civil rights while a Native Custom marriage exists between him and another woman. Section 22 (1) of Act No. 38 of 1927 states: "No male Native shall, during the subsistence of any customary union between him and any woman, contract a marriage, with any other woman, *unless* he has first declared upon oath . . . the name of such first-mentioned woman . . ." Sub-section (7) reads: "No marriage contracted after the commencement of this Act during the subsistence of any customary union between the husband and any woman other than the wife shall in any way affect the material rights of any partner of such union or any issue thereof . . ."

It is argued that the word "material" used in the foregoing paragraph refers only to property or inheritance rights, but, under Native Law, a wife can own no property, so the word cannot be construed in this restricted sense. The *Concise Oxford Dictionary* defines "material" as "concerned with the matter, not the form,

of reasoning; . . . unspiritual; concerned with bodily comfort; important; essential; . . ." There is no mention of its referring to property or worldly goods. In the absence of any specific meaning assigned to the word, this Court must be bound by the ordinary accepted meaning thereof.

Her material rights include her right of cohabitation with her husband and her right to live with and be supported by him.

Section 11 of Act No. 38 of 1927 gives discretion to Native Commissioners' Courts to apply Common or Native Law to suits between Native and Native, and contains the proviso that it shall not be lawful for any court to declare that the custom of lobolo . . . is repugnant to the principles of public policy or natural justice—in other words, *bonos mores*.

To apply these points to the present case: Lena married respondent by lobolo (Native) custom, which recognises the right of her husband to contract marriage unions with other women. The fact that he married another woman subsequently under Common Law does not in any way affect Lena's rights or privileges which are specially protected as stated above.

Being a tribally minded individual (*vide* her marriage by Native Custom) it cannot matter to her morally under what conditions her husband contracted the second marriage—he has merely acquired a second wife. Such second marriage cannot affect her in the least merely because it was not a customary union.

If Lena was legally and morally living and cohabiting with her husband prior to his second marriage, such mode of living cannot suddenly become immoral through no action of hers, and merely because of a state of affairs over which she had no control.

Of course, Lena, as an adult human being, entitled to the rights of any individual, is at liberty to refuse to live under such conditions and to leave her husband, but then Native Custom must inexorably operate; her guardian must return the lobolo paid for her. The number of cattle paid as lobolo is not challenged.

The appeal is dismissed, but the judgment of the Court below is corrected to read: "The defendant is ordered to return his daughter, Lena, to the plaintiff within one month, failing which he must refund the ten head of cattle paid as lobolo, or their value, £30, with costs. Failing return of Lena to her husband as ordered, the customary union is dissolved."

In view of this appeal, the one month mentioned will date from to-day.

I. C. H. O. Holtzhausen (Member): I concur with the remarks made by the Acting President.

A Native customary union is dissolved by the return of the "lobolo" or "bogadi".

In this case it would appear that Lena lived with respondent for about a year subsequent to his marriage with another woman by civil rites, it must therefore be presumed that her moral susceptibilities were in no way affected. She is still the customary wife of defendant, and any children she may have with another man will be the children of defendant and have his "Isibongo" (surname). Respondent would be able to sue such a man for damages for adultery, until such time as the customary union is dissolved by the return of the lobolo.

C. T. Bourquin (Member): I concur.

For Appellant: Adv. J. F. Marais, instructed by Messrs. Roux & Jacobsz, Pretoria.

For Respondent: Mr. S. P. de Villiers, Ermelo.

Statutes, Ordinances, etc., referred to:

Act No. 38 of 1927, Sections 11 and 22 (1).

CASE No. 7 OF 1949.

HEZEKIAH SIBIYA (Appellant) *v.* LEUCHARS SIBIYA (Respondent).

(N.A.C. Case No. 21/4/48.)

DURBAN: Tuesday, 1st February, 1949. Before Cowan, Acting President, De Vries and Hassard, Members of the Court (North-Eastern Division).

Ownership—Native widow—Acquisition of ownership prior to commencement of Act No. 38 of 1927.

Held: That where a marriage was contracted in Natal prior to the Native Administration Act, 1927, it is immaterial whether the union was a customary one or a marriage by Christian rites, as the property rights of the spouses are in either case governed by Native Law and that a Native widow can acquire property only for her house, unless emancipated under Section 28 of the Code of Native Law, 1932, and that she could dispose of such property only with the consent of the heir to her late husband.

Appeal from the Court of the Native Commissioner, Mapumulo.

Cowan, Acting President (delivering the judgment of the Court):—

The plaintiff in this case is the eldest son of the late Joseph Sibiya. The defendant is his younger brother.

The claim is one for eight head of cattle, or their value, which the plaintiff alleges are the progeny of a beast left by Joseph at his death and which he claimed were either in the wrongful possession of the defendant or had been fraudulently parted with by him with notice of the plaintiff's claim.

The defendant's plea which was given verbally in Court was a denial that he had any cattle belonging to the plaintiff. This was not a complete answer to the plaintiff's claim and a fuller reply should have been elicited from him by the Native Commissioner.

It appears from the evidence of the plaintiff that an uncle of the parties, Jafet, had certain cattle belonging to them registered in his name and when he applied for an old age pension these cattle were transferred to the name of the plaintiff. A dispute subsequently arose as to the ownership of eight of these cattle and the Native Commissioner (not the judicial officer in this case) before whom the matter came in his administrative capacity ordered that they should be transferred to the defendant and this the plaintiff did.

The record also discloses that at the time of his father's death in 1932 the plaintiff had established his own kraal away from that of his father and that the defendant is living at the latter's kraal with their widowed mother, Laura.

The plaintiff's evidence was to the effect that the eight cattle in dispute were the progeny of a red cow which was left by his father at his death and to which he claimed to succeed as the heir. The mother of the parties gave evidence for the defendant. She denied that the animals were the offspring of the red cow and maintained that they were the progeny of a cow which had been paid to her for her services to a certain firm.

The Native Commissioner found as proved facts—

(1) that the ancestor of the beasts in dispute was acquired by defendant from his mother;

(2) that his mother acquired the beast out of her own earnings after the death of her husband;

(3) that she is an inmate of the defendant's kraal and that, *a fortiori,* defendant is her kraalhead.

It appears from his reasons for judgment that in finding Fact (2) proved, the Native Commissioner was largely influenced by the fact that the record of a previous case disclosed that the plaintiff had then claimed that the ancestor of the animals had been gifted to him by his father. The record of that case was not put in by either party and the Native Commissioner was therefore not entitled to refer to it.

Notwithstanding these findings, however, he gave an absolution judgment and stated that he did so for the reason that neither party had brought the best evidence available regarding the origin of the animals. It is difficult to reconcile this judgment with the Facts (1) and (2) found proved.

An appeal against this judgment was noted on the following grounds:—

(1) That the judgment is against the evidence and weight of evidence.

(2) That the learned Native Commissioner erred in holding that the appellant had failed to establish his cause of action by good and sufficient evidence.

(3) That the Native Commissioner erred in holding that the appellant's evidence required corroboration.

(4) That the learned Native Commissioner erred in holding that the witness Laura, the mother of the parties, could acquire ownership in cattle purchased by her out of her earnings.

(5) That inasmuch as appellant is in law custodian and owner of such cattle, the defence raised by respondent, to wit, that the ancestor of the cattle in dispute had been purchased by the witness Laura out of her earnings, is not a defence valid in law.

(6) That inasmuch as appellant satisfactorily established his claim and the respondent failed to raise any defence valid in law, the learned Native Commissioner should have found for appellant.

This Court is not prepared to say that the plaintiff has satisfactorily established that the original beast formed portion of the estate of his late father at his death and on Grounds Nos. 1, 2 and 3 the appeal must fail.

The remaining grounds may be conveniently dealt with together.

The record does not disclose whether the union of Joseph and his wife was a customary union or a marriage by Christian rites. It is clear, however, that this union must have been contracted many years before 1927. In the case of S. Mvelase *v.* T. Mbhele, 1946 N.A.C. (T. & N.), 94, it was held that the provision of Section 11 of Law No. 46 of 1887 were impliedly repealed by Act No. 38 of 1927. The provisions of this section do, however, continue to apply to marriages of Natives contracted prior to the date of coming into operation of the 1927 Act. Whether, therefore, the union was a customary one or a marriage by Christian rites is immaterial as the property rights of the spouses are in either case governed by Native Law.

It is clear from the judgment in the case of N. Masuku *v.* M. Kunene, 1940 N.A.C. (T. & N.) 79, and the authorities cited therein at page 81, that a Native widow can only acquire property for her house and that she can only own property acquired by her in her own name if emancipated under Section 28 of the Code. It was never suggested that Laura had been emancipated and it follows that the beast acquired by her, and its increase, accrued to her house and therefore vested in the plaintiff who is the eldest son in that house. She would have no right to dispose of the animals without the consent of the plaintiff and the mere fact that the defendant has continued to reside at that kraal would certainly not give him the right to them as suggested by the Native Commissioner.

For these reasons the appeal must succeed and it is accordingly allowed with costs, the judgment of the Native Commissioner being altered to read:—

> "For plaintiff as prayed with costs, except that the value placed on the eighth beast is reduced from £3. 10s. to £3."

For Appellant: Adv. B. D. Burne, instructed by A. C. Bestall, of Kranskop.

For Respondent: P. B. Ngcobo.

Statutes, Ordinances, etc., referred to:

Section 11 of Law No. 46 of 1887 (Natal).

Act No. 38 of 1927.

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

Cases applied:

Mvelase *v.* Mbhele, 1946 N.A.C. (T. & N.) 94.

Masuku *v.* Kunene, 1940 (T. & N.) 79.