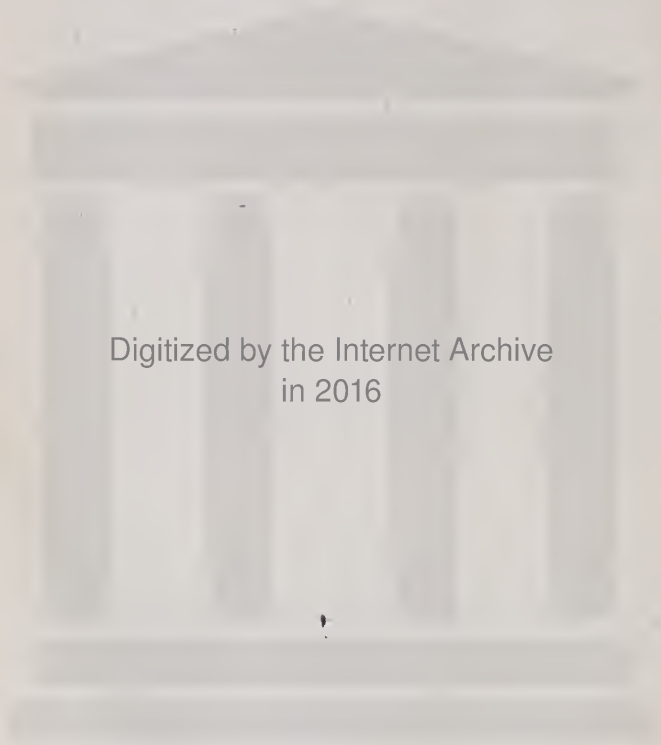

SELECTED DECISIONS

OF THE

NATIVE APPEAL COURT

(North-Eastern Division)

VOLUME I
Part VIII

The Government Printer, Pretoria.

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ERRATA.

SELECTED DECISIONS OF THE NATIVE APPEAL COURT
(North-Eastern Division)

Cover to cases numbered 1 to 16 of 1950 to read--

Volume I
Part VII

instead of

Volume I
Part VI.

ERRATUM.

SELECTED DECISIONS OF THE NATIVE APPEAL COURT (NORTH-EASTERN DIVISION).

Cover to cases numbered 1 to 16 of 1950 to read "Volume I, Part VII" instead of "Volume I, Part VI".

CASE No. 17 OF 1950.

MTAKATI MNGADI & ORS. (Appellants) v. JACOB MKIZE (Respondent).

(N.A.C. CASE No. 36/1/49.)

PIETERMARITZBURG: Wednesday, 18th January, 1950. Before Steenkamp, President, Cowan and Thompson, Members of the Court (North-Eastern Division).

Judgment delivered at Vryheid on 11th April, 1950.

Law of Delicts—Damages for for death caused in a fight.

Practice and Procedure—Request for judgment on hypothetical case.

Held: That this Court cannot lend itself to give decisions on legal issues unless the facts are proved or admitted.

Appeal from Court of the Native Commissioner, Richmond.

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

The plaintiff in his personal capacity and as guardian and supporter of the wife and children of the late Phillip Mkize, is suing the eight Defendants for damages sustained as a result of Phillip's death caused in a fight in which the defendants and the deceased took part.

The Native Commissioner gave judgement in favour of plaintiff for £180 and costs.

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

(1) That the Native Commissioner's judgment was against the law in that the plaintiff failed to discharge the onus of proving that defendants were responsible for the death of plaintiff's son.
(2) That there was no evidence to prove as to how the faction fight strated and as to when the defendants joined in the fight, and as to when deceased lost his life.
(3) That the plaintiff cannot obtain damages through his son's death as the latter was *particeps criminis.*
(4) That the Native Commissioner on the evidence should have granted to defendants a judgement of "absolution from the instance with costs."
(5) That there was no evidence as to who caused the death of his son.

The only evidence led is in connection with the damages suffered and Counsel for appellants and Counsel for respondent have agreed to argue the appeal on the following hypothetical issue:—

> "Assuming that the Defendants on the one side and deceased and his party on the other, gathered together to take part in a premeditated fight, i.e. that there was a challenge to fight and an acceptance of that challenge, may the dependents of the deceased claim damages from the defendants, based on loss of support?"

Numerous cases were quoted by both Counsel in support of a hypothetical case, but neither would agree that the facts in the present case are as stated above. This Court cannot lend itself to give decisions on legal issues unless the facts are proved or admitted. In the present case one or more or all of the defendants might have killed the deceased in self-defence; it might have been deliberate or it might have been accidental without any question of negligence or contributory negligence arising.

Two persons might agree to take part in an unlawful act but it does not follow that because one is killed, the victor is automatically liable to compensate the dependents of the deceased. It depends entirely on the circumstances existing at the time the mortal blow was inflicted, and this can only be established by evidence.

The appeal is allowed with costs and the judgment of the Native Commissioner is set aside and the record returned for the necessary evidence to be led.

Costs in the Court below to be costs in the cause.

For Appellant: Adv. J. D. Stalker (i.b. Messrs. Hershensohnn & Co., Pietermaritzburg).

For Respondent: Adv. Cowley (i.b. Messrs. Cowley & Cowley, Durban).

CASE No. 18 OF 1950.

MANGALISO KUMALO & ORS. (Appellants) v. PITA KUMALO (Respondent).

N.A.C. CASE No. 8/6/49.

PIETERMARITZBURG: Tuesday, 17th January, 1950. Before Steenkamp, President, Cowan and Thompson, Members of the Court (North-Eastern Division).

Judgment delivered at Vryheid on 11th April, 1950.

Law of Partnership—Actions by partner against partnership.

Held: That a partner may not sue the partnership (except for a dissolution thereof) during the subsistence of the partnership for money contributed by him.

Appeal from the Court of the Native Commissioner, Estcourt.

Thompson, member, delivering the judgment of the Court.

In 1946 plaintiff entered into a partnership with the five defendants in a business as bus owners under the name or style of "Kumalo & Co." He contributed various sums of money for the furtherance of the objects of this business. In the present case he sued his partners before the Native Commissioner for—

(*a*) an order directing the defendant to furnish him with an account, debate thereof and judgment for whatever his share in the business might be;

(*b*) judgment for £188. 2s. 8d. which he alleged he had advanced to defendants for the furtherance of the objects of the bus business.

The defendants pleaded that as the partnership was still in existence plaintiff was not entitled to claim any refund of moneys alleged to have been advanced. They admitted a loan to the partnership of £35 but pleaded that he had recouped himself out of takings.

The Native Commissioner gave the following judgment:—

"Absolution from the instance on the first claim.
On the second claim: For plaintiff in the sum of £35.

Costs to be borne by the partnership."

The plaintiff adduced evidence that he had contributed £173. 2s. 8d. altogether, which included the loan of £35.

The defendants led no evidence.

The defendants appealed against that portion of the judgment relating to the £35 and plaintiff cross-appealed in respect of amounts of £16. 2s. 8d., £4 and £6 which he alleged were loans to the partnership.

Cousel for defendants (now appellants) contended that a partner cannot be a party in litigation against the partnership while it still subsisted and that, as they had been absolved from the instance in respect of the first claim, plaintiff could in any case not advance the second claim.

Counsel for the plaintiff (now respondent and cross-appellant) maintained that money lent to the partnership by plaintiff was recoverable from the other partners.

We have consulted the following decided cases:—

Divine Gates & Co. *v.* African Clothing Factory, (1930 C.P.D. 238).
Harvey *v.* de Jongh (1946 T.P.D. 185 and 188).
McLeod & Shearsmith *v.* Shearsmith (1938 T.P.D. 87, 92).

On these authorities it seems clear that a partner cannot be a debtor or creditor of his firm and therefore cannot, during the subsistence of the partnership, sue for the return of moneys contributed by him. In addition we have consulted the case of Pataka *v.* Keefe & Another [1947 (2) S.A.L.R. 962] which is an Appellate Division case where it was not necessary to decide the matter and the question was left open. Tindall. J. A., is reported to have said:—

> "It is not necessary in this appeal to decide whether a partner can in no circumstances sue his partner during the existence of the partnership for re-imbursement of moneys spent by the former for the business of the partnership."

Counsel for plaintiff drew attention to the remarks in Nathan on Partnership—page 93—(2nd Ed. 1938).

The position therefore is that there have been several Provincial Division decisions in which it was held that a partner may not sue his co-partners (except for a dissolution of the partnership) during the subsistence of the partnership, and this Court is bound to follow these decisions.

In the present case it is common cause that the partnership is still in existence and Plaintiff therefore is not entitled to demand a return of any money contributed by him.

In the result his claim fails and the appeal is allowed with costs. The cross-appeal falls away and is dismissed, with costs.

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

> "Absolution from the instance with costs."

Steenkamp (President):

I agree that the appeal should be allowed with costs and that the cross-appeal should be dismissed with costs.

Counsel for plaintiff in his argument has quoted Nathan on Partnership, page 93 (2nd Ed. 1938). The learned author states as follows:—

> "A partner, in his turn, may sue his co-partners for repayment of what he has laid out, from his own funds, on the firm's behalf (Voet 17.1.13). And if he has had to bind himself personally in the firm's interests, the firm must indemnify him. (Poth. C. 7, s. 6). A partner must be indemnified not only for the expenditure and obligations he has incurred for the firm, but also for losses and injuries sustained by him, which were inseparable from his acts on the firm's behalf, provided that such losses are attributable to those acts. The firm is also liable to indemnify a partner for injuries which were the natural consequency of dangers encountered by him when doing the firm's work. But (though the older authorities, e.g. Voet held the contrary view), loss caused to the partner's private affairs by his attending to the firm's business need not be made good by the other partners (Poth., ib.)

"Where a partner has contributed the interests on certain property or the produce of certain goods as his share of the firm's capital, he is a creditor of the firm in respect of the property or goods which have to be restored to him at the termination of the partnership. Such things are not to be credited to his capital account."

I am not prepared to accept the opinion of the author where it differs from decisions of our Courts. It is observed that the author bases his opinion on Voet and Pothier, but our Supreme Courts have consistently held that one partner may not sue another partner during the subsistence of the partnership.

The question was raised in the case of Pataka *v.* Keefe & Another 1947 (2) S.A.L.R. 962, but it was not necessary for the Appellate Division of the Supreme Court to decide whether a partner can, during the existence of a partnership, sue his partner for re-imbursement of money spent by the former for the business of the partnership. Tindall, J. A., is reported to have stated inter alia that this question does not arise here. If it were necessary to decide the question a fuller discussion of the authorities would be required than is to be found in either of the cases quoted before him.

Since then the Transvaal Provincial Division in the case of Ferreira *v.* Fouche 1949 (1) S.A.L.R. 67 decided that it is not competent for one partner to sue the other for payment due to the partnership.

It is true in the present case the plaintiff is suing his co-partners not for money due to the partnership but due to him personally, but the principles are the same, and I am not prepared to give a decision contrary to what has already been decided by our various Supreme Courts. Whether these decisions of the various Provincial Divisions are correct or not can only be decided by the Appellate Division, and so far there has been no case of this nature in which a crisp decision is required.

Cowan (m.): I concur.

For Appellants: Adv. G. Caminsky, instructed by J. M. K. Chadwick, Esq., of Estcourt.

For Respondent: Mr. A. E. de Waal, of Messrs. Hellet & de Waal, of Estcourt.

Decided cases referred to:—

Divine Gates & Co. *v.* African Clothing Factory, 1930, C.P.D. 238.
Harvey *v.* de Jongh, 1946, T.P.D. 185 and 188.
McLeod & Shearsmith *v.* Shearsmith, 1938, T.P.D. 87, 92.
Pataka *v.* Keefe & Anr., 1943 (2) S.A.L.R. 962.
Ferreira *v.* Fouche, 1949 (1) S.A.L.R. 67.

CASE No. 19 OF 1950.

SIMPOFU SIBISI (Appellant) *v.* **DANIEL SIBISI (Respondent).**
(N.A.C. CASE No. 9/50.)

VRYHEID: Wednesday, 12th April, 1950. Before Steenkamp, President, Lawrence and Leibbrandt, Members of the Court (North-Eastern Division).

Native Law and Custom—Lobolo advanced set off.

Held: That, unless there is an express agreement to the contrary, lobolo advanced to a son is only due to be paid on the marriage of the son's eldest daughter: It cannot be set off against cattle of the son which are running at his father's kraal.

Appeal from the Court of the Native Commissioner, Nongoma.

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

The plaintiff sued his father, the defendant, in the Chief's Court for the delivery of 10 head of cattle which he alleges he had bought out of his own earnings and placed them at the Defendant's kraal. Plaintiff moved from defendant's kraal but left the cattle there.

Defendant's reply before the Chief was a denial of liability and he further averred that Plaintiff owes him eleven head of cattle which he had advanced to plaintiff as lobolo for his first wife, Elizabeth.

The Chief gave judgment for defendant with costs. An appeal was noted to the Native Commissioner who dismissed the appeal but altered the Chief's judgment to read as follows:—

(1) Claim in convention: For plaintiff in convention for ten head of cattle.

(2) Claim in reconvention: For plaintiff in recovention (defendant) for eleven head of cattle to be paid out of the lobolo of the first girl born of the marriage between plaintiff and his wife Elizabeth.

It is observed that when the case came before the Native Commissioner, defendant admitted that the ten head of cattle which are at his kraal are the property of plaintiff.

Defendant counter-claimed for eleven head of cattle, being the lobolo he advanced to plaintiff to take his first customary wife.

Plaintiff's reply to the counter-claim is to the effect that his father gifted him nine head of cattle to lobolo his wife, and that it was not a loan.

The Native Commissioner came to the conclusion that the cattle advanced were a loan and not a gift and this is the reason why he altered the Chief's judgment.

The defendant (appellant in this Court) was not satisfied with the Native Commissioner's judgment and he has now attacked it on appeal before this Court.

No grounds of appeal are given, nor are these necessary as the parties were not repersented in the Court below.

The Native Commissioner in preparing his reasons for judgment was faced with the difficulty that he did not know on what grounds the judgment is attacked. It would, however, appear that the only ground manifest is that the loan should have been returned to defendant (i.e. appellant) immediately, and not for the judgment to be suspended until such time as the son's eldest daughter gets married. It therefore boils down to a legal issue, seeing that defendant has admitted that there are ten head of plaintiff's cattle in his possession.

It is clear for Section 92 (1) of the Natal Code that assistance rendered by a kraal-head from kraal property to any son in obtaining a wife, by contributing the whole or portion of the lobolo, is a gift unless it is clearly stipulated to the contrary at the time of the celebration of the union. The evidence as to whether or not it was an advance is rather meagre, but the Native Commissioner has come to the conclusion that it was an advance and not a gift and as the plaintiff has not cross-appealed against this decision, no further mention may be made thereof.

According to sub-section (6) of Section 92, any liability for the refund of the lobolo advanced shall be liquidated from the lobolos of the daughters of the house established by the relative customary union, unless there is an express agreement to the contrary.

The Native Commissioner was evidently satisfied that there was no express agreement to the contrary and therefore the plaintiff is not liable to refund the lobolo until his eldest daughter gets married. The law is definitely against the defendant and he cannot now seek to set off his son's cattle running at his kraal as against a debt which can only accrue when plaintiff's eldest daughter gets married.

One of the essentials of the principle of set-off or *compensatio* is that the debt must be actually due. The cattle payable by the plaintiff are not due to be paid until his daughter gets married and therefore it cannot be said that the debt is actually due as yet.

The appeal is dismissed with costs.

For Appellant: Mr. Conradie of Messrs. Conradie & Wright, Vryheid.

For Respondent: In person.

Statutes, etc., referred to:—

Proclamation No. 168 of 1932, Section 92 (1) and (6).

CASE No. 20 OF 1950.

EZELA MLOTSHWA (Appellant) *v.* ZISHI NDWANDWE (Respondent).

(N.A.C. CASE No. 19/50.)

VRYHEID: Wednesday, 12th April, 1950. Before Steenkamp, President, Lawrence and Leibbrandt, Members of the Court (North-Eastern Division).

Law of persons—Legitimation of children.

Practice and Procedure—Jurisdiction of Native Commissioner's Court regarding above.

Held: That if a party considers he is entitled to the custody of a child, and to reap the benefit of her lobolo, he must establish his claim on principles of Native Law and not attempt to obtain his object by the subterfuge of applying for the child's legitimisation, a procedure wholly unknown to Native Law.

Held: That a legitimisation order is within the competence of a Native Commissioner's Court, and that each case must be decided on its merits. Where the interest of children genuinely require such an order, then it will ordinarily be granted. Where some ulterior motive is behind the application, then it will ordinarily be refused.

Appeal from the Court of the Native Commissioner, Vryheid.

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

In the Native Commissioner's Court the plaintiff (respondent in this Court) claimed from the defendant (appellant) the delivery of two minor children, namely two girls, and in his summons he states that he is the father and lawful guardian of the woman Esipa, the mother of the children.

In his plea the defendant states that at all material times he *bona fide* believed that the marriage between himself and Esipa was valid and he claims as a counter-claim that the Court declares the two children as being legitimate.

Plaintiff filed a rather unintelligible plea to the counter-claim. This plea reads that the defendant took Esipa to wife when he knew there could never be a legal marriage, and in fact he never entered into a *pro forma* marriage or customary union.

The Native Commissioner entered judgment for plaintiff as prayed with costs and refused to order that the children are legitimate. An appeal has now been noted to this court on the following grounds:—

(1) That the learned Native Commissioner erred in holding that he was precluded in law from making an order legitimising the children born out of the association of Esipa Ndwandwe and defendant.

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

This Court will first of all dispose of the question whether there had been a customary union. There can be no doubt that it never was the intention of the parties to enter into a customary union as they both admit that the intention was to be married by

Christian rites. With this in view they went to a parson who was not a marriage officer and he gave them a certificate that the banns had been called in Church. The parties were under the impression that the certificate of banns of marriage was in fact a marriage certificate. It is evident from the record that the particular Church to which the parties belonged looks upon the banns as some sort of a blessing and there can be no doubt that some kind of a religious service was held at the time the certificate of the banns of marriage was handed over to the bridegroom (defendant).

In fact, Esipa in her evidence states: "We got married in Church. We were married by the Reverend Ndwandwe who is also known as Jacob Nxumalo." This alleged marriage took place about 1938. It was only about three years ago that Esipa discovered that there was no legal marriage, because the defendant then wanted to marry another woman. This has caused the breach between the parties who, up to that time, were both under the impression that they were legally married.

There can be no doubt that there was no marriage either by Native custom because the girl did not give her consent as required by the Code for a customary union, or by civil rites according to our common law.

We can only come to the conclusion that the children were not born out of lawful wedlock, but the question is whether they can be declared as being legitimate.

We wish to make it quite clear that the Native Commissioner was mistaken in his view that he was precluded in all circumstances by the decision in Edison Mjwara *v.* Gangalezi Radebe, 1947, N.A.C. (T & N) 110, from granting a legitimisation order.

That decision, as we read it, is based on the view that the primary purpose of a legitimisation order is to benefit the children concerned and that it should not be permissible to any party to invoke the common law for the sole purpose of obtaining, through the children, rights to property which only accrue under Native law and custom.

A decision in a Native Commissioner's Court based solely on common law is clearly competent (Yako v. Beyi, 1948, S.A.L.R. 388) but it must be one or the other, not a hybrid admixture of the two.

If a party considers he is entitled to the custody of a child and to reap the benefit of her lobolo he must establish his claim on principles of Native law and not attempt to obtain his object by the subterfuge of applying for the child's legitimation, a procedure wholly unknown to Native Law.

That, we hold, is the purport of Edison Mjwara's case. Our view then is that a legitimisation order is within the competence of a Native Commissioner's Court and that each case must be decided on its merits. Where the interests of the children genuinely require such an order, then it will ordinarily be granted. Where some ulterior motive is behind the application, then it will ordinarily be refused.

In the present case we are not satisfied on the evidence that the interests of the children will be promoted by legitimation.

The appeal is dismissed with costs, but the Native Commissioner's judgment is altered to read as follows:—

> "Claim in convention: For plaintiff as prayed with costs.
> Claim in reconvention: Absolution from the instance with costs."

For Appellant: Mr. Conradie of Messrs. Conradie & Wright, Vryheid.

For Respondent: Mr. Myburgh of Messrs. Bennett & Myburgh, Vryheid.

Decided cases referred to:—

Edison Mjwara *v.* Gangaleli Radebe, 1947, N.A.C. (T & N) 110.

Yako *v.* Beyi, 1948, S.A.L.R. 388.

CASE No. 21 OF 1950.

MANTIZELA MHLUNGU (Appellant) *v.* VICTOR MHLUNGU (Respondent).

(N.A.C. CASE No. 16/50.)

VRYHEID: Wednesday, 12th April, 1950. Before Steenkamp, President, Lawrence and Leibbrandt, Members of the Court (North Eastern Division).

Native Law and Custom—Lobolo advanced—Whether loan or gift.

Held: That a kraalhead is not permitted to gift *house* property to a son of another house, and even a gift to a younger son in the same house requires clear proof of a public declaration.

Appeal from the Court of the Native Commissioner, Nqutu.

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

The plaintiff (appellant in this Court) sued his brother the defendant (respondent in this court) before the Chief for the refund of four head of cattle which he alleged his late father had advanced to the defendant as lobolo.

Defendant's reply before the Chief was that the cattle were a gift. The Chief entered judgment in favour of defendant with costs, and on appeal to the Native Commissioner this judgment was confirmed. An appeal has now been noted to this Court. The parties were not represented in the Court below, but Counsel for appellant has confined his arguments to the following grounds:—

(1) The Native Commissioner erred in believing witnesses for defence and disbelieving evidence tendered on behalf of Plaintiff.
(2) Native Commissioner overlooked defendant's plea where he admitted that cattle in dispute belonged to Indhlunkulu house and should not have allowed and/or believed evidence tendered by defence in this respect.
(3) Defendant who is responsible for entries (Section 69) cannot shield behind his own mistakes.

Plaintiff is the eldest son in the Indhlunkulu house and therefore the general heir to the late Ndolongwana. Defendant is the eldest son in the fourth house which was affiliated to the Indhlunkulu.

Defendant in his verbal plea before the Native Commissioner admitted firstly that five head of cattle from the Indhlunkulu house were used to lobolo his wife, and secondly that plaintiff is the general heir to their late father's estate.

The real dispute between the parties is whether the five head of cattle taken from the Indhlunkulu house were a gift or a loan. If a gift, then the plaintiff cannot recover, whereas a loan may be recovered, but only on the marriage of defendant's eldest daughter by the wife for which the loan was made.

Counsel for appellant has strongly urged in argument that the cattle advanced to the defendant must be looked upon as a loan, as any other view would be in conflict with the provisions of Section 92 of the Code. It is clear from the reading of this section of the Code that kraal property advanced to a son is a gift unless stipulated to the contrary at the time of the celebration of the union, but if house property is advanced, an obligation rests upon the house so established to make a refund. A kraalhead is not permitted to gift house property to a son of another house, and even a gift to a younger son in the same house requires clear proof of a public declaration [Mtembu *v.* Mtembu, 1943, N.A.C. (T & N) 67].

The conclusion arrived at, is therefore, that, notwithstanding the evidence led on behalf of defendant, the lobolo was a gift, such evidence cannot override the law which definitely does not recognise a gift from one house to another house.

The defendant and his wife are divorced (after five years of married life) and there is evidence that defendant has recovered refund of eight head of cattle from his wife's people. Counsel for plaintiff has advanced the view that the loan is now repayable. No evidence has been adduced as to whether defendant has a daughter by his wife, out of whose dowry the loan is repayable. Plaintiff should have led this evidence and only if the Court finds that there is no daughter, might the maxim *Lex non cogit ad impossibilia* be applicable to a case of this nature. This Court cannot agree with Counsel's contention that it was the duty of defendant to plead that the loan is only repayable when his eldest daughter gets married. The law (*vide* paragraph 6 of Section 92), is clear on this point, and plaintiff should not have taken premature action unless there were exceptional circumstances which he had to allege and prove.

This Court therefore decides that the advance of the lobolo cattle must be looked upon as a loan, and repayable, but the action is premature.

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

> "The appeal from the Chief's Court is allowed with costs and the Chief's judgment altered to read:—
>
> Absolution from the instance with costs."

For Appellant: Mr. du Toit of Messrs. Henwood & Co., Vryheid.

For Respondent: Mr. Turton, instructed by Messrs. Wynne & Wynne, Dundee.

Decided cases referred to:—

Mtembu *v.* Mtembu, 1943, N.A.C. (T & N) 67.

Statutes, etc., referred to:—

Natal Code of Native Law [Proclamation No. 168 of 1932, Section 92 (8)].

CASE No. 22 OF 1950.

MASOTSHA LANGA (Appellant) *v.* BIZENI LANGA (Respondent).

(N.A.C. CASE No. 42/2/49.)

VRYHEID: Wednesday, 12th April, 1950. Before Steenkamp, President, Lawrence and Leibbrandt, Members of the Court (North-Eastern Division).

Native Law and Custom—Customary unions—Change of domicile from Zululand to Natal—Code of Native Law (Natal) 1898—effect on right to nominate chief wife.

Practice and Procedure—A point not canvassed in Court below.

Held: That to call a right to nominate a chief wife (i.e. a right which may or may not be exercised and which had not been exercised at the time of change of domicile), a right relating to property, is an undue and unjustifiable straining of the connotation of that term.

Held: And that for a right of that kind to persist after a change of domicile to a country where that right is not recognised, the right must have advanced beyond a stage of a mere freedom of choice and must already have been exercised, thereby conferring definite and inalienable property rights to one or other of the parties concerned.

Held: That a new point which has not been canvassed in the Court below and which falls outside a set of facts agreed on, cannot be raised for the first time on appeal.

Appeal from the Court of the Native Commissioner, Babanango.

Lawrence, Member (delivering the judgment of the majority of the Court):—

The plaintiff (appellant) is the eldest son of the first wife of the late Mgidhla, and the defendant is the son of this person's fourth wife.

In June, 1949, the plaintiff applied in the Chief's Court for an order declaring that he and not the defendant is the general heir to the estate of the late Mgidhla.

The Chief's judgment was in favour of plaintiff with costs. This judgment was taken on appeal to the Native Commissioner at Babanango. After some evidence had been led the parties agreed to submit what the Native Commissioner calls a "stated case", but what should more correctly be described as a set of agreed facts on which the Court was asked to pronounce judgment.

These facts are as follows:—

(1) Mgidhla was a hereditary Chief and reigned in the Nsuze area of Zululand until Hlube war prior to Boer War.
(2) Whilst in Zululand he married certain of his wives including mothers of plaintiff and defendant.
(3) After Hlube war Mgidhla left Nsuze and took up residence in the Babanango District.
(4) Some time after taking up residence in the Babanango District he became an Induna of Chief Lubuhlungu, who was succeeded by Chief July. This was prior to 1926.
(5) Plaintiff is the eldest son of the first wife and defendant is eldest son of fourth wife. One wife had died when Mgidhla married defendant's mother.
(6) The Langa clan are members of the Zulu Royal family.
(7) In 1926, Mgidhla, at a properly constituted family gathering, followed by a public meeting, purported to appoint defendant as his general heir. This purported appointment was announced to Paramount Chief Mshiyeni.
(8) On the death of Mgidhla, which was between 1936 and 1940, defendant acted as heir and has remained in possession of and has dealt with estate assets since then.
(9) Mgidhla did not at any time, apart from appointing defendant as his general heir announce or take any formal steps to disinherit plaintiff.
(10) In 1933 plaintiff was appointed induna in place of Mgidhla.

On these facts the Native Commissioner upheld the Chief's judgment that plaintiff was entitled to be declared the general heir. The case is now brought on appeal to this Court.

In his carefully prepared and useful reasons for judgment, the Native Commissioner stated his view that although under the law as then existing in Zululand, the late Mgidhla had the right when he married the plaintiff's and defendant's mothers to nominate his chief wife, he became subject to the laws of Natal when he took up residence in the Babanango District, and therefore no longer possessed that right when he purported to appoint the defendant as his general heir.

At this point, reference should be made to the contention in argument before this Court by Counsel for respondent, that there was no evidence that the defendant's mother had ever been appointed "Nkosikazi" and that further, the appointment of the defendant as general heir is not tantamount to the declaration of his mother as the chief wife.

Counsel for appellant objected to this line of argument as being a departure from the agreed facts on which the Native Commissioner was asked to deliver judgment.

Counsel for respondent, while admitting that the point now raised was not canvassed in the lower Court, claimed that he was entitled to attack the validity of the defendant's appointment as

general heir on any ground that appeared to him to have substance and that he did not feel himself bound to confine himself to the legal issues which were debated in the Native Commissioner's Court.

This Court is of the opinion that the Native Commissioner understood that the parties had agreed on a set of facts which raised the single legal issue as to whether the law of Zululand as regards the right of a man to nominate his chief wife still applied after he had changed his domicile to Natal, where no such right existed. We hold the view, therefore, that the new point taken by Counsel for respondent falls outside the terms, as stated and implied, of the set of agreed facts and cannot be raised at this stage.

Counsel for appellant argued that the right of a man to nominate his chief wife is in effect the right to appoint his heir and is therefore a right to indicate how his property is to be disposed of. It is therefore a "proprietary" right which is governed by the law of the matrimonial domicile. Counsel for appellant's submission is therefore that the marriages of the late Mgidhla to the plaintiff's and defendant's mothers having taken place in Zululand, the law of that territory still applied as regards the rights of the parties to the marriages, after they changed their domicile to Natal.

He argued further that when the late Mgidhla's wives married him in Zululand, each of them had the hope (the spes) of being the one selected to produce Mgidhla's heir (admittedly a very great privilege under Native Law and Custom) and that they cannot be deprived of this right by a change of domicile.

The rule that the law of the place of marriage governs the rights of the parties to the marriage as regards property, is clearly settled law in this country—Anderson *v.* The Master, 1949, S.A.L.R. (4) 660; Frankel's Estate *v.* The Master, 1950, S.A.L.R. (1) 220. If, therefore, it is held that the right which the late Mgidhla purported to exercise in this case was a "proprietary" right, then the appellant's argument that the law of Zululand, i.e. the matrimonial domicile, applies, seems to be well founded.

My view of the matter, however, is that to call a right to nominate a chief wife—a right which may or may not be exercised, and which had not been exercised at the time of the change of domicile—a right relating to property, is an undue and unjustifiable straining of the connotation of that term. Indirectly the exercise of that right is a disposition of property, but in my view for a right of that kind to persist after a change of domicile to a country where that right is not recognised, the right must have advanced beyond the stage of a mere freedom of choice and must have already been exercised, thereby confering definite and inalienable property rights to one or other of the parties concerned.

Another aspect of the matter is that the law of matrimonial domicile can obviously not apply to all the consequences of a marriage contracted in other countries when the parties move to a country where those consequences are not part of the local law. Some of those consequences may conceivably be utterly repugnant to the local concepts of what is a proper matrimonial relationship and may even be expressly forbidden by the local law. In such a case, those so-called rights acquired in the country of marriage are obviously of no avail to the parties.

In the case under consideration, a man's right to select his chief wife was, and still is, regarded in Natal as objectionable and is not permitted to its own subjects. It is a sound principle, I think, that in such a matter a newcomer to the country should be compelled to conform to the local law especially where there is no interference with any vested rights.

I hold, therefore, that it was not competent for the late Mgidhla to declare defendant as his general heir, and therefore the appeal is dismissed with costs.

Steenkamp, President: I concur.

Leibbrandt, Member.

With due deference to the Honourable President and my brother Member, I cannot agree with the majority judgment.

In this case the parties agreed that the facts, as quoted on page 194, be submitted to the Native Commissioner. On these facts the Native Commissioner gave judgment for the plaintiff and held that in his opinion the provisions of the law confirmed the position of plaintiff's mother as the chief wife when Mgidhla became domiciled in Natal before having exercised his right to nominate another woman.

Against this decision the defendant has appealed on the following grounds: —

(1) The admitted facts established that the late Mgidhla Langa contracted customary unions in Zululand with the mothers of both parties sometime prior to 1900, at a time when he was residing and was domiciled in Zululand.

(2) The Native Commissioner should accordingly have held that the said customary unions were governed by the Zululand Code of 1878, and that any rights acquired by the parties in consequence of such customary unions were not affected by a subsequent change of domicile.

(3) By reason of the foregoing the Native Commissioner should have held that the late Mgidhla Langa retained the right to appoint his heir, and that the appointment of appellant was legal and valid.

The point to be decided therefore is whether the change of domicile from Zululand to Natal by the late Mgidhla after the Hlubi War affected the rights acquired by him prior to this change. In other words, whether Mgidhla's change of domicile affected his right to appoint a chief wife.

It is agreed that, although an hereditary chief in Zululand, Mgidhla relinquished the chieftainship when he went to live in the Babanago District. After his change of domicle he could, in any case, no longer be regarded as an hereditary chief in charge of a tribe. See Masusu Zulu *v.* Botha Zulu, 1938, N.A.C. (T & N) 267.

As commoners in Zululand enjoyed the privilege of appointing a chief wife in terms of the 1878 Code (Section 22), the fact that Mgidhla relinquished the chieftainship would not have taken away his right in this connection. See Dungumazi *v.* Zungu, 1915, N.H.C., 95.

It has been stated by the plaintiff that since Mgidhla appointed his heir while he was resident at Babanango, he was governed by the Code of 1891, which had been applied to that District by Act No. 1 of 1903. Section 6 of this Act provides for the application of Roman Dutch Law and Statute Law at the time of the annexation, with the proviso that "except in so far as may be inconsistent with the laws of Natal, the provisions of this Section shall not affect any right of action, or any other rights or obligations existing, or the liability to trial and punishment for any crime or offence committed, prior to the taking effect of this Act, or the validity of any judgment, order, or sentence of any Court, or the carrying out thereof, but provided also that the prosecution, enforcement, or carrying out of any such matters as aforesaid shall be effected by such means and in such manner as are allowed by the laws of Natal, or by any Proclamation or arrangement made in terms of this Act."

The Native Commissioner is thus of opinion that Mgidhla's action in appointing his general heir must be held to be inconsistent with the general laws of Natal and therefore invalid.

There have been numerous decisions in South African Courts to the effect that the proprietary rights of the spouses are governed by the laws of the country in which the marriage took place, See Frankel's Estate *v.* The Master, 1950 (1) S.A.L.R., 220, which very clearly sets out the principles of Roman Dutch Law in this respect. These decisions have been followed by this Court in Shezi *v.* Shezi, 1927, N.H.C., 27, and Mdhlose *v.* Mdhlose, 1937, N.A.C. (T & N) 112.

In Shezi's case the Court held that where the parties were married in Natal and subsequently moved to Zululand, the husband was bound by the Natal Code (see also Stafford, page 101),

In the 1937 case it was found that the parties were domiciled in Natal and were therefore bound by the 1891 Code, as the right of election was not exercised prior to 1903. It was stated that the subsequent transaction in Zululand was of no effect.

In the present case, Mgidhla removed from Zululand to Natal and it would therefore appear, on the principles applied above, that the Zululand Code of 1878 should apply in view of the fact that this Code was still in force at the time that he made the appointment.

There can be no doubt that Mgidhla himself considered that he was fully entitled to this right, and his actions were those of a man who acted openly. He even reported his decision to Chief Mshiyeni in order to convey to the Zulu Royal family his decision in this matter.

It is contended by the respondent that once Mgidhla took up his domicile in Natal, his first wife automatically became his chief wife and that he no longer had the power of selection. In my opinion this power flows directly from the marriage itself and was one of the proprietary rights governing Native marriages in Zululand. It was a right well known to this ex-Chief and all his wives, and they all, by marriage, voluntarily accepted it. It would be difficult to contend with a state of affairs where rights flowing from the marriage itself can be changed by moving from one Province to another. It might even be contended, if this is the case, that had Mgidhla gone back to Zululand after living many years in Natal, he would once again fall under the Code of 1878.

I am therefore of opinion that Mgidhla's change of domicile does not alter the proprietary rights that he had acquired by his marriage in Zululand, and that he accordingly could select his chief wife after he had taken up his domicile in Natal.

For Appellant: Mr. Manning of Messrs. Nel & Stevens, Greytown.

For Respondent: Mr. Uys of Messrs. Bestall & Uys, Kranskop.

Decided Cases referred to:—

Gaza Tshezi v. Gungubele Tshezi, 1927, N.H.C. 27.
Seedat's Executor *v.* The Master, 1917, A.D. 309.
Wilmot Mdhlalose *v.* Msiseni Mdhlalose, 1937, N.A.C. 112.
Anderson *v.* The Master, 1949, S.A.L.R. (4), 660.
Frankel's Estate *v.* The Master, 1950, S.A.L.R. (1), 220.
Masusu Zulu *v.* Botha Zulu, 1938, N.A.C. (T & N) 267.
Dungumazi *v.* Zungu, 1915, N.H.C. 95.

Statutes, etc., referred to:—

Zululand Code of Native Law, 1878 (G.N. 194/1878) Section 22.
Natal Code of Native Law, 1891 (Law 19/1891) Section 125.
Act 1 of 1903 (Natal), Section 6.

CASE No. 23 OF 1950.

GUMEDE SIBIYA (Appellant) *v.* JOSEPH MTSHALI (Respondent).

(N.A.C. CASE No. 17/50.)

VRYHEID: Wednesday, 12th April, 1950. Before Steenkamp, President, Lawrence and Leibbrandt, Members of the Court (North-Eastern Division).

Native Law and Custom—Damages caused by animals.

Held: That unless an animal had shown previous vicious propensities, the owner is not liable under Native Law and Custom for any damages done by the animal.

Appeal from the Court of the Native Commissioner, Mahlabatani.

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

The plaintiff (respondent in this Court) sued the defendant in the Chief's Court for damages for the loss of a bay mare whose death he alleges was caused by defendant's stallion by covering it while its forelegs were hobbled.

From the evidence, however, it is clear that although the stallion might have attempted to cover the mare, she fell down—presumably because her legs were hobbled—and the evidence is to the effect that she was savaged by the stallion.

The Chief awarded plaintiff £7 with costs, and on appeal to the Native Commissioner, this judgment was confirmed. An appeal has now been noted to this Court.

The Native Commissioner found the following facts proved:—

(1) That plaintiff's mare was molested by defendant's stallion.
(2) That at the time of the molestation the mare was hobbled.
(3) That while endeavouring to avoid such molestation the mare fell and the fall caused it injury and it was unable to rise without assistance or compulsion.
(4) That the mare lingered in such condition for 14 days and then died.
(5) That the action of defendant's stallion was the main contributing cause of the death of plaintiff's mare.

The first point which strikes this Court is whether a claim of this nature can be brought under Native Law and Custom. There can be no doubt that Plaintiff based his claim on Native Law and Custom as he, in the first instance, sued before the Chief, who only has jurisdiction in connection with cases under Native Law and Custom.

The Native Commissioner does not state in the record whether he tried the case under common law or under Native Law and Custom, but it is obvious that he intended to apply the latter law, as it was an appeal from the Chief's Court.

This Court has consulted the following cases to find out in what circumstances damages can be claimed under Native Law and Custom where injury had been done by an animal:—

(1) Gxarisa *v.* Magqoza, 1936, N.A.C. (C.O.) 36.
(2) Mgadi *v.* Magwaza, 1945, N.A.C. (T & N) 87.

The first of those cases was tried under Tembu custom and the Tembu assessors were asked to state what the Native Law was. Scott (P) is reported to have stated:—

> "The Tembu assessors were asked to state whether damages would be laid against the owner of a cow which was admittedly vicious but had not, as far as was known, actually killed another animal, for injury by such cow to other animals on the common pasture lands. The assessors stated that there was no case in which damages had ever been awarded under such circumstances. If a cow is vicious its owner is told to cut off the tips of its horns and if he neglects to do so he is held liable for damages subsequently done by it and that it is the duty of a man owning a vicious cow to cut off the tips of its horns without being asked to do so."

In that case the owner knew the cow was vicious and he had not cut off the horns and he was therefore held liable for the damage done by that cow.

In the second case which came before McLoughlin (P) and two Members, it was held that where an animal does injury, the matter is one which is adequately provided for in Native Law. No liability is incurred normally where an animal, normally not vicious, suddenly attacks and injures a person on the commonage. It is regarded as bad luck if this is done.

It therefore seems clear that unless an animal had shown previous vicious propensities, the owner is not liable under Native Law and Custom for any damages done by the animal.

In the present case there is no evidence that the stallion had shown such propensities. It had the right to be on the commonage and therefore under Native Law and Custom, under which this case was tried, the owner is not liable for any damage done by the stallion.

It is therefore clear that the Native Chief who tried the case could not award damages. We doubt whether, under common law, the plaintiff would be able to succeed as there is evidence that he hobbled his mare while she was grazing on the commonage and he knew there was a stallion about and he must expect that a stallion will molest a mare.

We are not so certain that he is not guilty of contributory negligence.

Under common law, on the authority of the case of O'Callaghan *v.* Chaplin, 1927, A.D. 310, the mere fact that a person is an owner of an animal, makes him liable for any damage done by that animal, unless the person who suffered the damage is guilty of some negligence.

We are not, however, hearing this case under common law and as indicated above, the action fails under Native Law and Custom.

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

> "The appeal from the Chief's Court is allowed with costs and the Chief's judgment is altered to read:—
>
> 'Absolution from the instance with costs'".

For Appellant: Mr. Conradie of Messrs. Conradie & Wright, Vryheid.

Respondent—in person.

Decided cases referred to:—

Gxarisa *v.* Magqoza, 1936, N.A.C. (C.O.) 36.

Mgadi *v.* Magwaza, 1945, N.A.C. (T & N) 87.

O'Callagham *v.* Chaplin, 1927, A.D. 310.

CASE No. 24 OF 1950.

SADU MALEMBE (Appellant) *v.* **NQUTU NKALA (Respondent).**

(N.A.C. CASE No. 22/6/49.)

PIETERMARITZBURG: Monday, 24th April, 1950. Before Steenkamp, President, Robertson and Rossler, Members of the Court (North-Eeastern Division).

Practice and Procedure—Application to have record returned to Court below.

Held: That as litigation should come to an end, this Court cannot allow a re-opening of the case where either one or other of the parties, when represented, had not seen fit to call an important witness.

Appeal from the Court of the Native Commissioner, Msinga.

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

Defendant's Attorney has filed additional grounds of appeal.

These read as follows:—

(1) That the Native Commissioner should not have found that eight increase had been proved as there is no evidence to show that the three head of cattle died before the statement to the induna that there were five increase.

(2) The appellant prays for an order in terms of the attached affidavit returning the matter to the Native Commissioner to enable him to call a witness Sitimela Nkala.

An objection against the admission of the additional grounds has been filed. The objection is based on the following grounds:—

(1) That the appeal is not properly before this Honourable Court in that the notice of appeal dated 25th November, 1949, lodged by appellant's Attorney with the Clerk of the Court, Msinga, does not comply with the requirements of Rule 10 (*b*) in that it fails to specify the grounds of appeal clearly and specifically.

(2) That the grounds of appeal specified in "Additional Grounds of Appeal" dated 6th February, 1950, filed by appellant's Attorney, if relied on as a proper notice of appeal, were not filed timeously and there is no application for condonation of delay in the late filing of such grounds or notice of appeal.

(3) That the appellant's affidavit dated 30th November, 1949, should be expunged from the record in that the Rules make no provision for this type of application and, in any event, it appears from the record that the appellant together with his witnesses, only gave evidence after the respondent had closed his case and the appellant consequently knew that Sitimela Nkala was not being called as a Witness by the respondent.

The first paragraph in the additional grounds of appeal is really a legal issue which was manifest in the Court below and should have been incorporated in the notice of appeal which was lodged in time. It is Native Law and Custom that unless deaths of sisaed cattle are formally reported, the sisa holder is liable for the loss.

Application is also made for the record to be returned to the Native Commissioner for the evidence of Sitimela to be called. In his supporting affidavit the defendant states:—

> "I ask for an indulgence to be allowed to call the said Sitimela Nkala in this case",

but in the additional ground of appeal (ground No. 2 above), the defendant asks that the Native Commissioner should call this witness.

While it is permissible for the Native Commissioner in terms of Section 12 (5) of the Native Administration Act to call witnesses on his own motion, this Court is of opinion that where the parties are legally represented, it becomes their duty to call all the evidence on which they wish to rely. There is no law compelling the Plaintiff to have called Sitimela, and after plaintiff had closed his case it was incumbent on defendant to have called this witness and he could have applied, through his Attorney, for a postponement of the case to enable him to do so if the evidence was considered to be in support of the defendant's case.

This Court cannot allow a re-opening of the case where either one or other of the parties, when represented, had not seen fit to call an important witness. It is in the public interest that litigation should come to a finality, and we are therefore not prepared to grant the application.

The plaintiff (respondent in this Court) sued the defendant in the Chief's Court for one beast and its increase of six head of cattle, being the nqutu beast paid by defendant to plaintiff and left with defendant at defendant's request.

The Chief entered judgment for defendant, but on appeal to the Native Commissioner the appeal was upheld and the judgment altered to one in favour of plaintiff for the beast in question and its eight increase, with costs.

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

Before any evidence was adduced in the Native Commissioner's Court the claim was amended to read: "One beast and its eight increase." The reason for this is that since the case was heard before the Chief there have been a further two increase. The Native Commissioner allowed the amendment.

From the evidence adduced on behalf of the Plaintiff and which the Court accepted, it is clear that before plaintiff's sister got married to the defendant, seven head of cattle and an nqutu beast were pointed out and accepted. Plaintiff thereafter went to work in Johannesburg and he left the marriage arrangements in the hands of his half-brother, Sitimela, who was the general heir to their late father. Plaintiff was the house heir.

Amongst the cattle pointed out to plaintiff was a dun coloured heifer and this, plaintiff states, was the nqutu beast. Defendant, on the other hand, states that nqutu beast was a roan coloured ox which was slaughtered on the day of the wedding.

The issue in this case revolves around the question as to whether the nqutu beast was the dun coloured heifer. The Native Commissioner who had the witnesses before him, came to the conclusion that this heifer was the nqutu beast.

The plaintiff states that after his return from Johannesburg, the defendant approached him and asked for the dun coloured heifer to be sisaed to him. Defendant denies that he ever did so, but plaintiff called supporting evidence which the Native Commissioner believed. This Court does not doubt that some of the offspring of the dun coloured heifer might have died in the meantime, but as the defendant denies he ever sisaed a beast from the plaintiff, he naturally will not state whether any report of deaths had been made to the plaintiff, and therefore this Court must accept that the heifer has had eight increase and that no death had ever been reported to the plaintiff.

The defendant admits there was a dun coloured heifer at his father's kraal but he states that this was never paid out as an nqutu beast. He also admits that the heifer has had increase but as to the number of increase, his evidence differs from that adduced by the plaintiff. Once the Native Commissioner has believed the plaintiff that the nqutu beast was a dun coloured heifer, then he must disregard defendant's evidence and accept the plaintiff's version regarding the increase.

The appeal is dismissed with costs.

For Appellant: Adv. W. G. M. Seymour, instructed by Mr. A. Milne Buchan of Weenen.

For Respondent: Mr. W. K. van Rooyen of Messrs. van Rooyen & Forder, Greytown.

Statutes, etc., referred to:—

Native Administration Act, No. 38 of 1927, Section 12 (5).

CASE No. 25 OF 1950.

OBED HLATSHWAYO (Appellant) *v.* **DANIEL HLONGWANE (Respondent).**

(N.A.C. CASE No. 5/50.)

PIETERMARITZBURG: Tuesday, 25th April, 1950. Before Steenkamp, President, Robertson and Rossler, Members of the Court (North-Eastern Division).

Practice and Procedure—Native Chief's Courts—Attachment—Execution of judgment.

Held: That a real owner whose cattle have been attached for the debt of someone else, does not lose his right of vindication.

Appeal from the Court of the Native Commissioner, Bergville.

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

Plaintiff claims from the defendant the delivery of two head of cattle and the progency which he alleges are his property.

Defendant in his plea states that he bought the cattle from one Bulalizwe, who was the judgment creditor in a case in which he was the plaintiff and one Henry Hlatshwayo, brother of plaintiff, was the defendant, and hereinafter referred to as the judgment debtor.

It is common cause that Bulalizwe, the judgment creditor, was granted a judgment against the judgment debtor in the Chief's Court. Thereafter the Chief's Messenger, Simbi, attached the cattle and handed them over to the judgment creditor who in turn sold them to the defendant (respondent in this court).

The Native Commissioner in the Court below has dealt with this case on the basis that once the attached cattle were handed over to the judgment creditor, the latter received good title and could therefore transfer that title to the present defendant who purchased the cattle in good faith. The Native Commissioner granted judgment in favour of defendant with costs, and against this judgment an appeal has been noted to this Court. It is not necessary to set out the grounds of appeal in full. Briefly they mean that the defendant could not have obtained good title to these cattle, seeing that they were the property of the plaintiff and were wrongfully attached by the Chief's Messenger.

The cattle were at the time at the kraal where the judgment debtor was residing and therefore the onus was on the plaintiff to prove to the satisfaction of the Court that these cattle are his property.

This is apart from the legal issue as to whether the judgment creditor and in turn the defendant obtained good title when the cattle were handed over to the former by the Chief's Messenger.

The Native Commissioner has not gone into the facts as to whether the plaintiff has advanced sufficient evidence that he was the owner of the attached cattle. As remarked before, he has based his judgment on a legal issue.

The Native Commissioner has quoted the case of Pakati *v.* Nxumalo, 1947, N.A.C. (T & N) 113. In that judgment an *obiter dictum* appears to the effect that once attached cattle are handed over to the judgment creditor, he obtains unimpeachable title. The facts in Pakati's case are not the same as in the present case. In that case the judgment debtor sought to claim cattle which had been attached and handed over to the judgment creditor. After the judgment had been confirmed by the Native Commissioner he made an attempt to get his cattle back by tendering the amount of the judgment, and the Court held he could not succeed.

As this Court had some doubt as to the correctness of that *obiter dictum,* Native assessors were called and questioned. The questions and answers are attached hereto. It is clear from their replies that a real owner whose cattle have been attached for the debt of someone else, does not lose his right of vindication. Seven of the assessors were unanimous on this, but the one assessor, Chief Bhekizizwe, at first informed the Court that a judgment creditor receives good title when the cattle are handed over to him, but after he had heard the replies of the other assessors, he informed the Court that before he orders an attachment of cattle to be made, he makes certain that those cattle do belong to the judgment debor. He has evidently not had a case of this nature and therefore we think that he is not too certain what Native law and custom is in such circumstances.

As the opinion of the Native assessors conforms with our common law, we agree that the legal position is as stated by the assessors. It is true that according to the Magistrates' Courts Act and the Native Commissioners' Courts Rules, execution cattle

sold at a scale confer unimpeachable title. This is a special statutory enactment and cannot be applied in the case of a Chief's Court where no sales take place.

The defendant, unfortunately, when he conducted his own case in the Court below, took up the attitude that as he had purchased the cattle from the judgment creditor without any suspicion of the title being defective, it is not for him to call any evidence to rebut the evidence of the plaintiff that the cattle in fact are plaintiff's property.

The defendant being unrepresented and not knowing the legal position, this Court feels that in the interests of justice, he should be given an opportunity to bring the necessary evidence to rebut the evidence of plaintiff.

From the record it is not at all certain whether these cattle are the property of the plaintiff. Plaintiff has certainly made out a *prima facie* case, but certainly not a conclusive case, and we feel that the record should be returned to the Native Commissioner to enable the defendant to call further evidence, especially that of the Chief's Messenger, Simbi Hlope, and Headman, Shonapi.

It is ordered that the Native Commissioner's judgment be set aside and the record returned to him for the purpose of calling the evidence of the Chief's Messenger, Simbi Hlope, and Headman Shonapi, and any other evidence either party might wish to call: Thereafter the Native Commissioner to give a fresh judgment. Costs of appeal and costs in the Court below to be costs in the cause.

ASSESSORS.

From Zululand—
Mnyayiza Zulu, Mbuzele Ngema, Nongoma district.

From Natal—
Chief Nkasa Mkize, Induna Mahleke Shezi, Umbumbulu district.
Chief Dumezweni Ngcobo, Ndwedwe district.
Chief Nganekwane Mqadi, Umzinto district.
Chief Langalake, Chief Bhekizizwe, Pietermaritzburg district.

Question 1: After a Chief has given a judgment, then you send the Chief's Messenger or Tribal Constable to attach the cattle from the judgment debtor?

Reply by all: Yes.

Question 2: How long after judgment is the Messenger sent to attach—or is there no specified time?

Mnyayiza Zulu: There is no specified time.

Chief Dumezweni Ngcobo: I differ slightly from Mnyayiza Zulu. The Constable is sent three days after the judgment has been given to write down the number of cattle. That is, to register the judgment and then he is told that he is given 14 days in which to point out the cattle, failing which the cattle will be executed.

Chief Nkasa Mkize: Within seven days after judgment has been given, the judgment is then registered at the Court and then after registration that person is given 14 days in which to hand over the cattle, failing which they are executed.

Induna Mahleke Shezi: With us it is 14 days after registration.

Court: In other words, you give the debtor 14 days to pay, otherwise you send a Messenger to attach?

Other Assessors: Yes.

Question 3: A Chief's Messenger attaches the beast. Does he hand that over to the judgment creditor straight away?

Mnyayiza Zulu: The beast is handed over to the judgment creditor.

Mbuzele Ngema : The Constable takes the beast and he hands it directly over to the judgment creditor.

Chief Nkasa Mkize: He hands it directly over to the person who is supposed to get it.

The other Assessors are all in agreement.

Question 4: The man to whom it is handed, the judgment creditor, does he then get good title to that beast, i.e. is it his own?

All Assessors agreed that that is so.

Court: And he may sell that beast to a third person?

Assessors: Yes.

Chief Dunezweni Ngcobo: For instance, the judgment creditor does not want a beast—in that case the beast is then driven to the Chief's kraal, who sells it for cash and the cash is then handed over to the judgment creditor. If the judgment is for money and he only has a beast, he drives along the beast to the Chief who then sells it for money.

Question 5: Say for instance—after the beast is attached by the Messenger and it is handed over to the judgment creditor—then a third person comes along and says: "That beast does not belong to the debtor, but it belongs to me"—what right has that man got—i.e. the third party?

Chief Nkasa Mkize: We go into the matter and investigate and if that is true, then we return the beast to the proper owner.

Court: Even if the judgment creditor has already sold the beast?

Chief Nganekwane Mqadi: We investigate the matter and if we find it is true, then we hold the judgment debtor responsible for that beast. We fetch the beast from the man who has bought it. We deprive him of that beast.

Chief Bhekizizwe: If a person comes along and points out the beast and says it belongs to him—in that case we hold the judgment debtor responsible, because he said it was his beast when it was attached. He is responsible to pay over the beast to the man who now says that the beast is his.

Court: You mean the judgment creditor and not the judgment debtor?

Chief Bhekizizwe: The one responsible for all this, to refund the beast, is the one from whom the Messenger took away the beast, i.e. the judgment debtor.

Court: Do you claim the beast back from the man who bought it from the judgment creditor?

Chief Bhekizizwe: No. That becomes his property.

Court: What do the other Assessors say about this?

Chief Nkasa Mkize: The person who claims the beast—and it is found (after the matter has been investigated) that that beast is his—gets it back, but we now take steps against the judgment debtor. He is now responsible to take out another beast. In that case I then go to the judgment creditor or the person who bought it from him and tell him—"Now look here, I must have that beast back" and I get it back and I hand it over to this person, and I then hold the judgment debtor responsible for that beast.

Court: Do you disagree with Chief Bhekizizwe?

Chief Nkasa Mkize: Yes—a person wants his own beast with the same colours—therefore I must return the identical beast to him.

Court: If the judgment debtor has nothing, what happens then? What about the man who paid his money for that beast?

Chief Nkasa Mkize: He must go and get his money from the judgment creditor. He will have to get his money from the judgment creditor and then the judgment creditor may take steps against the judgment debtor.

Court: Is the man always entitled to get back the beast which belonged to him?

Chief Nkasa Mkize: Yes.

Mbuzele Ngema: If a man comes and claims his beast, we go into the matter and if we find that it is true, then we bring them along to the judgment creditor and say: "look here, this person wants his beast. You better return him the money" and then he pays him back. If he has not got money, he takes a beast. If he describes the colour of his own beast, we go and fetch that very same beast from somebody else who has got it.

Court: Even from a person who bought it?

Mbuzele Ngema: Yes.

Mnyayiza Zulu: I agree with Mbuzele Ngema.

Induna Mahleke Shezi: And if the owner comes and claims his beast, we go to where the beast is—we take it away and bring it back, and the money must be refunded by the man who sold the beast to him, i.e. judgment creditor, and then the judgment creditor can claim from the judgment debtor again. I really agree with Mnyayiza Zulu and Mbuzele Ngema.

Chief Dumezweni Ngcobo: I agree with Mnyayiza Zulu, Mbuzele Ngema and Chief Nkasa Mkize.

Chief Nganekwane Mqadi: Yes, I agree. We go into the matter and if we find that the person who points out the beast as his, is the real owner thereof, then we return the beast to him, and the judgment creditor can take steps against the judgment debtor for the replacement of the beast.

Chief Langalake: I say I differ from the other Chiefs in this respect, that after it has been found that the beast now belongs to a third person, we hand it to the original owner, and then that man who bought the beast from the creditor comes and claim his money from the creditor and then the judgment creditor goes to the judgment debtor for the beast.

Court (addressing Chief Bhekizizwe): You heard what the others say—they do not agree with you.

Chief Bhekizizwe: What I do, before I send my Constable out, I first find out where the man's belongings are, because if I go out and I just attach before investigating whether he has anything, that might cause confusion and trouble. I always go into the matter first.

Court: If you take the debtor's beast, thinking that it is his —you perhaps find afterwards that it belongs to his brother. Do you get that beast returned?

Chief Bhekizizwe: The beast is not returned because some people, when they get a beast, they slaughter it or sell it.

Court: But if the beast is sold—you say they cannot get it back from the person to whom it was sold?

Chief Bhekizizwe: Yes—it cannot be returned.

Court: All the other Assessors say that the beast *can* be returned.

Chief Bhekizizwe: The judgment debtor has to take out another beast, because he made the mistake of pointing out the beast which does not belong to him.

Court: These seven Assessors say that the beast can be fetched and it does not matter in whose possession it was.

What happens if that beast had increase in the meantime?

Chief Nkasa Mkize: The increase go with the beast, even if there are 10 increase. (Other Assessors all agreed on this point).

Court: If a third party is claiming that beast, do you mean he must go to the Chief or Chief's Court to claim that beast?

Chief Dumezweni Ngcobo: He does not actually go to the Chief in person, he goes to the ibandhla and the Court must be satisfied that this man who is claiming the beast has a good claim before they will take the beast back from the man in whose possession it now is. (All Assessors agreed to this.)

For Appellant: Adv. D. L. Shearer, instructed by V. M. G. Beck of Bergville.

For Respondent: in default.

Decided cases referred to:—

Pakati *v.* Nxumalo, 1947, N.A.C. (T & N) 113.

CASE No. 26 OF 1950.

TSHAYELI SONI (Appellant) *v.* FELOKWAKE CILIZA (Respondent).

(N.A.C. CASE No. 15/7/49.)

PIETERMARITZBURG: Wednesday, 26th April, 1950. Before Steenkamp, President, Robertson and Rossler, Members of the Court (North-Eastern Division).

Practice and Procedure—Substitution of Appellant's representative when Appellant had died since judgment.

Held: That no application in connection with the appeal can be heard until such time as the record is in order and that the record be referred to the Court below for the purpose of considering any application which might be made in connection with the substitution of appellant's representative as the defendant.

Appeal from the Court of the Native Commissioner, Ixopo.

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

This appeal was postponed from the last session of this Court, to enable the appellant to apply to the Native Commissioner for the substitution of appellant's representative for appellant who has died since the judgment of the Native Commissioner.

Counsel for appellant has now applied for the condonation of the late noting of the appeal and he seems to labour under the impression that until such time as condonation is granted action for substitution cannot be proceeded with.

He is clearly mistaken there as, in the opinion of this Court, no application in connection with the appeal can be heard until such time as the record is in order.

It is ordered that the record be referred to the Court below for the purpose of considering any application which might be made in connection with the substitution of appellant's representative as to the defendant. It is further ordered that such application be made within six weeks from to-day.

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

For Respondent: Adv. J. D. Stalker, instructed by Messrs. H. L. Bulcock, Ixopo.

CASE No 27 OF 1950.

NGCINDEZI MKIZE (Appellant) *v.* JONATHAN MAKATINI & ANOTHER (Respondents).

(N.A.C. CASE No. 25/50.)

PIETERMARITZBURG: Thursday, 27th April, 1950: Before Steenkamp, President, Robertson and Rossler, Members of the Court (North-Eastern Division).

Practice and Procedure—Defective summons—Recording of system of law under which case is tried—Costs.

Held: That it should be made clear in summons for damages for seduction, whether the father is suing under the common law on behalf of his daughter, or is suing under Native Law and Custom on his own behalf.

Held further: That it should be made clear in the declaration that the second defendant is joined because he is liable under Native Law and Custom for the tortious acts of his son, who is an inmate of his kraal.

Held: That both parties bear their own costs of appeal as the plaintiff was responsible for the defective summons and as the defendants neither asked for more particulars nor objected to the defects in the summons, which could thereafter have been rectified.

Appeal from the Court of the Native Commissioner, Pietermaritzburg.

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

Plaintiff (appellant in this Court) sued the two defendants for damages for seduction, and in his summons he alleges as follows:—

> "To answer the claim of Ngcindezi Mkize in his capacity as father and guardian of Mtikiza Mkize."

He further states in his summons—

> "During the months of November, 1948, to February, 1949, first defendant seduced the said Mtikiza Mkize at his kraal. The said Mtikiza being at the time an unmarried female and a virgin. By reason of the said seduction defendants are liable to plaintiff in the amount of £11 being £5 for the mvimba beast and £6 for the nqutu beast."

The least that can be said of this summons is that it is badly drawn up, and it is observed that it was drafted by plaintiff's attorney. In reading the preamble to the declaration one gains the impression that the Plaintiff is not suing according to Native Law and Custom but in his capacity as the father and guardian of the girl and therefore it can be surmised that any damages he obtains really belong to the daughter. Counsel for appellant, on the question being raised by this Court, intimated that the claim was under Common Law, but on being further questioned, he stated it was under Native Law and Custom. This goes to prove that proper consideration was not given to the matter at the time the summons was drawn up.

This Court must insist on summonses being drawn up in a more intelligent manner and it should be made clear in the summons whether the father is suing under the common law on behalf of his daughter, or is suing under Native Law and Custom on his own behalf.

Assuming for the moment that plaintiff is suing under Native Law and Custom, it should be made clear in the declaration that the second defendant is joined because he is liable under Native Law and Custom for the tortious acts of his son who is an inmate of his kraal.

There is no indication in the record that the case is tried under Native Law and Custom and this Court must reiterate that it becomes the duty of the Presiding Officer to clearly indicate if it is not obvious from the record, under what system of law he is trying the case.

In their written plea, the defendants plead as follows:—

(1) First defendant denies seduction; alternatively.
(2) In the event of it being proved that the seduction took place, the first defendant denies that plaintiff was a virgin.

The Native Commissioner entered judgment in favour of defendants with costs, and against this judgment an appeal has been noted on the ground that the judgment was against the weight of evidence.

While we feel that there is a lot to be said in favour of plaintiff's case, we are hampered by the fact that the summons is so badly drawn up that it does not disclose precisely whether the plaintiff is suing under Native Law and Custom, nor—as remarked before—has the Native Commissioner given any indication under what system of law he tried the case. Even Counsel could not assist this Court.

The summons, as drawn up, cannot stand, and for this reason this Court is not prepared to consider the merits of the case. The only judgment this Court can give is to dismiss the summons with costs. This will enable the plaintiff to bring the case before the court again.

It is accordingly ordered that the appeal be and is hereby allowed, and the Native Commissioner's judgment is altered to read:—

"Summons dismissed with costs."

In so far as costs of appeal are concerned, we are not prepared to make an order, and both parties must bear their own costs. Plaintiff is responsible for the defective summons, but defendant could have asked for more particulars, or could have raised in the Court below the defects in the summons which could thereafter have been rectified.

For Appellant: Mr. Britz of Messrs. Raulstone & Co., Pietermartizburg.

For Respondent: In default.

CASE No. 28 OF 1950.

CONCO MANQELE (Applicant) *v.* **MKISHWA CEBEKULU (Respondent).**

(N.A.C. CASE No. 10/5/48.)

ESHOWE: Tuesday, 2nd May, 1950. Before Steenkamp, President, Cowan and Thompson, Members of the Court (North-Eastern Division).

Practice and Procedure—Application for leave to appeal from the Native Appeal Court to the Appellate Division—Essentials.

Held—

(*a*) that there must be good grounds for believing that the appeal might succeed, i.e. the point must be arguable;
(*b*) that the matter must be of general importance and the point raised of legal importance or of public or professional interest;
(*c*) that the amount involved must not be trivial in comparison with the costs which would be incurred.

Held: An application to appeal from the Native Appeal Court to the Appellate Division should state the points which the petitioner wishes to have stated for decision by the Appellate Division.

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

This is an application for leave to appeal to the Appellate Division against a judgment of this Court. The judgment in question was delivered on the 26th January, 1949, and reads:—

> The plaintiff's claim in the Chief's Court was for the property rights in the girl Nomajele, a daughter of his late brother, Pongwana. The Chief found that Nomajele was illegitimate and held that as lobolo for her mother had been paid by Pongwana only after her birth, the property in her vested in her mother's brother, the defendant.
>
> The plaintiff, whose appeal to the Native Commissioner's Court was dismissed, has now appealed to this Court.
>
> The following facts emerge from the evidence: Some time before 1929 Pongwana seduced defendant's sister, Nozinqwazi, and Nomajele was born. The usual damages were paid and Pongwana then asked for Nozinqwazi's hand in marriage from her uncle and guardian, Ntsika, and tendered eleven head of cattle as lobolo. Although he accepted these eleven head, Ntsika refused to give his consent and demanded a further five head of cattle. Pongwana is then stated to have carried out the "Kehla" ceremony, and on this being reported to him, Ntsika complained to the "Court House" and was referred to his Chief. The Chief instructed his tribal constable to take Ntsika to the Court House and to register him as an induna and this was done. Apparently no further steps were taken by either side and the woman Nozinqwazi continued to live with Pongwana, and bore him eight more children.
>
> On these facts the Native Commissioner, although sympathizing with the plaintiff, found that no marriage [*sic*] had taken place and that the girl was therefore illegitimate.
>
> The provisions of Section 57 (3) of the Code apply to this case and it has been laid down that the essentials of a Customary Union at that time were consent of the contracting parties and of the woman's guardian and cohabitation [see the case of J. Mbonambi *v.* S. Sibiya, 1944, N.A.C. Tvl. & Natal), 49]. In the minority judgment it was contended that custom also demanded the payment, or the promise of payment, of lobolo.
>
> Now it is clear from the evidence that both parties desired the union, that there was long cohabitation between them and that lobolo in an amount of eleven head of cattle was paid and accepted by the woman's guardian. Their long cohabitation as man and wife raises a presumption in favour of a Customary Union having taken place. Can the woman's guardian now be heard to say that there was no valid union simply because he did not give his formal consent to it? Whether or not he formally consented, the fact remains that when eleven head of cattle were tendered as lobolo, he accepted them. Although he demanded the payment of a further five head he permitted the woman to live with Pongwana as his wife and took no active steps to end what he now wishes to make out was an illicit union. The Court must be guided by his actions rather than by his words and the evidence all points to his having given his tacit consent to the union.
>
> The Court finds that there was in fact a valid customary union between Pongwana and the woman Nozinqwazi, and the girl Nomajele thus became a member of the house established by Pongwana by the union.

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

"Appeal upheld with costs and Chief's judgment altered to—'Plaintiff declared entitled to the custody of, and the property rights in, the girl Nomajele, with costs.'"

The petition to appeal to the Appellate Division is supported by a lengthy affidavit but the petitioner has failed to comply with the requirements laid down by this Court in omitting to specify the points which the petitioner wishes to have stated for decision by the Appellate Division [*vide* Nhleko *v.* Nhleko, 1948, N.A.C. (T & N) 2]. In his argument, however, Counsel for petitioner has intimated that the point he wishes to have stated by this Court is whether the customary union between Pongwana Cebekulu and Nozinqazi Cebekulu was a valid union.

The parties, who will be referred to as husband and wife hereafter, lived together in Zululand as man and wife for a number of years and had nine children. The property rights in these children are concerned, although the case in the lower Court was only in respect of the lobolo of one girl. From the affidavits it appears that the property rights in respect of seven more girls will be affected by the decision given in the case.

From the judgment it is apparent that the husband handed over to his father-in-law eleven head of cattle which was the full lobolo in Zululand for a man of his status, and the wife went and lived with the husband at his kraal. When the wife's father was asked for formal consent, he refused to give this and stated that he wanted five more head of cattle. He was clearly not entitled to the additional cattle and any payment of additional beasts at that time would have been illegal as, according to the Code which was in force in Zululand at that time, he was only entitled to the ten head of lobolo cattle plus an nqutu beast.

To justify his demand for fifteen head of cattle he went to the Chief and got himself appointed as an induna, which would have entitled him to fifteen head of cattle. It cannot be overlooked that this appointment as an induna subsequent to the time his daughter went and lived with her husband, does not entitle him to the extra lobolo.

In Nhleko's case referred to above, it was laid down that applications of this nature would not be favourably considered unless firstly there are good grounds for believing that the appeal might succeed, that is, the point must be arguable. Secondly the matter submitted must be of general importance and the point raised of legal importance or of public or professional interest. Thirdly the amount involved must not be trivial in comparison with the costs which would be incurred.

While this Court readily concedes that the present application fulfils requirements two and three, the question is whether it does in respect of one.

Section 57 (3) of the present (1932) Code reads as follows:—

"Notwithstanding anything in any other law, any customary union as defined in the Act entered into between Natives in Zululand either prior to the application of this Code to that territory or thereafter until the requisite official witnesses shall have been appointed shall be deemed to be valid and shall for all purposes be regarded as a customary union under the provisions of this Code."

The test to apply therefor is: What were the requirements of a union under Native Law and Custom in Zululand prior to 1932? The essentials of such a union are laid down in various cases decided by this Court and those are the payment or promise of lobolo and the living together of the man and the woman.

We have referred to Stafford on "Native Law in Natal" page 66 *et seg.* and the case of Mbonambi *v.* Sibiya, 1944, N.A.C. (T & N) 49 and the case of Sibiya *v.* Mtembu, 1946, N.A.C. (T & N) 90 in which McLoughlin (P) gave a crisp decision, with which we agree, that the essentials under original Custom (Zululand) were that lobolo had been paid or promised, and the girl had gone to live with the man.

These cases bear out the Native axiom that the woman cannot be where the cattle are.

For these reasons we are firmly of the opinion that the appeal has no prospect of success and therefore the application for leave to appeal to the Appellate Division is refused with costs.

For Appellant: Adv. C. Cowley, instructed by Messrs. Cowley & Cowley, Durban.

For Respondent: Mr. P. B. Rutherfoord, Eshowe.

Statutes, etc., referred to:—

Code of Native Law (Natal): Proclamation 168 of 1932. Section 57 (3).

Cases referred to:—

Mbonambi *v.* Sibiya, 1944, N.A.C. (T & N) 49.

Sibiya *v.* Mtembu, 1946, N.A.C. (T & N) 90.

Nhleko *v.* Nhleko, 1948, N.A.C. (T & N) 2.

CASE No. 29 OF 1950.

MAPIPI NTULI (Appellant) *v.* HLUTSHUMFAZI NTULI (Respondent).

(N.A.C. CASE No. 7/4/49.)

ESHOWE: Wednesday, 3rd May, 1950. Before Steenkamp, President, Cowan and Thompson, Members of the Court (North-Eastern Division).

Native Law and Custom—Affiliation—Substitution.

Held: That substitution can only be effected if the first wife is barren.

Held: That under the Code of 1878 each house is an independent house if there has been no affiliation or if cattle have not been taken from an existing house in respect of lobolo for the new wife.

Appeal from the Court of the Native Commissioner, Eshowe.

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

The late Hlomendhlini had seven wives and they were married in the following order:—

(1) Nsweleka—who had a son. He died after his mother.
(2) Nozibakela—the mother of the plaintiff.
(3) Nobasentele—who had a son and a daughter.
(4) Nomuva.
(5) Nomalapi—mother of the defendant.
(6) Mzamose—who had two daughters, viz. Sipiwe and Nomacala.
(7) Nomasonto.

Plaintiff alleges that he is entitled, as heir to the Ikohlo section, to the property rights in the girls Sipiwe and Nomacala, daughters of the sixth wife, Mzamose. He, however, bases his claim on an alleged Custom that failing a declaration of affiliation, the 4th and 6th wives married are automatically affiliated to the Ikohlo section. As will be seen later he is not correct in this respect.

Defendant on the other hand avers that his mother, Nomalapi, who was a half sister of the first wife, was placed in the Indhlunkulu hut after the death of the first wife and therefore he is entitled to the lobolo rights in the two girls in question.

There is a conflict of evidence as to whether Nomalapi was a half-sister of Nsweleka, the first wife, or whether she was an ngena sister, but this is not material for the purposes of this case as the first wife on her death had a son, and "substitution" can only be effected if the first wife is barren, which in this case she was not.

This case was tried by the Chief who gave judgment in favour of plaintiff. The Chief in his reasons states that the plaintiff in a previous case had stated in his presence and the presence of defendant that his mother belongs to the Ikohlo section, and defendant said nothing. The Chief also bases his judgment on the mistaken idea that, because the property of sixth house was concerned, it automatically belongs to the Ikohlo section.

An appeal was noted to the Native Commissioner who confirmed the Chief's judgment and found as proved that the late Hlomendhlini did not make any formal declaration of status in respect of any wife at the time of the celebrations of his various marriages.

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

(1) The judgment is against the weight of evidence and is bad in law in as much as the Assistant Native Commissioner has found that respondent, the eldest son of the second wife is the heir of the Indhlunkulu section and as such entitled to the lobolo in dispute, whereas in law and by Native Custom and by admission, he is the heir of the Ikohlo house: Alternatively.

(2) The parties' father, the late Hlomendhlini Ntuli having married Nomalapi an ngena, sister of his first wife, announced that Nomalapi would take the place of his chief wife and revive her house, the Assistant Native Commissioner should have found that the said Nomalapi was in fact the chief wife and that the woman Mzamose was affiliated to her.

The various marriages took place prior to the Code of 1932 and therefore the Code of 1878 has to be consulted to find out what the legal position was when Hlomendhlini married his various wives.

It is laid down in Section 22 of the Code of 1878 that with commoners the wife first married is presumably the great wife unless she was then a widow or divorcée. Section 26 lays down that the wife secondly married is presumably the first wife on the left-hand side (Ikohlo) and the wife thirdly married is in like manner the first wife on the right-hand side.

The Code is silent as to the position of the wives married subsequent to the third wife, except that if cattle are taken from a house on either side of the kraal the new wife belongs to that house. It is also mentioned in Section 26 that generally the head of the kraal declares his will on these points at the time of marriage. By this we understand that a declaration contrary to the usual presumptions may be made by the husband.

It is admitted by plaintiff that defendant is the general heir and he could only have been such if the 5th wife had been affiliated to the Indhlunkulu. This goes to prove that the late Hlomendhlini made certain dispositions of his houses. The plaintiff cannot rely on the automatic affiliation of the 4th and 6th wives to the Ikohlo. The Native Commissioner has found as a fact that the late Hlomendhlini did not make any formal declaration of status in respect of any wife at the time of the celebrations of his various marriages. This cannot be correct as the plaintiff and his witnesses have admitted that defendant is the general heir, as mentioned above and that plaintiff belongs to the Ikohlo section.

The sixth wife, Mzamose, according to plaintiff was automatically affiliated to the Ikohlo but this contention is untenable. Even assuming that the Native Commissioner's finding, that no affiliation had taken place, is correct, this means that Mzamose's house is an independent one and, failing an heir in that house, its property devolves on the general heir.

This Court is not prepared to go further than to hold, for the purpose of arriving at a decision, that if there were no affiliation at all, the sixth house was independent of the others and the property in that house then devolves on the general heir.

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

> "Appeal from Chief's Court is allowed with costs, and judgment entered for defendant with costs."

For Appellant: H. H. Kent, Esq., of Eshowe.

For Respondent: S. H. Brien, Esq., of Messrs. Wynne & Wynne, Eshowe

Statutes, etc., referred to:—

Code of Native Law, 1878 (G.N. 194/1878), Sections 22 and 26.

CASE No. 30 OF 1950.

JUBELE NGEMA (Appellant) *v.* **KAKABA NGEMA (Respondent).**

(N.A.C. CASE No. 6/50.)

ESHOWE: Wednesday, 3rd May, 1950. Before Steenkamp, President, Cowan and Thompson, Members of the Court (North-Eastern Division).

Native Law and Custom—Lobolo advanced—Whether loan or gift.

Held: That there was a corresponding obligation on the part of the elder brother to provide the lobolo where the younger brother has regularly remitted his earnings to an elder brother on whom he looked as being the kraalhead and his guardian, and that once the elder brother did so without making a stipulation that it was a loan, his heir cannot afterwards come forward and claim that the lobolo is refundable.

Appeal from the Court of the Native Commissioner, Melmoth.

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

The plaintiff (appellant in this Court) sued the defendant (respondent) in the Chief's Court for 11 head of cattle, being a refund of cattle borrowed by defendant's late father from plaintiff's late father for lobolo purposes. The Chief entered judgment in favour of plaintiff for 11 head of cattle and costs, but on appeal to the Native Commissioner this judgment was reversed to one of "for defendant with costs".

An appeal has now been noted to this Court on the grounds that the judgment is against the weight of evidence and bad in law.

Appellant was not represented in the Court below, therefore it was not necessary to give full grounds of appeal.

The respective fathers of the plaintiff and defendant were full brothers, being sons of the late Mbumane in the Indhlunkulu house. They were Mzila and Mtshadu. Mzila died while plaintiff was still a minor and he therefore fell under the guardianship of an uncle by the name of Matsheketshane, who was older than Mtshadu.

It is alleged by the plaintiff that his late father paid Mtshadu's lobolo and he further avers it was a loan and not a gift and therefore whatever lobolo Mzila advanced it now replayable.

Conflicting evidence was given, but the Native Commissioner found proved that some time between 1902 and 1906, Mzila paid six head of cattle towards the lobolo of his full and much younger brother Mtshadu and that after Mzila's death, the estate was then administered by the full brother, Matsheketshane, who paid the remaining five head of cattle, making eleven head in all. He also found that defendant's father regularly remitted moneys while he was being employed at Durban to plaintiff's father, his elder brother, in the usual way.

There can be no doubt that neither plaintiff nor defendant are in a position to state from first-hand knowledge whether the advance of the lobolo cattle was a loan or a gift. Plaintiff however states: "My father was just helping his brother to lobola his wife and no other agreement or arrangement was made."

According to plaintiff's evidence, defendant's father died about 1918, and it will therefore be observed that he is only *now* claiming an alleged debt which was incurred many years ago. Plaintiff also states: "Even if defendant's father did not send money, it was my father's duty to lobola for him, as my father was the eldest." He goes on and states: "This would only be in the nature of a loan. It is not a gift, and is repayable."

This is a Zululand case and reference will have to be made to the Zululand Code of 1878. According to Section 21 of that Code there is no legal obligation on anyone to provide payment for or towards anyone else's marriage, but an elder brother who is the common ancestor's heir usually, unless there be cause to the contrary, helps towards the payment for the brother's first marriage.

A similar case came before the Native Appeal Court, *vide* Manqele *v.* Manqele, 1940, N.A.C. (T & N) 71, to which reference is made by the Native Commissioner, and it is also a Zululand case. In that case Stafford (A.P.) is reported to have stated:—

> "The kraalhead is entitled to a reasonable share of the earnings of the members of his family and other inmates of the kraal. In terms of Section 91 (1) of the Code of 1932, younger brothers are usually assisted in the way of lobolo for their wives, but it is clear that even in this case, the obligation is purely moral and that in terms of Section 91 (2) the younger brother cannot reclaim his earnings except under an agreement whereby his lobolo has been promised."

In the present case there is no question of the earnings being claimed as the defendant is only alleging that, as his father's lobolo was actually paid by his elder brother (plaintiff's father), there is no legal debt on his part to refund that lobolo, seeing that his father, during his lifetime and before he was married, regularly remitted his earnings to his elder brother.

We can do no better than quote the remarks of Stafford in his book "Native Law in Natal" on page 51 where he states—

> "having received such earnings, the kraalhead usually assists younger brothers in obtaining the lobolo for their first wives."

It is true we are dealing here with a Zululand case and as the events which led up to this case occurred before the promulgation of the present Code, it is perhaps not correct to refer to it. However, it seems clear form Section 21 of the Zululand Code of 1878 that the principles in this respect are similar.

Here we have a case where the younger brother has regularly remitted his earnings to an elder brother on whom he looked as being the kraalhead and his guardian and therefore there was a corresponding obligation on the part of the elder brother to provide the lobolo. It is true the elder brother could have refused to provide the lobolo, but once he has done so without making a stipulation that it is a loan, his heir cannot afterwards come forward and claim that the lobolo is refundable. An obligation to refund the lobolo paid on behalf of inmates in the same house can only arise out of a specific undertaking to do so or when it was specifically stipulated at the time of the payment of the lobolo that it was a loan and not a gift.

Counsel for appellant has conceded that in so far as the six head of cattle paid by the father is concerned, these are not repayable but he has strongly urged that the five head were only delivered after the plaintiff had become the heir and during his minority and as he had not ratified the payment made by the guardian, he may now recover the cattle.

This Court cannot agree with Counsel's contention as there has been a delay of many years between plaintiff's attaining his majority and the commencement of the action. His father died during 1902 and at the latest he attained majority about 1923 and he is only now claiming the cattle. He should have denounced the gift when he reached majority and the mere fact that he did not do so, now militates strongly against him.

We are not unmindful of the fact that a gift may be revoked at any time during the lifetime of the donor, but as plaintiff's father was the donor and committed himself to the payment of the lobolo for his younger brother, the heir cannot now be heard when he seeks to recover a donation or a promise of a donation made by his father.

This Court holds the view that taking into consideration all the aspects of the case and the evidence adduced on beralf of both parties, only one conclusion can be arrived at, and that is that the lobolo was a gift.

The appeal is dismissed with costs.

For Appellant: H. H. Kent, Esq., of Eshowe.

For Respondent: S. H. Brien, Esq., of Messrs. Wynne & Wynne, Eshowe.

Statutes, etc., referred to:—

Zululand Code of Native Law, 1878, Section 21.

Decided cases referred to:—

Manqele *v.* Manqele, 1940, N.A.C. (T & N) 71.

CASE No. 31 OF 1950.

HERMAN MASEKA (Appellant) *v.* **SAMUEL S. DHLADHLA (Respondent).**

(N.A.C. CASE No. 18/50.)

ESHOWE: Thursday, 4th May, 1950. Before Steenkamp, President, Cowan and Thompson, Members of the Court (North Eastern Division).

Mercantile Law—Contracts—Purchase and sale—Instalments paid through Post Office—Whether Post Office is agent or not.

Held: That when a plaintiff told a defendant that he should post the money, he connot be held to have agreed that he had appointed the Post Office as his agent to receive the money on

his behalf or that it was a definite agreement that defendant's responsibilities would cease when the envelope containing the money was posted.

Held: That it is the duty of the debtor to seek out the creditor and pay his debt and that if he elects any other method, he runs the risk that his chosen method will fail.

Appeal from the Court of the Native Commissioner, Nkandhla.

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

The plaintiff sued the defendant for £4 being balance of an amount defendant (appellant in this Court) owed on the purchase price of a watch.

In his plea defendant alleges payment. The onus was therefore on him to prove payment. The Native Commissioner gave judgment in favour of plaintiff as prayed with costs, and against this judgment an appeal has been noted to this Court on the following grounds:—

(1) That the Court erred, after finding correctly which facts were proved, and finding that any further obligation rested upon the appellant after he had posted the £4 in terms of his agreement with respondent and overlooked the fact that each party to the contract is obliged to perform only such terms of the contract as are expressively stipulated and agreed upon or which must be regarded as having been impliedly agreed upon.

(2) The Court accordingly erred in considering it necessary to give any finding with regard to the agency of the Post Office and the duties of the parties to seek out one another for payment, the manner of payment having been expressly agreed upon; but even if the Court did not err in this regard, it erred in finding that the Post Office was not the agent of the respondent.

(3) The Court erred in finding that the laws of equity are laws which may be applied in Court and in any event applied such laws incorrectly in view of the fact that appellant has no legal right to claim the £4 from the Post Office, has not received the amount and unless he received it the effect of the judgment would be to pay twice, and erred in finding that the Postmaster-General has no discretion to make payment of the £4 to respondent.

The facts, which are common cause, are as follows:—

(*a*) Plaintiff sold a watch to defendant for £7. 15s. of which amount he paid £3. 15s. cash and left a balance of £4.

(*b*) Some six or seven months later defendant placed £4 in notes in a letter and despatched the envelope by registered post to the plaintiff.

(*c*) Plaintiff received the envelope, the contents of which consisted of a letter and a few pieces of brown paper, but no money.

(*d*) Both plaintiff and defendant are satisfied that the money was removed from the envelope in transit.

The defendant contends that, in addition to these facts, he was instructed by the plaintiff that he should post him the balance of the money owing in instalments.

As will be seen from the grounds of appeal, defendant's contention, which was also advanced in argument, is that once plaintiff informed him he should post the money, his responsibilities terminated when he had posted the envelope. With this submission we cannot agree for the reason that when plaintiff told the defendant he should post the money he cannot be held to have agreed that he had appointed the Post Office as his agent to receive the money on his behalf or that it was a definite agreement that defendant's responsibilities would cease when the envelope containing the money was posted. If this were so, business transactions in the commercial world would be dislocated to such an extent that the position would become one of extreme disorganisation.

It is the duty of a debtor to seek out the creditor and pay his debt. If a debtor elects any other method he runs the risk that his chosen method will fail. In this case defendant, however, avers that the words used by plaintiff, viz. "that the money should be posted" are an agreement which plaintiff must now honour. In the opinion of this Court the words were no more than a concession to the defendant that he might make use of the post if he chose to do so, and are not a binding contract that the posting of the money would discharge defendant's obligations.

The appeal is dismissed with costs.

For Appellant: W. E. White of Eshowe.

For Respondent: In person.

CASE No. 32 OF 1950.

MADELWA GUMEDE (Appellant) *v.* **MPIYONKE GUMEDE (Respondent).**

(N.A.C. CASE No. 20/50.)

DURBAN: Tuesday, 9th May, 1950. Before Steenkamp, President, de Vries and Ashton, Members of the Court (North-Eastern Division).

Native Law and Custom—Lobolo advanced by kraalhead—Whether gift or loan.

Held: That it is well established law that any cattle advanced by a kraalhead towards lobolo of any of his sons of the same house are to be looked upon as a gift, unless otherwise stipulated at the time of the marriage.

Appeal from the Court of the Native Commissioner, Umbumbulu.

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

The plaintiff (appellant in this Court) in his summons alleges that he, out of his own property advanced the lobolo for the wife of his full brother in the Indhlunkulu house, the defendant (respondent), and now that defendant's eldest daughter is married, the plaintiff claims a refund of the cattle he had advanced to the defendant.

The defendant, on the other hand, states that his lobolo was paid out of his own earnings. It is not disputed that plaintiff and defendant were living together with their father, Velapi, who was still alive at the time the defendant got married. Whatever cattle there were, were running at Velapi's kraal or had been sisaed. Plaintiff, however, does aver that Velapi had no cattle in the Indhlunkulu house, and any cattle there were belonged to the other houses of which there were four in all.

Defendant in his evidence states that he was working and had collected cattle and that his lobolo was paid out of *his* cattle. Plaintiff, however, states that defendant was a waster and did not save his earnings.

In the first place it cannot be overlooked that all cattle found at the kraal are presumed to be the property of the kraalhead, i.e. Velapi in this case. Secondly, according to Section 35 of the Code, a kraalhead is entitled to a reasonable amount of the earnings of the inmates of his kraal.

Plaintiff in his evidence states: "I spent all my money in cattle." This Court can only place one interpretation on that statement and that is that all his earnings were used by him to purchase cattle. He therefore did not contribute, if his statement is to be believed, any of his earnings towards his father's kraal.

Plaintiff has not discharged the presumption that the cattle running at his father's kraal were not the property of his father, the kraalhead.

The Native Commissioner, in well prepared reasons, has come to the conclusion that plaintiff cannot succeed, and he entered judgment in favour of defendant with costs.

An appeal has now been noted to this Court. It would appear that the plaintiff and defendant, who are full brothers, have been at logger-heads, the cause of which would appear to have been rather trivial—over a dispute about a bag of sugar—and it seems to this Court that plaintiff is under the impression, if he is to be believed, that because cattle purchased from his earnings were used for defendant's lobolo, those cattle must be looked upon as an advance and not as a gift from the kraalhead.

It is well established law, according to the Code, that any cattle advanced by a kraalhead towards lobolo of any of his sons of the same house are to be looked upon as a gift, unless otherwise stipulated at the time of the marriage.

The cattle used for defendant's lobolo might have been acquired out of plaintiff's earnings, but he cannot get past the fact that his father was entitled to a reasonable amount of the earnings, and whether those earnings were handed over to the father in cash or in kind makes no difference to this aspect of the law.

This case had previously been before the Chief who granted absolution judgment, and that judgment was confirmed by the Native Commissioner. According to the reasons for judgment, the case was again brought before the Native Commissioner but was not concluded, and it was then brought before the present presiding officer. He goes on in his reasons and states that as the plaintiff has had two attempts against his brother, the time has arrived for the Court to enter a final judgment. This Court agrees with those views and as the law is against the plaintiff there is no room for any other judgment but the one given by the Assistant Native Commissioner in the present Case.

The Assistant Native Commissioner has gone to considerable trouble in preparing his reasons, which have been of great assistance to this Court in coming to a decision.

The appeal is dismissed with costs.

For Appellant: Mr. W. T. Clark of Durban.

Respondent: In person.

CASE No. 33 OF 1950.

ANNAH DUBE d.a. (Appellant) *v.* SOPHIA TUSI d.a. (Respondent).

(N.A.C. CASE No. 10/50.)

DURBAN: Tuesday, 9th May, 1950. Before Steenkamp, President, de Vries and Ashton, Members of the Court (North-Eastern Division).

Practice and Procedure—Defamation—Translation of words.

Held: That, notwithstanding the provisions of Section 132 (3) of the Code, this Court wishes to lay it down as a practice to be followed in future, that a translation must either be embodied in the summons, or evidence as to the meaning must be adduced.

Appeal from the Court of the Native Commissioner, Durban.

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

This is an application for condonation of late noting of the appeal. Judgment was given on the 8th December, 1949, and on the 12th December, 1949, Applicant's Attorney applied for written reasons for judgment together with a copy of the record. The reasons were not furnished until the 6th January, 1950, and there appears a note on the Native Commissioner's reasons that owing to his absence on sick leave they could not be given earlier.

An appeal was thereafter noted on the 27th January, 1950. The delay between the 6th January and the 27th January, 1950, is explained in the affidavit filed in support of the application in which it is stated that a copy of the record was only received

on the 18th January, 1950. This excuse is unacceptable as this Court sees no reason why the appeal could not have been noted soon after the 6th January, assuming for the moment that the Attorney was justified in not noting an appeal until he had received the Native Commissioner's written reasons for judgment as applied for.

The reasons for the late noting are not such that the Court would in normal circumstances grant the condonation, but because of the special circumstances which will appear in the judgment and because of the delay caused by the presiding officer's illness, this Court feels that justice demands that defendant (appellant) should be allowed to be heard.

This Court has not had the benefit of a uniform translation of the words alleged to have been uttered, and while, in accordance with Section 132 (3) of the Code, the words need not necessarily be accompanied by a translation, yet this Court wishes to lay it down as a practice to be followed in future, that a translation must either be embodied in the summons, or evidence as to the meaning must be adduced.

Notwithstanding the lack of uniform translation of the words which form the subject of this claim, this Court is satisfied from the circumstances under which they were uttered and from the nature of the words themselves, that they constitute nothing more than vulgar obscenity and do not fall within the meaning of "defamation" as defined in Section 132 (2) of the Code.

The appeal is accordingly dismissed with costs.

For Appellant: Mr. Cornish of Messrs. C. Cornish & Co., Durban.

Respondent: In person.

Statutes, etc., referred to:—

Natal Code of Native Law, Proclamation No. 168 of 1932, Section 132 (3).

CASE No. 34 OF 1950.

LAMFANA NTSELE (Appellant) *v.* **LLOYD MNGWENGWE (Respondent).**

(N.A.C. CASE No. 33/50.)

DURBAN: Tuesday, 9th May, 1950. Before Steenkamp, President, de Vries and Ashton, Members of the Court (North-Eastern Division).

Practice and Procedure—Application to return record to Native Commissioner's Court.

Held: That it is in the interests of justice that finality to litigation be reached and that it is not the duty of this Court to have points canvassed where both parties were represented in the Court below, and there is suspicion of some irregularity which they did not deem necessary to raise.

Appeal from the Court of the Native Commissioner, Umbumbulu.

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

The undisputed facts are that the late Charlie Dick Ntsele was the registered owner of some 27 odd acres of ground, being Lot No. 30, Amanzimtoti Mission Reserve, No. 3360, situate in the County of Durban. During his lifetime the whole of this land was transferred to his son-in-law, Lloyd Mngwengwe, the defendant.

There is, however, a dispute as to what consideration the late Charlie received for the ground, but that is immaterial as the fact remains that Lloyd did receive title to the ground.

Some years before the land was transferred to the defendant, the late Charlie executed a will, leaving portion of the ground to his two daughters, of whom one is the defendant's wife. The rest of the ground was left to his wife during her lifetime and on her death it had to devolve on the two daughters.

The plaintiff is a brother of the late Charlie and he is now claiming in his summons that he is the intestate heir and as such, entitled to the transfer of the property.

Defendant in his plea denies that the late Charlie left no will and his plea, which consists of four paragraphs, is really to the effect that—firstly, defendant was entitled to the transfer of the property during the lifetime of the late Charlie, and secondly, if the deceased had died intestate, the defendant admits plaintiff would have been the heir.

The Native Commissioner granted judgment in favour of defendant with costs and against this judgment an appeal has been noted on grounds which may be summarised to mean that as the plaintiff was the intestate heir to the late Charlie, he is the guardian of the dependents and as such he inherits the general property of the deceased.

According to the grounds of appeal it would seem that the appellant (plaintiff) is under the impression that the late Charlie could not make a will disposing of his immovable property, but that the property had to devolve according to Native Law and Custom.

Counsel for appellant has, however, only confined argument to the question as to whether or not the donation was valid, and he has conceded that on the evidence before the Court he cannot seriously argue against the judgment, but he has urged that defendant was not bona fide when the property was transferred to him and has threby defeated the interests of the heir. He strongly urged that the case be returned to the Native Commissioner for a reconstruction of the claim and pleadings to afford plaintiff some relief especially as defendant's evidence was not satisfactory.

This Court cannot agree that where the parties are both represented in the Court below and there is suspicion of some irregularity which they did not deem necessary to raise, that it is the duty of this Court now to have the points canvassed. It is in the interests of justice that finality to litigation be reached.

Counsel has also argued the question of costs, but as defendant has succeeded in both Courts, he is entitled to costs.

The appeal is dismissed with costs.

For Appellant: Adv. A. V. Hoskings, instructed by Messrs. Fowle & Driman, Durban.

For Respondent: Mr. K. R. Burne of Messrs. Burne & Burne, Durban.

CASE No. 35 OF 1950.

JOSEPH SEKOELE & ORS. (Appellants) *v.* **JOHANNES SEKOELE & ORS. (Respondents).**

(N.A.C. CASE No. 52/1/49.)

PRETORIA: Monday, 12th June, 1950. Before Steenkamp, President, O'Connell and Bosman, Members of the Court (North-Eastern Division).

Practice and Procedure—Attorney who draws up a document, acting for a party who attacks the validity of such document.

Held: That it does not seem quite correct that an Attorney responsible for the preparation of a document, should later act as the Attorney for the party who seeks to attack the validity of such document.

Appeal from the Court of the Native Commissioner, Pietersburg.

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

Two summonses were issued in the Native Commissioner's Office. In the first case (No. 19/48) the plaintiffs are cited as being—

(1) Joseph Sekoele;
(2) Andries Sekoele;
(3) Nelson Sekoele;

and the defendants are—

(1) Johannes Sekoele;
(2) Johannes Sekoele (N.O.)
(3) Alpheus Sekoele N.O.

The claim is (*a*) for the payment of the sum of £70 being rent for seven years at the rate of £10 a year, and (*b*) an order of ejectment from Portion 20 of the farm Kalkbank No. 130.

In the second case (No. 20/1948) the plaintiffs are—

(1) Andries Sekoele;
(2) Nelson Sekoele;

and the defendant is Johannes Sekoele.

The claim is for an order directing defendant to hand over the Deed of Transfer in respect of Portion 20 of the farm Kalkbank No. 130, district of Pietersburg.

A written plea in respect of Case No. 19/1948 was handed in. This plea is to the effect that while defendants admit Portion 20 of the farm had been transferred into the names of the three plaintiffs, such transfer was effected on a deed of sale which defendant No. 1 was induced to sign by means of fraud and misrepresentation and that it was represented to him that he was signing a will or other form of testamentary disposition and that he had intended and was under the firm belief that he was signing a will or other testamentary disposition and there was therefore no *consensus ad idem* between the parties.

They pleaded further that they at no time entered into any arrangement to pay rentals.

First defendant filed a counterclaim claiming *restitutio in integrum* by the cancellation of the deed of sale as being void *ab initio* and for an order on plaintiffs to retransfer the aforesaid property, viz. Portion 20 of the farm Kalkbank No. 130 into the name of the defendant (defendant No. 1).

In Case No. 19/48 on the claim in convention the Native Commissioner entered judgment in favour of defendants with costs and on the claim-in-reconvention he entered judgment for plaintiff-in-reconvention as prayed. The deed of sale is declared null and void *ab initio* and defendants-in-reconvention are ordered to retransfer the property in question to plaintiff-in-reconvention. Defendants-in-reconvention to pay costs.

In Case No. 20/1948 the Native Commissioner entered judgment for defendant as prayed with costs and it is ordered that the deed of transfer be placed in the custody of the Clerk of the Court pending the retransfer of the property in terms of the judgment in Case No. 19/1948.

An appeal has been noted to this Court in both cases, which were tried together. It is not necessary to set out the grounds of appeal which briefly are to the effect that according to the evidence and probabilities of the case, a valid sale between the three plaintiffs in Case No. 19/1948 and the defendant No. 1, Johannes Sekoele, took place, and that as the three plaintiffs are the legal registered title holders of the farm in question, they are not under any obligation to permit the defendants to reside on the farm.

The crux of the whole case is whether the defendant No. 1, Johannes Sekoele, hereinfater referred to as the defendant, understood the context of the deed of sale signed by him before Mr. Attorney Hirschmann on the 30th October, 1941. If it is

found that he fully understood what he was signing, then the counterclaim and other defences fall away and the three plaintiffs are entitled to an order of ejectment. The question of rentals, viz. £70 claim by the plaintiff will be dealt with separately.

Counsel for defendant (now respondent) has conceded that the onus is on him to discharge the allegation that the documents he signed was not intended as a deed of sale. Lengthy evidence was led by both parties on this aspect of the case and these can be divided into four different categories, viz.—

(1) Negotiations.
(2) The price.
(3) Signing of the deed of sale.
(4). Subsequent conduct of the parties.

The deed of sale which was handed in by consent as Exhibit "A" reads as follows:—

"The Seller (Johannes Sekoele—Defendant) hereby sells to the Purchasers (1. Joseph Sekoele, 2. Andries Sekoele and 3. Nelson Sekoele) who hereby purchase certain Portion marked No. 20 of the quitrent farm Kalkbank No. 130. district Pietersburg; measuring EIGHTY (80) morgen, SIX THOUSAND FIVE HUNDRED AND SEVEN (6.507) square feet, subject to the following terms and conditions, namely:—

1. The purchase price is the sum of ONE HUNDRED POUNDS (£100) which the Seller hereby acknowledges having received.

2. Transfer of the said property shall be passed to the Purchasers jointly and such transfer shall be proceeded with immediately.

3. All costs of transfer, transfer duty, stamps and this Deed of Sale shall be paid by the Purchasers.

Dated at Pietersburg this 30th day of October, 1941.

Johannes Sekoele. X His Mark.
SELLER.

AS WITNESSES:
1. I. Hirschmann.
2. ? Chaitow.

(Sgd.) Joseph Sekoele.
Andrew Sekwele.
Nelson Sekwele.
PURCHASERS."

It will be observed that Mr. I. Hirschmann, the Attorney who acted for defendant in the Court below, signed as one of the witnnesses and there is evidence of record that Mr. Hirschmann drew up the document. This is the document with which Mr. Hirschmann has associated himself in the case as being void *ab initio*. This Attorney did not give evidence on oath, the reason for this being apparently due to the fact that he was the legal representative of the defendant. However, with the permission of Counsel who appeared on behalf of the three plaintiffs (now appellants) the Attorney made an *ex parte* statement as to what occurred in his office when the deed of sale was drawn up, and this statement was recorded as evidence. It does not seem quite correct that an Attorney responsible for the preparation of a document should later act as the Attorney for the party who seeks to attack the validity of such document.

Mr. Hirschmann did not utilise the services of his Interpreter but permitted plaintiff No. 1—an interested party—to undertake the duties of Interpreter.

The undesirability of such practice will be commented on at a later stage. Suffice to state here that notwithstanding this ill-advised action of the Attorney, the Court will have to decide whether or not the defendant knew and understood what he was signing.

It is common knowledge that the defendant did not understand the English language in which the deed of sale was drawn.

Counsel for defendant has stressed the fact that there is no evidence regarding prior discussions or negotiations about the sale of the ground. Plaintiff No. 1 in his evidence on page 14 of the typed copy states:—

> "I and my farther (defendant) discussed the sale—the others were not present. I spoke to my farther for myself. I was not present when they (plaintiffs 2 and 3) spoke to my father. At first they went alone to my father and I went alone to my father. *We never discussed the purchase.*"

There is evidence on record that plaintiff No. 2 paid £35; plaintiff No. 1 paid £40 and plaintiff No. 3 paid £25, making a total of £100 in all, being the amount defendant acknowledged in the deed of sale as having been received by him.

This Court concedes that the evidence in connection with prior negotiations or discussions is very vague, and if the result of the case had to be decided on this, then the result might have been of a different complexion, but in view of what is being stated later on it is not necessary to dwell further on this aspect.

The net point taken by Mr. Trengove, Counsel for respondent (defendant), is the discussion regarding the purchase price. It must not be overlooked that this case is between father and sons, and we are fully aware of the fact that according to Native Custom, money passes frequently between parents and children and invariably children expect some *quid pro quo* as a repayment of benefits received from them by the father. It looks very much as if money discussions were not looked upon as being of paramount importance, but we cannot get away from the fact that there is evidence on record that money had passed between the sons and the father. The evidence is not too satisfactory, but here again we are faced with the deed of sale and if we find that defendant fully realised the purport of the document he had signed, then he will be estopped from averring that he had not received the consideration mentioned in the deed of sale.

The most important aspect of the case is the signing of the deed of sale and we have to decide whether the contents thereof were fully understood by the defendant before he affixed his mark thereto.

According to the evidence of defendant, the plaintiff No. 1 and his mother (wife of defendant) approached him and mentioned that after his death his eldest son by the great wife will inherit the farm unless a will was made appointing plaintiff No. 1 as the heir. He states he was not prepared to do so and felt that they (meaning plaintiff No. 1 and his mother) wanted to deprive him of the farm Kalkbank at once. He informed plaintiff No. 1 to bring Andries (plaintiff No. 2) and Nelson (plaintiff No. 3). Andries was to be a witness that they claim the farm. After discussion they decided to go to Pietersburg. Defendant first wanted to go to the lekgothla but the plaintiff No. 1 and his mother, Lydia, refused. Defendant suggested they go to the Native Commissioner but he was prevailed upon to go to the firm of Attorneys in which Mr. Hirschmann was a partner.

Here it should be paused to mention that according to defendant's evidence he was suspicious that the plaintiffs might attempt to deprive him of the farm and if this is true it cannot be understood why he did not object to one of his sons undertaking the interpreting in the office of the Attorney. Later on in his evidence defendant states that he was on good terms with his three sons (plaintiffs) and he had trust in them. This evidence cannot be reconciled with his earlier statement that he was suspicious.

According to Mr. Hirschmann's *ex parte* statement in Court, he was consulted on the 30th April, 1941, being the date the deed of sale was signed. There is no indication that he was consulted prior to this date. The requirements were explained by plaintiff No. 1 to Mr. Hirshmann, who drew up the deed of sale and the Power of Attorney to pass transfer. These documents

were read over to plaintiff No. 1 who translated them to defendant and the other two plaintiffs. Mr. Hirschmann was satisfied that the interpreting was done correctly and he thereupon requested them to sign the deed of sale and defendant to sign the Power of Attorney. It should be mentioned that Mr. Hirschmann does not understand the Native language and therefore he is not in a position to state whether the contents of the deed of sale were correctly interpreted. Let this be as it may. This Court is faced with this argument by Counsel for plaintiffs (appellants) that the plaintiffs did not know Mr. Hirschmann would employ plaintiff No. 1 as an Interpreter and it cannot possible be conceived that when plaintiffs discovered that the Interpreter employed by the Attorney was not used to interpret, they there and then—on the spur of the moment—gave Mr. Hirschmann spurious information. They could not possibly have anticipated such a change of Interpreters and only the mind of a superman might in such circumstances have thought of a quick change of front. Even then they would not have known that the prepared document, viz. the deed of sale, would be explained through one of them. A change of front could not have been spontaneous on the part of plaintiff No. 1 only, and he would have required consultation with his two brothers. This Court fully agrees with Counsel for appellants that it is most improbable, if not impossible, for the plaintiffs to have conceived the idea which the defendant wishes this Court to believe. This is such an important aspect of the case and is in reality the crux of the whole matter that once the Court comes to the conclusion, as it does, that the plaintiffs could not possibly have decided on the spur of the moment to give the Attorney incorrect information, then the defendant's allegation that he was under the impression he was signing a will and not a deed of sale, is untenable.

The subsequent conduct of the defendant is not inconsistent with that of a person who had regretted the steps he took in disposing of the property to his three sons. Various meetings of the Lekgothla were held and attended by the parties at various times. The recording of the minutes of these meetings leaves much to be desired. Counsel for respondent has conceded that too much reliance cannot be placed on the minutes, which are not necessarily proof of the presence of the persons mentioned as being present. We agree that the existence of the minutes is proof that meetings were held in connection with the dispute between defendant and his three sons, the plaintiffs.

We must, however, seek a reason for defendant's change of mind in connection with the farm. There is evidence that the mother of two of the plaintiffs, viz. Lydia, was not on good terms with defendant and that the feeling between them became worse of late years. This, it might be argued, would not unduly influence the defendant, but we know that a Native with several wives, has his favourite wife. It is, however, not the function of this Court to probe into the mind of a litigant, and as remarked by Brian (C.J.) in an English case—

> " It is trite learning that the thought of man is not triable, for the Devil himself knows not the thought of man."

Having arrived at the decision that the defendant well knew that he was transferring the farm to his three sons, the plaintiffs, we have to deal with the claim of £70, being the rent for seven years. It is admitted by the plaintiffs that they were only charging for the right to plough arable ground, and not for residence or grazing. We do not overlook the possibility that it might well be that the father and his wife Myriam and also the woman Nagabo, cited as being under the guardianship of defendant No. 3, were tenants at will. In any case, defendant No. 3 is a minor and he could not have been the guardian of the woman Nagabo. We are of opinion that plaintiffs have not proved an agreement to

pay rental, especially as they have not claimed any rent for seven years, and therefore this claim which is not proved, should be disposed of by granting an absolution judgment thereon.

Having come to the conclusion that defendant did dispose of the property to the plaintiffs, they are entitled to the return of the Title Deed, which was originally handed over to defendant for safe-keeping.

The counter-claim could only have succeeded if this Court had arrived at the conclusion that the deed of sale was a spurious document. This not being so, the only judgment on the counter-claim that can be entered is one for plaintiffs (in convention).

In regard to the use by Mr. Hirschmann of an interested party to the contract to interpret its provisions to the other contracting parties, this Court feels that such practice is very undesirable. The danger exists that where such practice is resorted to, advantage may be taken of the situation by an unscrupulous person used as Interpreter, to convey to the Attorney concerned some agreement to his advantage, other than that contemplated by the parties, especially where—as in the present case—the Attorney has no knowledge of the language into which the details of the contract have to be interpreted. Furthermore, as this case serves to show, needless litigation may follow. This may be an isolated instance, but should other cases of a similar nature arise, this Court may well be constrained to draw the attention of the proper authorities to the undesirability of the practice, with a view to making provision under the law for the attestation by a Native Commissioner or other disinterested official, of all written contracts entered into by Natives.

The appeal in Case No. 19/1948 is allowed with costs and the Native Commissioner's judgment is altered to read:—

"Claim 1: Absolution from the instance with costs.
Claim 2: For plaintiffs with costs.
Counter-claim: For defendants (in-reconvention) with Costs."

The appeal in Case No. 20/1948 is allowed with costs, and the Native Commissioner's judgment is altered to read:—

"For plaintiffs with costs."

For Appellant: Adv. Jerling (instructed by Messrs. Berrangé, Wasserzug & Fleishack, Johannesburg).

For Respondent: Adv. Trengove (instructed by Messrs. Chaitow & Hirschmann, Pietersburg).

CASE No. 36 of 1950.

MADEVU MTETWA (Appellant) *v.* MKANDO MTETWA (Respondent).

(N.A.C. CASE No. 31/50.)

VRYHEID: Tuesday, 27th June, 1950. Before Steenkamp, President, Hobson and Watson, Members of the Court (North-Eastern Division).

Practice and Procedure—No cause of action where plaintiff's rights have not been infringed by some overt act on the part of defendant.

Held: That Native Commissioners should guard against actions in which no infrigement of rights have occurred and should dismiss such claims.

Appeal from the Court of the Native Commissoner, Mahlabatini.

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

In the Chief's Court plaintiff, now respondent, claimed from the defendant (now appellant) his brother, two oxen. The Chief entered judgment in favour of defendant, but on appeal to the Native Commissioner the judgment was altered to one for plaintiff with costs.

It is not clear from the plaintiff's claim in whose possession the oxen were at the time he instituted action in the Chief's Court. but it is clear from the evidence given before the Native Commissioner that the oxen are in his possession and he bases his claim on the fact that defendant is claiming that the oxen are his property. Nowhere in the record is it averred that plaintiff's rights of possession have at any time been infringed.

In the case of Lax *v.* Hotz, 1913, C.P.D. 261, it was held that in the absence of any allegation that the plaintiff's rights had been infringed by some overt act on the part of the defendant, the claim discloses no cause of action.

Beck in "The Theory and Principles of Pleadings in Civil Actions" states on page 49 (1923 Edition)—

> "the main principle is that the Court does not decide mere academic disputes but only concrete disputes where rights have actually been infringed and not merely threatened."

In the present case on appeal it is absolutely clear that all the defendant did was to threaten plaintiff's right to the two oxen and therefore there are no facts on which plaintiff can claim redress.

This Court wishes to point out that Native Commissioners should guard against actions in which no infringement of rights have occurred, and the Native Commissioner should have ordered that the claim before the Chief be dismissed.

There is another aspect in this case and that is that after defendant and some of his witnesses had given evidence, he applied for a postponement to call an additional witness. Plaintiff objected to a postponement and the Native Commissioner upheld the objection.

The defendant had therefore not closed his case. The position is that plaintiff, being in possession of the cattle, cannot found a claim for a declaration of rights. If defendant feels that he is the owner of the cattle, then the onus is on him to institute action against the plaintiff for the delivery of the oxen.

In the circumstances this Court has no alternative but to order that the claim be dismissed with costs.

It is true, defendant did not plead that there was no cause of action, but it becomes the duty of this Court, where parties are not represented, to hold that as here is no infrigement of rights, there can be no claim.

Plaintiff being in possession of the cattle, he need not unduly anticipate any trouble until such time as the defendant sess fit to take the cattle. The point was not raised in the Court below and neither did the Native Commissioner realise that there was no cause of action, and in the circumstances this Court feels that no order as to costs should be made.

It is accordingly ordered that the appeal be and is hereby allowed and the Native Commissioner's judgment is altered to read: "Claim before Chief's Court is dismissed." No order as to costs of appeal or costs in the Court below.

Appellant: In person.
Respondent: In person.

Cases referred to:—

Lax *v.* Hotz, 1913, C.P.D. 261.

CASE No. 37 OF 1950.

SIMON NGCOBO (Appellant) *v.* GUMEDE SIBIYA (Respondent).

(N.A.C. CASE No. 11 OF 1950.)

VRYHEID: Tuesday, 27th June, 1950. Before Steenkamp, President, Hobson and Watson, Members of the Court (North-Eastern Division).

Practice and Procedure—Service of notice of appeal on respondent where his present whereabouts is unknown.

Appeal from the Court of the Native Commissioner, Mahlabatini.

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

The respondent is in default and as no notice of hearing of the appeal has been served on him, this Court cannot allow argument.

The appeal was postponed from the last session for the reason that notice of hearing had not been served.

The appellant is entitled to prosecute his appeal, and this Court therefore makes the following order:—

> Appeal posponed to 4th October, 1950. Appellant is ordered to deposit with the Clerk of the Court in terms of Rule 16 (4) of the Native Appeal Court Rules a sum of money sufficient to cover Messenger's fees for formal notice of hearing to be served at respondent's last place of residence by the Messenger of the Court.

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

For Respondent: In default.

CASE No. 38 OF 1950.

MADOVUYANA ZULU (Applicant/Appellant) *v.* NTSHOSHO Z. NKOSI (Respondent).

(N.A.C. CASE No. 39/50.)

VRYHEID: Wednesday, 28th June, 1950. Before Steenkamp, President, Hobson and McCabe, Members of the Court (North-Eastern Division).

Practice and Procedure—Force of ineffective judgments.

Held: That, as no effective judgment had been given against the applicant, this Court holds the view that a writ cannot be issued and that the applicant could have applied to have the writ set aside. He had such redress in the Court below and should have explored that avenue before coming to this Court.

Appeal from the Court of the Native Commissioner, Nongoma.

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

This is an application for the condonation of the late noting of the appeal.

Judgment was delivered on the 30th June, 1949, but the appeal was only noted on the 6th April, 1950, on the following grounds:—

> "The Native Commissioner erred in making an order against the appellant as he was not a party in the action."

A woman by the name of Bafokisile Zulu, duly assisted by her guardian Madovuyana Zulu (now applicant) sued the defendant (now respondent) in the Native Commissioner's Court for the dissolution of a customary union entered into between herself and the respondent.

The Native Commissioner entered the following judgment:—

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

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

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

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

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

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

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

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

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

The application is dismissed with costs.

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

For Respondent: In default.

Cases referred to:—

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

SELECTED DECISIONS

OF THE

NATIVE APPEAL COURT

(North-Eastern Division)

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