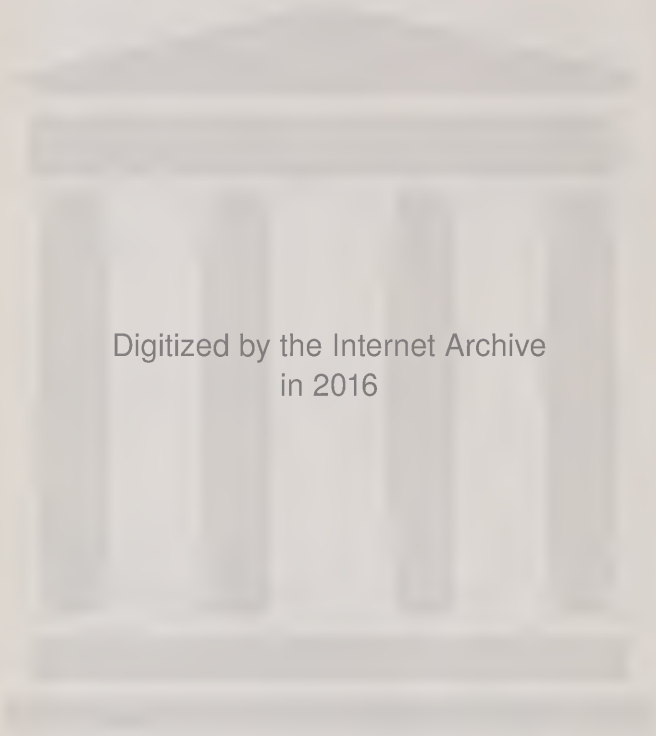

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VERSLAE

VAN DIE

NATURELLE-APPÈLHOWE

1955 (1)

REPORTS

OF THE

NATIVE APPEAL COURTS

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NORTH-EASTERN NATIVE APPEAL COURT.

BHENGU *v.* **MAZIBUKO.**

N.A.C. CASE No. 75 OF 1954.

PIETERMARITZBURG: 19th January, 1955: Before Ashton, Acting President, Bayer and Nel, Members of the Court.

COMMON LAW.

Res judicata—*Absolution judgment.*

Summary: Plaintiff claimed an order on the defendant to render an account of a certain business, debate of such account and payment of the amount found to be due and an order on defendant to deliver immediate possession of the business to him. Defendant pleaded in bar that the matter was *res judicata* and relied on an absolution judgment delivered on the same subject matter and between the same parties. Plaintiff contended that an absolution judgment could not be relied on in a plea of *res judicata* to which defendant replied that where a finding is made on which an absolution judgment is based that definite finding may become *res judicata.*

Held that " every judgment is conclusive proof as against the parties of facts directly in issue in the case decided by the Court and appearing from the judgment itself to be the ground upon which it is based."

Held that in the case relied upon for the plea of *res judicata* there was a finding of fact that there was an agreement for rental and purchase of the store in issue and as that finding was the basis of the present action the plea of *res judicata* was rightly taken.

Held further that this Court is not confined for guidance to the decisions of any particular divisions of the Supreme Court whether or not it is bound by those decisions.

Cases referred to:
Cohn *v.* Rand Rietfontein Estates Ltd., 1939 T.P.D. 324.

Statutes, etc., referred to:

Beck's Theory and Principles of Pleadings in Civil Actions (Second Edition) 138.

Appeal from the Court of the Native Commissioner, **Msinga.**

Ashton (Acting President) delivering the judgment of the Court:

In response to the summons issued in this case the defendant pleaded in bar that the plaintiff was precluded from bringing the action as it had already been decided by the same Court and was *res judicata.* The defendant proceeded to plead to the summons in the event of his plea not being successful.

Certain amendments to the plea were allowed and the parties agreed to hand in Case No. 18/52 heard in the same Court " as record in this case ". Thereafter an objection to defendant's request for permission to refer to the facts-found-proved in Case No. 18/52 was rejected and having allowed the defendant to refer to these facts the Assistant Native Commissioner recorded " Therefore judgment is summons dismissed. Judgment for defendant with costs."

Case No. 18/52 was between the same parties as in this case and the judgment recorded was "Summons dismissed with costs". That judgment was upheld on appeal to this Court on the 20th April, 1953. The particulars of the claim were:—

"1. During or about April, 1950, and at Cwaga aforesaid defendant verbally agreed with plaintiff that he would manage the business of a general dealer at Cwaga on behalf of the plaintiff.

2. The firm name of the business is the Bantu Supply Store which is being conducted by defendant in the property of the estate late Johannes Bhengu herein before referred to and the store and the property are estate assets.

3. It was an implied term of the agreement that defendant should render periodical acounts to the plaintiff of all business transactions during the period 1st April, 1950, to 30th April, 1952, and make payment of the amount found due on the taking of such account.

4. The defendant did business for plaintiff at all material times since 1st April, 1950, aforesaid (though to what extent plaintiff is unable to state) but plaintiff has not received a full true and accurate account nor received any payment in the business.

5. Defendant's failure to render such account or to make payment constitutes a material breach of the agreement and one which goes to the roots of the contract and plaintiff has as a result suffered serious prejudice.

6. Plaintiff consequently cancelled the agreement and claimed a rendering of an account, payment of moneys due and delivery of possession of the said business wherewith defendant refuses, fails or neglects to comply.

7. Wherefore plaintiff prays for judgment as follows:—

(*a*) An order on the defendant to render to plaintiff a full true and accurate account of the said business during the period stated;

(*b*) To debate such account before Court and to pay to plaintiff such sum of money as might on debate of such account be found due to plaintiff;

(*c*) An order on the defendant to deliver immediate possession of the said business to plaintiff."

and the particulars of the claim in the case now on appeal are:—

"1. Plaintiff Mengenduna Bhengu of Cwaga, Natal, a Native male with full contractual capacity in his personal and and as a representative in the estate of the late Johannes Bhengu duly appointed as such by the Native Commissioner of Msinga under Certificate of Appointment dated the 3rd April, 1950, where chief is Madhlala Mbaso of Cwaga, Natal.

2. Defendant is Solomon Mazibuko an adult Native male with full contractual capacity whose chief is Mqati Majozi of Cwaga, Natal.

3. In or about the month of April, 1950, the parties herein agreed that the defendant should manage a certain general dealer's store at Cwaga, Natal, for plaintiff.

4. The said store is an asset in the estate of the plaintiff's father, and the plaintiff is the representative of the said estate and also the heir to the said estate.

5. Since April, 1950, defendant has acted as manager of the business but despite demand has failed, neglected to pay and/or refused to render an account to the plaintiff of his management or of the proceeds of the business.

6. Defendant has further despite demand failed, refused and neglected to pay over to the plaintiff any money being the proceeds of the general dealer's business.

7. Defendant further neglects and refuses to hand the said business back to the plaintiff who has cancelled the contract of management with the defendent by reason of defendant's wrongful and unlawful acts.

8. By reason of defendant's wrongful and unlawful actions, plaintiff has suffered damages in the amount of £300.

9. Should this Honourable Court find that plaintiff's alleged cancellation is legal, plaintiff prays for an order cancelling the said contract of management.

Plaintiff therefore claims:—

(*a*) An order on the defendant to render to the plaintiff a full, true and accurate account of his management and financial dealings of the said business as from April, 1950 to date hereof.

(*b*) Debate of the said financial account.

(*c*) Payment of the amount found due after debate of the said account.

(*d*) An order of ejectment from the said business premises against the defendant.

(*e*) Damages in the sum of £300.

(*f*) Costs."

Alternatively.

Should this Honourable Court hold that plaintiff's cancellation of the contract of management was illegal then—

"(i) an order cancelling this said agreement;

(ii) the relief claimed in paragraphs (*a*), (*b*), (*c*), (*d*), (*e*) and (*f*) of the relief hereinbefore."

The judgment of the Assistant Native Commissioner now comes on appeal to the Court on the following grounds:—

"1. The judgment of the Native Commissioner is wrong in law and in fact in that the facts do not establish that the matter is now *res judicata* alternatively:—

The Native Commissioner in holding that the judgment of "summons dismissed with costs" caused the matter to become *res judicata.*

2. The Native Commissioner erred in giving a judgment in the form 'action dismissed with costs, judgment for the defendant with costs' as he was only adjudicating upon a plea in bar."

In regard to ground No. 1 the parties in the two cases are the same and the subject matter of both is the same store and business at Cwaga. In both cases plaintiff asked for a rendering of account and payment of the amount found to be due after a debate of the account. In the earlier case the finding of the Court was "that during April, 1951, plaintiff and defendant agreed that defendant should pay plaintiff rent as from April, 1950, and an agreement was entered into whereby defendant purchased the store at Cwaga." This decision goes to the very root of the present case and if reference to it is admissible in the present case the plea of *res judicata* must be upheld.

In Beck's Theory and Principles of Pleading in Civil Actions (2nd Edition) at page 138 appears the following passage:—

"It is not every final judgment which determines the rights of the parties, for a judgment of absolution is always a final judgment but it can seldom be interposed as a plea of *res judicata.* Such a judgment does not determine the rights of the parties at all. In the case of Cohn *v.* Rand Rietfontein

Estates, Ltd., however, a judgment of absolution from the instance was successfully interposed as a plea of *res judicata*. "While it is true that in the majority of cases in which absolution from the instance is granted the Court does not intend to arrive at any definite finding of fact there are cases in which a definite finding of a fact in issue has been made." Such definite finding thereby becomes *res judicata* in any subsequent action between the same parties in respect of the same subject matter."

Quoting from Stephens' Digest as set out on page 324 of the judgment in Cohn's case (1939 T.P.D.) it is apparent that "every judgment is conclusive proof as against parties and privies of facts directly in issue in the case actually decided by the Court and appearing from the judgment itself to be the ground upon which it was based."

It is clear from the judgment that the dismissal of the summons in the 1952 case between the parties was based on the finding that there was an agreement in 1951 for rental to be paid as from April 1950 and for the purchase of the Cwaga store; it is equally clear that the *ratio decidendi* of the present case would be that very fact and it must therefore be concluded that the plaintiff is estopped by that finding from pursuing the claim set out in his summons if the plea *res judicata* is allowed in the present case.

Council for appellant suggested that this Court is not bound by the judgment in Cohn *v.* Rand Rietfontein Estates Ltd. and that that case is never referred to as authority for accepting that an issue decided in a case in which an absolution judgment is granted may be relied upon for a plea of *res judicata* but his reasons for the suggestion were not convincing and it is not accepted.

There is ample authority in what has been written *supra* to justify this Court in saying that the plea in bar was rightly taken.

The result is therefore that appellant cannot succeed and it is ordered that the appeal be and it is hereby dismissed with costs. The judgment of the Assistant Native Commissioner is however, altered to read "for defendant with costs".

For appellant: Adv. J. H. Niehaus, instructed by S. G. Moodly.

For respondent: Adv. D. C. Shearer, instructed by Denis R. Smith.

NORTH-EASTERN NATIVE APPEAL COURT.

SHANGASE *v.* CHAMPION.

N.A.C. CASE No. 81 OF 1954.

PIETERMARITZBURG: 20th January, 1955. Before Ashton, Acting President, Bayer and Nel, Members of the Court.

LAW OF CONTRACT.

Powers of the Native Commissioner's Court—Practice and Procedure—Right of postponement.

Summary: Plaintiff asked for an order upon defendant to sign within thirty days the documents necessary to pass transfer of certain immovable property and, in the event of defendant failing to comply, for an order on the Clerk of the Court

to do so in his stead. A written agreement was relied upon and defendant pleaded that plaintiff had not carried out his obligations under the contract. The Native Commissioner rejected an application by defendant for a postponement to enable him to engage an attorney and defendant made this refusal a ground of appeal.

Held: That it is competent for a Native Commissioner's Court to direct the Clerk of the Court to sign documents on behalf of the defendant in order that transfer of immovable property to which the documents refer may be effected in a Deeds Registry.

Held further: That where a defendant had conducted his case personally right up to the close of plaintiff's case and had had every opportunity prior to that stage to engage counsel it was not necessarily a wrongful exercise of his discretion for the presiding officer to refuse an application by him for a postponement to enable him to engage counsel.

Cases referred to:
Tishini and Others *v.* Mzobe and Another, 1949, A.D. 623.

Statutes,, etc. referred to:
Section 20 of Deeds Registries Act No. 47 of 1937.
Section 21 of Act No. 56 of 1949.
D. Newall "The Law and Practice of Deeds Registration".

Appeal from the Court of the Native Commissioner, Camperdown.

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

This is an appeal from the judgment of the Native Commissioner, Camperdown in which plaintiff asked for an order upon defendant to sign within thirty days of the date of the order the documents necessary to enable certain property in the District of Verulam to be registered in his (plaintiff's) favour. The plaintiff asked further that, in the event of defendant failing to comply with the order, the Court order and authorise the Clerk of the Court to do so in his stead.

A written agreement was relied on and plaintiff declared that he had complied with his part of the contract and accordingly was entitled to have compliance of his part by defendant enforced.

The defendant pleaded—

"1. That this Honourable Court has no jurisdiction.

2. That the alleged contract is void.

3. Defendant denies that plaintiff fulfilled the obligations of the alleged contract and puts plaintiff to the proof thereof.

4. That the alleged contract was terminated on the 6th November, 1950."

and counterclaimed for the return of Deed of Transfer No. 8050/5/ or alternatively the sum of £113. 7s. 1d. being the balance on the valued price of the property.

Plaintiff excepted to the plea and counterclaim and after hearing the parties the exceptions were upheld by the Native Commissioner and subsequently an amended plea and counterclaim were filed to which plaintiff filed a reply.

Thereafter at a pre-trial conference it emerged that defendant admitted receiving a part only of the purchase price of the property and that he contended that he did not intend when signing the agreement to make it immediately binding and that the real agreement was to be entered into after the winding up of the estate from which he inherited the property. He contended that the written agreement was meant to be merely an option to purchase.

The Native Commissioner found it proved that defendant entered into an agreement to sell the property to plaintiff for £125, that plaintiff had paid the full purchase price and that defendant despite demand had failed to pass transfer. In the claim in re-convention no evidence was led and the Native Commissioner dismissed the claim with costs. On the claim in convention his judgment read—

> "It is ordered that, within 30 days from the date hereof, the defendant sign the necessary documents to enable transfer of the property namely, Lot 36 of Cele of A of S of the farm Piezang Rivier No. 805, situate in the county of Victoria, Province of Natal in extent 5 acres 2·25 perches (Deed of Transfer No. 8050/49, dated 5th October 1949) to be registered in the plaintiff's favour and that the defendant sign any and all further documents that may be necessary and incidental in connection with the transfer when he is called upon to do so.
>
> And it is further ordered that if the defendant fails or neglects or refuses to comply with the order, the Clerk of the Court shall sign on behalf of the defendant all documents in compliance with the order of the Court.
>
> Defendant to pay costs."

Against these judgments the defendant appeals to this Court on the following grounds:—

"1. That the above Court had no jurisdiction as the issue is about landed property situate in another district.

2. That the learned Native Commissioner erred in ruling that Common Law should apply as the contract of sale and purchase is one known to basic Native Law.

3. That the learned Native Commissioner further erred in refusing appellant's application for a postponement so as to be represented, there having been no such application or postponement before.

4. Nevertheless, the said judgment is bad in law."

In regard to ground 1 the fact that the property was situated in a district other than that in which the trial court was situated does not need discussion. It is rejected.

In regard to ground 2 the same remarks apply. It is also rejected.

In regard to ground 3 the Native Commissioner furnishes the following reasons:—

> "Summons in this matter was originally issued as far back as 29th March, 1954. On 29th July, 1954, the matter came before Court on an exception; on 6th October, 1954, the matter again came before Court for purposes of a pre-trial conference and finally the matter came to trial on 26th October, 1954. The defendant therefore had ample time in which to engage an attorney and was well aware of the case he had to meet. The plaintiff, furthermore, had already been put to considerable expense as a result of the two prior appearances at Court, occassioned by the defendant's defective pleadings, and the granting of the application for an adjournment was not justified."

It is clear from the record up to the time of the application for the adjournment that defendant had had no intention of engaging counsel and as he had no other apparent good grounds for an adjournment he gave the reason of desiring to engage an attorney. Moreover, plaintiff had by then established his case and even the help of an attorney could have availed defendant little. It is significant that in this Court defendant (now appellant) conducted his case in person. This Court can find no good grounds for saying that the Native Commissioner did not exercise his discretion justly.

In regard to ground 4 the points taken by appellant why the judgment is bad in law are not such as to be capable of support by this Court. There was no foundation for his contention that the agreement was other than what its wording showed it to be and that payment of the full purchase was not proved.

At the end of his additional reasons for judgment the Native Commissioner stated:—

"4. In regard to the alternative order reading as follows:—

"And it is further ordered that if defendant fails or neglects or refuses to comply with the order, the Clerk of the Court shall sign on behalf of the defendant all documents in compliance with the order of Court," and paragraph 12 (*c*) of my Reasons for Judgment, dated 8th November, 1954, I have had further opportunity of considering the competency of such an order, and have come to the conclusion that this alternative order should not have been made. The case of Tushini and Others *v.* Mzobe and Another, 1949, A.D. 623, is in point and it would seem that in terms of section 20 of the Deeds Registries Act No. 47 of 1937, read with the definition of "court" in this Act, only a Provincial or Local Division of the Supreme Court is empowered to order the Registrar to accept the signature of anyone but the owner or his authorised conveyancer for the passing of transfer.

Although not specifically appealed against I suggest that this portion of the order empowering, the Clerk of the Court to sign the necessary documents be expunged."

This Court in rejecting the Native Commissioner's suggestion points out that the order be made on the Clerk of the Court is legally correct. His attention is invited to page 48 of D. Newalls "The Law and Practise of Deeds Registration" where the following statement of the law appears:—

"By virtue of section 21 of Act No. 56 of 1949 a Native Commissioner's Court must now be taken as a Court for the provisions of the section (i.e. section No. 20 of the Deeds Registries Act No. 47 of 1937)."

The result is that this Court can find no good reason for upholding the appeal.

It is accordingly ordered that the appeal be and it is hereby dismissed with costs.

For Appellant: In person.

For Respondent: M. E. Hassim of Messrs. A. Christopher.

SOUTHERN NATIVE APPEAL COURT.

NXELE AND TULANI *v.* MAKALABA.

N.A.C. CASE No. 83 OF 1954.

BUTTERWORTH: 20th January, 1955. Before Israel, President. Warner and Harvey, Members of the Court.

PRACTISE AND PROCEDURE.

Application for condonation of late noting of appeal—No good cause for granting relief shown—Inability to contact lawyer and absence on visit to relatives untenable—Lack of funds and unsubstantiated illness reiterated as not being good grounds for granting indulgence sought—As no prospect of success in proposed appeal on proved facts exists—Refused with costs.

Summary: This is an application by two unsuccessful defendants, who jointly disputed a claim by plaintiff for a declaration of rights in and to a certain girl of whose mother defendant No. 2 was her second customary husband and No. 1 her dowry-eater, for condonation of late noting of appeal against a written judgment in terms of rule 2 (1) of Native Appeal Courts delivered on 16th October, 1954, Notice of Appeal being lodged on 13th November, 1954.

Held that:

(1) The last two submissions, i.e. inability to contact a lawyer and absence on a visit to relatives of the other defendant, are obviously untenable, while lack of funds and unsubstantiated illness have been ruled by Native Appeal Courts to be not good grounds for granting the indulgence sought. As no good cause for granting relief has been shown it remains, then, to enquire, in accordance with established practice whether on the merits of the proposed appeal the appellants have a prospect of success.

(2) A reading of the record of the Assistant Native Commissioner's reasons for judgment coupled with a careful consideration of the arguments preferred shows that appellants have no such prospect as it is apparent from his reasons that the Assistant Native Commissioner was at pains to consider and to give proper weight to all the evidence adduced and he has sufficiently justified his rejection of certain of the evidence and his acceptance of other to make it quite clear that appellants have no prospect of success in their proposed appeal and as there is no merit in the application for condonation itself, it must be refused with costs.

Cases referred to:

Mbata *v.* Mdhlalose, 1952 (3) N.A. 210.

Oosthuizen *v.* Stanley, 1938, A.D. 333.

Statutes, etc., referred to:

Rule 2 (1) N.A.C., Government Notice No. 2887 of 9th November, 1951.

Appeal from the Court of the Native Commissioner, Willowvale.

Israel (President):—

This is an application by the two unsuccessful defendants for the condonation of the late noting of their appeal from a judgment of the Court of Native Commissioner. Judgment was pronounced on the 7th October, 1954, and a written judgment was delivered to the Clerk of the Court on 16th October, 1954, by the presiding officer in terms of rule 2 (1) of the rules for Native Apeal Courts, but notice of appeal was not lodged until 13th November, 1954. The defendant who was conducting the negotiations for the appeal on behalf of both of them, gave as his reasons for the delay a lack of funds at the time, the sudden sickness of his baby child, his inability to get in touch with his lawyer and the absence on a visit to his relatives of the other defendant. The last two submissions are obviously untenable, while lack of funds and unsubstantiated illness have been ruled by the Native Appeal Courts to be not good grounds for granting the indulgence sought. [Mbata *v.* Mdhlalose, 1952 (3) N.A.C. 210.] The application, therefore, shows no good cause for granting relief, and it remains, then, to enquire, in accordance with established practice, whether on the merits of the proposed appeal good cause can, nevertheless, still be shown: that is to say that the appellants have a prospect of success.

A reading of the record and of the Assistant Native Commissioner's reasons for judgment coupled with a careful consideration of the arguments preferred, convinces me that appellants have no such prospect. The first and third grounds of the proposed appeal are concerned with the evidence; the former stating that the judgment was against the weight of evidence, and the latter that the presiding officer without sufficient reason erredly disregarded facts which emerged from plaintiff's case and similarly disregarded the bulk of the evidence for the defence.

I can find no justification for these criticisms. The action hinged on (*a*) the age of the girl, the rights to whom were in dispute, and (*b*) the date of the girl's mother's second marriage by Native Custom to the second defendant. In determining both points it is apparent from his reasons that the Assistant Native Commissioner was at pains to consider and to give proper weight to all the evidence adduced with judicious care, and he has in my opinion sufficiently justified his rejection of certain of the evidence and his acceptance of other. His judgment cannot be attacked on these grounds.

The second ground of appeal complained that the Assistant Native Commissioner was wrong in law in holding that any cause of action had been established against first defendant. Now, the action under consideration was a request for a declaration of rights in and to a certain girl of whose mother second defendant was her second customary husband and first defendant was her dowry-eater. Had the latter intended from the outset to have nothing to do with the case he could have excepted to the summons, so far as he was concerned, on the ground of mis-joinder and, most likely, would have been successful in thus disassociating himself from the matter. He did not do so. Instead, in the pleadings he joined the second defendant in contesting the correctness of the material particulars of plaintiff's claim and associated himself unequivocally in disputing plaintiff's rights to the girl. It is true that the defendant's plea included a paragraph specially pleading that the summons disclosed no cause of action against first defendant, but this is inconsistent with the other points of the plea, and cannot protect him against a judgment given in respect of the point of issue in contesting which he spontaneously joined forces with second defendant. Moreover, the judgment was a judgment *in rem* and therefore operative, not only against him and his fellow defendant but against the whole world, so that he has suffered no prejudice.

The fourth and final ground of appeal was to the effect that the Assistant Native Commissioner was wrong in allowing the evidence of an additional witness for plaintiff to be led at the close of the defendant's case. *In limine* the Assistant Native Commissioner recorded: "It is agreed that onus rested equally on both parties. If anything fresh arises from defendant's evidence plaintiff has right to call rebutting evidence". No objection to this ruling is recorded, and after defendants had closed their case plaintiff called a woman to testify to the date of yet another customary union contracted by second defendant which was referred to in the evidence for the defendants and which was material in establishing further the parentage of the girl in question. Again the Assistant Native Commissioner says in his reasons, no objection was raised to this procedure. Indeed, full advantage was taken of the opportunity to cross-examine this witness at length and she was even recalled after the tea interval at the instance of counsel for the defence for further cross-examination. In these circumstances I cannot see that the defendants have any cause for complaint on this score. But if this is not enough, the ruling of the Appellate Division in the case of Oosthuizen *v.* Stanley, 1938, A.D. at page 333 *et seq.*, establishes beyond doubt that the Assistant Native Commissioner was right in allowing the witness to be called. The necessity for

calling her arose from an allegation made in the defendant's own case, her evidence was not such as to require the defendant to bring back their witnesses, and above all, it was considered by the Court *a quo*, and is so considered by this Court, to be material to the matter and weighty, in that it went far to establishing the truth regarding one of the factors on which the action hinged.

It is therefore quite clear that appellants (defendants) have no prospect of success in their proposed appeal and as there is no merit, as I have already pointed out, in the application for condonation itself, it must be refused with costs.

Warner (Permanent member): I concur.

Harvey (Member): I concur.

For Appellant: Mr. Wigley, Willowvale.

For Respondent: Mr. Dold, Willowvale.

NORTH-EASTERN NATIVE APPEAL COURT.

XULU *v.* KUMALO.

N.A.C. CASE No. 67 OF 1954.

ESHOWE: 26th January, 1955. Before Ashton, Acting President, Cowan and Nel, Members of the Court.

ZULU CUSTOM.

Taking a widow to wife—Exercise by Chief of administrative powers—Native customary union—Res judicata.

Summary: Plaintiff claimed two girls born by Ntombiyenkosi Kumalo to defendant; defendant contended that the woman Ntombiyenkosi Kumalo was his customary union wife. In a previous case in a Chief's Court plaintiff asked for the return of his wife Ntombiyenkosi Kumalo and the Chief gave "judgment for plaintiff. It was ordered that defendant (Ntombiyenkosi) should return to plaintiff's kraal."

Held: That what purported to be a judgment by the Chief following the exercise of judicial powers was nothing more than an administrative order and that as such it was not a "judgment" upon which a plea of *res judicata* could be based.

Held further: That although the union was not registered the following facts taken together proved that defendant and Ntombiyenkosi Kumalo had entered into a customary union:—

(*a*) Defendant and Ntombiyenkosi lived together for about five years and five children were born to them.

(*b*) A beast was slaughtered when defendant took Ntombiyenkosi to wife.

(*c*) An official witness ascertained that *lobolo* was to be paid and questioned the woman.

(*d*) No damages were paid for the various pregnancies.

Held further: That the slaughter of a beast by the new husband of a widow to enable her to partake of food in his kraal is the true Zulu Custom when a man takes a widow to wife.

Appeal from the Court of the Native Commissioner, Mtunzini.

Ashton (Acting President) delivering the judgment of the Court:—

In the Court of Chief Lindelihle in the Mtunzini district plaintiff claimed two girls born by Ntombiyenkosi Khumalo to defendant; defendant pleaded that the girls were his because he contracted a valid union with Ntombiyenkosi; the Chief gave judgment for plaintiff as prayed and defendant appealed against it to the Native Commissioner.

The Native Commissioner dismissed the appeal and upheld the judgment of the Chief and now that decision is brought on appeal to this Court on the following grounds:—

"1. That the learned Native Commissioner erred in holding that the judgment of Chief Nsoyi dated 26th May, 1947, referred to and proved in the evidence did not constitute a bar to the plaintiff's claim and did not substantiate a plea of *rea judicata* or *lis Pendens*.

2. That the learned Native Commissioner erred in placing too heavy an onus on the appellant and erred in his general analysis of the evidence in that he attached too much significance to such unsatisfactory features as there may have been in the evidence for the appellant and did not pay sufficient regard to the unsatisfactory features in the evidence for the respondent and in that while admitting that the evidence as to payment of local tax for two wives since 1937, that Ntombiyenkosi did during 1937 admit that she was the appellant's wife, that the Chief Nsoyi did find in 1947 that she was his wife was satisfactory the learned Native Commissioner did not attach sufficient significance to these proved facts neither to the other general facts proved in the appellant's favour.

3. That the judgment is against the weight of the evidence."

It will be convenient to deal first with the plea of *res judicata* raised by the defendant in the Native Commissioner's Court.

The defendant brought an action in the Court of Chief Nsoyi which together with the Chief's judgment is set out as follows:—

"*Claim.*

Plaintiff claims the return of defendant Ntombiyenkosi who is his lawful wife married by Native Custom. Defendant is living with her guardian and not at plaintiff's kraal and having not previously obtained divorce. Costs 14s.

Judgment.

For plaintiff. It was ordered that defendant should return to plaintiff's kraal."

It was argued for defendant that this judgment was in *rem* in that the Chief pronounced upon the status of Ntombiyenkosi and so this could not be gone into again as was sought to be done by plaintiff in the case now before us. It was argued on plaintiff's behalf that the Chief's judgment, because there were no pleadings and no written reasons for judgment, did not indicate that the Chief had found as a fact that Ntombiyenkosi was the wife of defendant.

This Court of its own motion questioned whether what purported to be a judgment following the exercise of judicial powers was not in fact an administrative order and it is its view that it was the latter. Such being the case the "judgment" relied upon cannot be regarded as satisfying the requirements of a plea of *res judicata*. This disposes of ground No. 1 of plaintiff's appeal.

Turning to the facts, the Native Commissioner found proved the following:—

"The woman Ntombiyenkosi is the mother of the two girls in dispute. She was the legal wife of the late Ndlyamantla.

He died shortly before the earthquake of 1932.

Mgada (since deceased) took his place as kraalhead and guardian of Ntombiyenkosi and of plaintiff.

Plaintiff is the son and heir of the late Ndluyamantla, born of the latter's union with Ntombiyenkosi.

Soon after Ndluyamantla's death, defendant and Ntombiyenkosi commenced to co-habit. That would be in 1932 or 1933.

No union between defendant and Ntombiyenkosi was ever registered.

Five children, including the two girls in dispute, of all of whom defendant is the father, were born by Ntombiyenkosi, after she and defendant commenced to co-habit.

Two further children, of whom defendant may or may not be the father, were also subsequently born by her.

Defendant has consistently paid local tax for 2 'wives' from 1937 onwards.

He already had one wife when he commenced his relationship with Ntombiyenkosi.

The only woman who could be his second wife, *if* in fact, he did have a second wife, is Ntombiyenkosi.

Mgada died about 1946, whereupon plaintiff became his own kraalhead; succeeded to his late father's estate; and would be the guardian of Ntombiyenkosi and her other children—and entitled to the property rights he claims in the 2 girls in dispute—if, in fact, Ntombiyenkosi is not the legal wife by customary union of defendant.

The issue in this case, which is an appeal from the Chief's Court is therefore clear, viz., the legitimacy or illigitimacy of the 2 girls in dispute, depending entirely on whether or not a valid customary union was ever contracted between defendant and Ntombiyenkosi."

We agree with these findings.

It emerges from the evidence that defendant and Ntombiyenkosi lived together as man and wife for from four to five years and that five of the children were born to them; it is clear that a fight between Ntombiyenkosi and defendant's first wife caused Ntombiyenkosi to leave defendant; it is clear that one beast was slaughtered when defendant took Ntombiyenkosi to wife—this is in keeping with Zulu Custom which requires that the new husband of a widow must provide an animal and kill it to enable her to partake of food in his kraal; it is also clear that defendant called in an official witness who ascertained the *lobolo* to be paid and "questioned" the woman at the husband's kraal in the presence of the relatives—this is also in keeping with practice; no damages were paid for the various pregnancies and the suggestion that the beast (which was slaughtered) was paid in respect of damages for the first pregnancy is not acceptable.

The union was not registered, it is true, but the overwhelming evidence quoted above amply proves defendant's contention that he and Ntombiyenkosi entered into a valid customary union.

Such being the case we hold that the Native Commissioner was wrong in his conclusions that defendant failed to prove that his association with Ntombiyenkosi was a valid union and that plaintiff was entitled to judgment.

It is accordingly ordered that the appeal be and it is hereby allowed with costs. The judgment of the Native Commissioner is set aside and for it is substituted "Appeal upheld with costs. The Chief's judgment is set aside and for it is substituted 'Judgment for defendant with costs'."

For Appellant: Mr. W. E. White.

For Respondent: Mr. H. H. Kent.

NORTH-EASTERN NATIVE APPEAL COURT.

NKWANYANA *v.* XULU.

N.A.C. CASE No. 78 OF 1954.

ESHOWE: 26th January, 1955. Before Ashton, Acting President, Cowan and Nel, Members of the Court.

ZULU CUSTOM.

Native customary union Zululand—Payment of lobolo—*Long association together of man and woman.*

Summary: Plaintiff sued defendant for thirty-three head of cattle in respect of the *lobolo* of three girls being the daughters of his mother by defendant to whom she was, he averred, not married. Defendant contended that he married plaintiff's mother in or about the year 1925, after plaintiff's father died and that he was the rightful person to have the *lobolo* of the three girls even though plaintiff was the heir to his late father.

Held: That defendant did all that was expected in Native Law of a prospective bridegroom in that he paid *lobolo* to the man who was head of the kraal of the prospective bride and her father, having been assured by him that he was the person to be negotiated with.

Held further: That *lobolo* having been paid, the inactivity of the rightful guardian and the long association of defendant and the widow (1925-1952) as man and wife and the birth of five children precluded the Court from declaring the children illegitimate so that plaintiff might claim their *lobolo* and guardianship.

Appeal from the Court of the Native Commissioner, Mtunzini.

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

This case comes on appeal from the Native Commissioner, Mtunzini, who allowed an appeal from a Chief's judgment for plaintiff for 33 head of cattle in respect of the *lobolo* of three girls and altered it to read "for defendant with costs."

Plaintiff claimed the *lobolo* of the three girls being the daughters of his mother by defendant to whom she was, he averred, not married. He also claimed the custody of two brothers of these three girls.

The Chief rejected defendant's plea that he was married to the mother of the girls and gave judgment for plaintiff as prayed.

It is not seriously contended that Mangema the mother of plaintiff did not marry his father and it is common cause that when the latter died she lived with defendant for some years and had the five children by him which are now the subject of this litigation. The whole case depends on the question whether Mangema and defendant can be said to have entered into a valid customary union.

The Native Commissioner held that "since plaintiff has admitted and it seems to be perfectly clear from the evidence that the children he now claims were all born after his mother became widowed he is completely out of Court and can at most be heard in a claim for *lobolo* of the widow, his mother." He did not state specifically in his reasons for judgment whether he found that a valid union between Mangema and defendant existed or not.

It is clear, however, from the record that Mangema and defendant lived together as man and wife from 1925 to 1952, over a quarter of a century.

Plaintiff's witness, Mtubatuba, says that defendant and Mangema married but he did not know whether *lobolo* was paid and the other witnesses were equally hazy regarding the question of a union between defendant and Mangema. But defendant says that he paid *lobolo* to Mloyeni Ngema at whose kraal he found her a widow though he was led to believe that she was a spinster.

Defendant's witness, Dinanja Ngema confirms that *lobolo* was paid to Mloyeni but he maintained that Mangema was not married when she married defendant. Other evidence given by defendant's witnesses went to establish a ceremony when defendant took Mangema to wife.

Mtubatuba was the self declared guardian of the widow. He said that he knew that Mangema and defendant were living together as man and wife. He took no action in connection with the union between his ward and the defendant although admittedly he was the only person who should have done so.

It is clear from the evidence that defendant did all that was expected in Native Law of a prospective bridegroom in that he paid *lobolo* to the man who was the head of the kraal of the prospective bride and her father, having been assured by him that he was the person to be negotiated with.

Despite this payment of *lobolo*, the inactivity of the rightful guardian and the long association of defendant and the widow together as man and wife and the birth of five children, the plaintiff at this late stage asks the Court to declare those children illigitimate so that he can claim their *lobolo*.

This Court is not prepared to accede to such a request.

The Native Commissioner gave judgment for defendant and in that conclusion we concur.

It is accordingly ordered that the appeal be and it is hereby dismissed with costs.

For Appellant: Mr. S. H. Brien of Wynne & Wynne, instructed by J. Gerson.

For Respondent: Mr. H. H. Kent.

SOUTHERN NATIVE APPEAL COURT.

NDYU *v.* **NXOKE.**

N.A.C. CASE No. 71 OF 1954.

PORT ST. JOHN'S: 27th January, 1955. Before Israel, President, Warner and Wakeford, Members of the Court.

PONDO CUSTOM.

Children repudiated and/or born after dissolution of customary union become property of mother's father—Beast paid by husband's father to effect repudiated woman's return does not revive the union—Agreement of parties required.

Summary: Plaintiff, now appellant, the son and heir of the late Ndyu by his customary wife Mampindweni the daughter of the late Nxoko whose heir is defendant, sued defendant for a declaration of rights in and to Mampendweni's two female children, Nomjikelo and Nompumelelo; such dowry cattle as may have been paid for either of them; an order of Court for their custody and costs, judgment being granted in defendant's favour with costs.

Held:

(1) The finding that defendant had established Ndyu's public repudiation of his customary wife is justified by the evidence.

(2) Plaintiff's statement that Ndyu visited defendant's kraal to cohabit with Mampindweni as he still regarded her as his wife is improbable and cannot be accepted.

(3) As Ndyu repudiated the child Nomjikelo, and as Nompumelelo was born after the customary union was dissolved, they both became the property of their mother's father.

(4) As the customary union had been dissolved when Ndyu's father paid a further beast to get Mampindweni back, the payment would not have the effect of reviving the union without the agreement of the parties particularly as Ndyu repudiated the woman and refused to be a party to the payment.

(5) The judgment of the Native Commissioner was correct and should be confirmed.

Cases referred to:

Tonono *v.* Tobo, 3 N.A.C., 120.

Appeal from the Native Commissioner's Court, Tabankulu.

Warner (Permanent Member):—

It is common cause that plaintiff is the son and heir of the late Ndyu who contracted a customary union with a woman named Mampindweni, daughter of the late Nxoko, whose heir is defendant. While living at Ndyu's kraal, Mampindweni gave birth to plaintiff and some other children. Afterwards she gave birth to a female child named Nomjikelo. While this child was still small, Mampindweni left Ndyu's kraal with the child and went to live at defendant's kraal leaving the elder children at

Ndyu's kraal. After some years while still at defendant's kraal Mampindweni gave birth to another female child named Nompumelelo. Mampindweni did not return to Ndyu's kraal but contracted a customary union with a man named Dingindawo who paid dowry to defendant. The girls Nomjikelo and Nompumelelo remained at defendant's kraal. The dowry paid by Ndyu was not returned.

Plaintiff has brought this action against defendant in which he claims (*a*) a declaration of rights in and to the said Nomjikelo and Nompumelelo; (*b*) such dowry cattle as may have been paid for either of them; (*c*) an order of Court for the handing over to plaintiff by defendant of the said Nomjikelo and Nompumelelo and (*d*) costs of suit.

Defendant pleaded that, when Mampindweni was pregnant with Nomjikelo, the late Ndyu repudiated the child saying that it was illegitimate and drove Mampindweni away and discarded her as his wife and forfeited his dowry and also repudiated the child and abandoned it whereupon Mampindweni returned to defendant's kraal where, thereafter, she gave birth to Nompumelelo whose natural father was one Thulani Nozala from whom fine was demanded by defendant but who has never paid any such fine; thereafter Mampindweni married Dingindawo who paid dowry for her to defendant; all this took place during the lifetime of the late Ndyu and with his knowledge and he at no time made any claim to Nomjikelo and Nompumelelo nor did he claim any refund of his dowry when Mampindweni was maried so that defendant is entitled to all rights in respect of the two girls mentioned.

The Assistant Native Commissioner gave judgment for defendant with costs and plaintiff has appealed on the following grounds:—

1. That the judgment is against the weight of evidence and the probabilities of the case.
2. That defendant failed to discharge the onus of proof, which lay upon him and the admitted acceptance by defendant—after the alleged act of repudiation—of further dowry for Nompindweni supports the plaintiff's contention that the payment and acceptance of further dowry is not in accordance with defendant's plea or Native Law and Custom.

Plaintiff and his witnesses say that Mampindweni left Ndyu because of a domestic quarrel, but they are unable to give the cause of the quarrel. The Native Commissioner found that defendant had established that Ndyu repudiated Mampindweni publicly and I consider that this finding is justified by the evidence. It is admitted that the matter went before the headman. Nonkom, a headman's councillor, says that he was present and heard Ndyu repudiate his wife and say that he was not claiming a refund of his dowry. Plaintiff called the headman who says that Mampindweni complained that Ndyu had driven her away saying that she had given birth to an illegitimate child and that Ndyu had stated that they had had a quarrel and he was going to fetch her. It is not explained, however, why he did not do so. Defendant brought evidence to show that Ndyu was a frequent visitor to defendant's kraal as his half-sister was married to defendant. It was also stated that Mampindweni contracted the union with Dingindawo when she was staying at the kraal of one of Ndyu's relatives. Ndyu must, therefore, have known of this union but he took no steps to obtain damages or a refund of his dowry. Plaintiff's statement that Ndyu visited defendant's kraal to cohabit with Mampindweni as he still regarded her as his wife is improbable and cannot be accepted.

As Ndyu repudiated the child Nomjikelo, she became the property of her mother's father (see case of Tonono *v.* Tobo 3 N.A.C. 120) and as Nompumelelo was born after the customary union had been dissolved, she is also the property of Mampindweni's father.

It is admitted by defendant that a further beast was paid as dowry after Mampindweni had been driven away by Ndyu. According to defendant, Ndyu's father Nombila, in the absence of Ndyu, paid a further beast to get Mampindweni back but Ndyu said he did not want her back and refused to fetch her. As the customary union has been dissolved when this beast was paid, the payment would not have the effect of reviving the union without the agreement of the parties particularly as Ndyu repudiated the woman and refused to be a party to the payment.

In her evidence, Mampindweni states that Ndyu was not the father of Nomjikelo but, when he questioned her, she told him that he was. Mr. Birkett has argued, in this Court, that, in refusing to disclose the name of the adulterer, Nampindweni was rejecting her husband so that she left the kraal for this reason and not because Ndyu had repudiated her and, as there was no return of dowry, the union was not dissolved. It seems unlikely, however, that, if this were the case, Ndyu would not have called a meeting of the two families so that the matter could be discussed or claimed a refund of the dowry paid by him.

For these reasons, I consider that the judgment was correct and the appeal should be dismissed with costs.

Israel (President): I concur.

Wakeford (Member): I concur.

For Appellant: Mr. H. H. Birkett.

For Respondent: Mr. F. C. W. Stanford.

SOUTHERN NATIVE APPEAL COURT.

MBELO *v.* **HLUPEKO.**

N.A.C. CASE No. 73 OF 1954.

PORT ST. JOHN'S: 27th January, 1955. Before Israel, President, Warner and Wakeford, Members of the Court.

PONDO CUSTOM.

Return of customary widow and her children—Status of widow and rights to children enunciated—Heir no right to claim return of deceased's widow—Chief's judgment accords with Native Law but order for woman's return incompetent—Could be ignored so that defendant not prejudiced.

Summary: In the Chief's Court second plaintiff (now respondent), as representative of his eldest brother and present kraal-head whose whereabouts are unknown sued and obtained judgment for the return of his eldest deceased brother's wife Maletshimani and her two children Zalani and Kwelitile which was upheld on appeal to the Native Commissioner's Court. Maletshimani is defendant's daughter.

Held:

(1) The question whether Maletshimani was a widow of her late husband's kraal or a *dikazi* of defendant's kraal does not depend on the attitude adopted by defendant but depends upon whether she had severed connection with her late husband's kraal and that she had not done.

(2) In accordance with principles laid down in previous decision of this Court, plaintiff is entitled to the children born to Maletshimani at defendant's kraal.

(3) When the matter came before the Native Commissioner on appeal the parties did not file statements of the claim and defence as provided for in section 12 of the Regulations for Chiefs' and Headmen's Courts as promulgated in Government Notice No. 2885 of 1951.

(4) The Chief gave a judgment which is in accordance with Native Law but the position was altered by the Eastern Districts Court which ruled that *an heir has no right to claim that the deceased's wife shall return to his kraal.*

(5) The order for the woman's return while incompetent could be ignored so that defendant has not suffered any prejudice.

Cases referred to:

Guleni *v.* Guleni, 1944, N.A.C. (C. & O.), 45.

Mcitwa *v.* Ndondo, 1944, N.A.C. (C. & O.), 96.

Mfana *v.* Ntlokwana, 1945, N.A.C. (C. & O.), 69.

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

Statutes, etc., referred to: Section 12, Government Notice No. 2885 of 1951.

Appeal from the Native Commissioner's Court, Tabankulu.

Warner (Permanent Member):—

This is an appeal against the judgment of the Native Commissioner dismissing an appeal against the judgment of Chief's Deputy Matubeni Dinwayo in favour of plaintiff who claimed return of Maletshimane widow of the late Malinge Hlupeko and her two children namely (1) Zalani; and (2) Kwelitile. The following are the grounds of appeal:—

1. That not very long after her late husband's death, Maletshimani's name was struck off the tax registers, since when no taxes have been paid for her, a period of 20 years or more.
2. That the judgment is against the weight of the evidence and the probabilities in the case.
3. That in as much as the judgment for the return of Maletshimani is unenforceable in law, it is not a competent one.

The following facts are not disputed:—

1. The late Hlupeko had five sons, the eldest of whom was Malinge, the second plaintiff and the third Matshangane.
2. Malinge contracted a union with a woman named Malejimane and had four children by her, all of whom died.
3. Malinge predeceased Hlupeko.
4. Shortly before the death of Malinge, Malejimane returned to her people's kraal, the head of which is now defendant.
5. After Malinge's death in 1931, Hlupeko paid taxes for Malejimane as a widow for four years. He then said that he was finding this a burden and arranged with the headman that her name should be deleted from the tax registers but the land should be retained for her. He undertook to resume paying taxes for her as soon as she returned to his kraal.
6. Malejimane remained at defendant's kraal and cohabited with Mtunzana Mcutu by whom she had three children, fines being paid by him to defendant in respect of the first two. The eldest girl is married.
7. Hlupeko died in 1949 and plaintiff succeeded him as head of the kraal.
8. Plaintiff's whereabouts are unknown. Mtshangane is in charge of the kraal and is his representative during his absence and has brought this action in plaintiff's name.
9. About three years ago Mtshangane paid a further beast to defendant as further dowry in respect of Malejimane.

Plaintiff says that, after Malejimane left the kraal, several attempts were made to secure her return and she would promise to return but fail to keep her promise, or she would return for a short time and then go back to defendant's kraal. The defence is that Malejimane had severed all connection with plaintiff's kraal.

Malejimane says that, before Malinge's death, Hlupeko accused her of being the cause of her children's deaths and ordered her to leave the kraal. She has not brought any evidence to substantiate this statement and admits that she did not make a report to the headman. She also says that, when she left the kraal, two of the children had died, she took one with her, leaving the other which she fetched later so that two of the children died at defendant's kraal. Her story that she was driven away is, therefore, unacceptable.

It is unnecessary to traverse the evidence in this case because defendant and Malejimane have not only admitted the payment of a further beast as dowry but have also admitted that they regarded Malejimane as a widow of Hlupeko's kraal. The first daughter born to Malejimane after she returned to defendant's kraal was married and the natural father claimed the dowry. Defendant resisted the claim on the ground that plaintiff was the proper person to receive the dowry. Mtshangane took the dowry and the natural father was successful in a claim for it brought before the headman. The natural father paid fines to defendant for having caused the pregnancies of Malejimane and defendant then took up the attitude that Malejimane was not a widow of plaintiff's kraal but a *dikazi* of defendant's kraal. Her status, however, does not depend upon the attitude adopted by defendant but depends upon whether she had severed connection with her late husband's kraal and I am satisfied that she had not done so.

In accordance with principles laid down in the cases of Guleni *v.* Guleni, 1944, N.A.C. (C. & O.), 45, Mcitwa *v.* Ndondo, 1944, N.A.C. (C. & O.), 96 and Mfana *v.* Ntlokwana, 1945, N.A.C. (C. & O.) 69, plaintiff is entitled to the children born to Malejimane at defendant's kraal.

According to the notes furnished by the Chief, plaintiff sued in his Court for return of Malejimane, widow of late Malinge Hlupeko and her two children, namely (1) Zalani; (2) Kwelitile and costs and judgment was given for plaintiff. When the matter came before the Native Commissioner's Court on appeal the parties did not file statements of the claim and defence as provided for in section 12 of the Regulations for Chief's and Headmen's Civil Courts as promulgated in Government Notice No. 2885 of 1951. The Native Commissioner entered a judgment of: "The appeal is dismissed and judgment entered for plaintiff as prayed with costs."

The Chief gave a judgment which is in accordance with Native Law but the position was altered by the decision in the case of Nbono *v.* Manoxoweni 6 E.D.C. 62, which ruled that an heir has no right to claim that the deceased's wife shall return to his kraal. This means that the order for the return of the woman Malejimane was incompetent. This order could be ignored so that defendant has not suffered any prejudice.

The appeal should be dismissed with costs but the judgment of the Native Commissioner should be deleted and the following substituted:—

> "The appeal is dismissed with costs but the Chief's judgment is made to read: Plaintiff is declared to be entitled to the custody of the two children born to Malejimane, widow of

Malinge Hlupeko, namely, Zalani and Kwelitile, and to property rights in respect of the said two children.".

Israel (President): I concur.

Wakeford (Member): I concur.

For Appellant: Mr. H. H. Birkett, Port St. John's.
For Respondent: Mr. F. C. W. Stanford, Flagstaff.

SOUTHERN NATIVE APPEAL COURT.

MADOLO *v.* **LUBUZO.**

N.A.C. CASE No. 1 OF 1954.

PORT ST. JOHN'S: 27th January, 1955. Israel, President. Warner and Wakeford members of the Court.

PRACTICE AND PROCEDURE.

Absolution from the instance at close of plaintiff's case—Incompetent—Native Commissioner not justifid in holding defendant had no case to meet—Appeal against weight of evidence and probabilities not understood—Contract—Purchase and sale—Basis explained—When plaintiff entitled to judgment—Onus on defendant.

Summary: Plaintiff (now Appellant)) claimed from defendant delivery of a cow and its increase or payment of their value £30. 10s., alternative relief and costs of suit alleging that in 1947 he purchased a certain heifer from defendant and had paid the agreed purchase price of £5, that this heifer had had increase and that defendant was *in mora* in failing or neglecting to deliver the cattle which had died before summons was issued.

Held:

(1) As defendant had not led any evidence to contradict plaintiff's evidence it is not understood why the weight of evidence and probabilities of the case were appealed against.

(2) If plaintiff can prove that the contract was entered into, that he fulfilled his obligations under it and that defendant was *in mora* when the subject matter perishes plaintiff is entitled to judgment unless defendant can prove that the case falls within the exception to the general rule.

(3) As it has been shown that defendant was *in mora,* the onus is on him to prove that the cattle would have died even if the cow had been handed to plaintiff at the proper time.

(4) As the onus was on defendant, a judgment of absolution from the instance was incompetent at the close of plaintiff's case.

(5) The Native Commissioner was not justified in holding that defendant did not have a case to meet. The application for absolution should have been refused and defendant called upon to present his case.

Literature referred to:

Wessel's Law of Contract, paragraphs 2704 to 2706 inclusive.

Appeal from the Court of the Native Commissioner, Libode.

Warner (Permanent Member):—

Plaintiff alleged that, in 1947, he purchased a certain heifer from defendant and paid him £5, the agreed purchase price, that the heifer had had increase and that defendant failed or neglected to deliver the cattle to plaintiff. He claimed delivery of the cow and its increase on payment of their value £30. 10s., alternative relief and costs of suit.

Defendant's plea was a denial that he had ever sold cattle to plaintiff.

Plaintiff gave evidence of the purchase of the heifer and payment of the purchase price. He also stated that in 1952, before summons was issued, defendant had told him that the heifer and its calf had died.

Evidence was brought to show that, in 1951, plaintiff instructed an attorney to send defendant a letter of demand for delivery of the heifer. This was done and defendant attended at the attorney's office and said that the beast in question should be fetched by plaintiff or the latter should send someone to fetch it. Bafana Vaco gave evidence to the effect that he was sent by plaintiff to fetch the beast and went to defendant on three occasions but, although the latter pointed out the beast to him, he made some excuse for not delivering it on each occasion so that it was not handed over to Bafana as agent of plaintiff.

Johnson Ndamase said that the heifer was in his possession as he was keeping it on behalf of defendant and he could not give any reason why it had not been delivered to plaintiff. Eventually it gave birth to a calf and about two weeks later it died and about a week thereafter the calf died. The witness said that the beast died of drought although he took great care of it.

Plaintiff closed his case and defendant's attorney applied for dismissal of plaintiff's summons on the ground that, as the cow and calf had died before the issue of summons, plaintiff could not sue for their delivery.

The Native Commissioner reserved judgment on the point of law raised and postponed the case.

Before the day to which the case was postponed, plaintiff's attorney gave notice that he would apply for an amendment of the summons by deleting the claim for delivery of the cattle and substituting a claim for payment of their value and by altering the particulars of claim to allege that defendant wrongfully and unlawfully failed or neglected to deliver the cattle until the said cow and calf died. At the resumed hearing, application was made in terms of this notice. Defendant's attorney opposed the application but it was granted.

Defendant's attorney then applied for an absolution judgment on the grounds that plaintiff had failed to prove that the death of the two cattle was due to negligence on the part of defendant. The Native Commissioner granted the application and entered judgment of absolution from the instance with costs.

Plaintiff has appealed against this judgment on the following grounds:—

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

(2) That the judgment is bad in law in that the defendant having been *in mora* judgment should have been given for plaintiff for the value of the beast and its calf.

As defendant had not led any evidence to contradict the evidence given for plaintiff it is not understood why the first ground of appeal has been inserted.

In his reasons for judgment under the heading "facts found proved", the Native Commissioner states that the defendant failed or neglected within a reasonable time to effect transfer of the animal at the dipping tank so as to enable plaintiff to take delivery and that defendant was *in mora.* In this Court, Mr. Birkett has conceded that this finding is correct.

The Native Commissioner also states that the cow and its calf died of natural causes and that consequently the plaintiff is not entitled to damages. Further in his reasons, however, he quotes paragraphs 2704 of Wessel's Law of Contract which lays down that if the loss of the thing occurs after it became the legal duty of the debtor to deliver it (if he is *in mora*) then he continues to be bound, even if the destruction or loss was through no fault of his own. This means that, as, in the present case, defendant was *in mora,* he is liable even if the animals did die of natural causes.

The Native Commissioner has based his judgment on statements in paragraphs 2705 and 2706 of Wessel's Law of Contract to the effect that, even if the debtor is *in mora,* he is not liable if the thing would have perished even though it were placed at the proper time in the hands of the creditor.

But the defendant did not plead that the cattle would have died even if he had handed the cow to plaintiff at the proper time nor has he brought any evidence to show that this was the case.

If plaintiff can prove that the contract was entered into, that he fulfilled his obligations under it and that defendant was *in mora,* when the subject matter perished, he (plaintiff), is entitled to judgment unless defendant can prove that the case falls within the exception to the general rule.

As it has been shown that defendant was *in mora,* the onus is on him to prove that the cattle would have died even if the cow had been handed to plaintiff at the proper time.

As the onus was on defendant, a judgment of absolution from the instance was incompetent at the close of plaintiff's case.

Johnson Ndamase said that he took great care of the animal and did everything in his power to preserve it. He also stated: "It does not matter in whose care it was it would have probably have died from natural causes. This is not only a matter of opinion by one who does not appear to be an expert but is qualified by the use of the word "probably".

He also stated that the drought was prevalent in other locations in the Libode district, and that Maseweni location (where the pliantiff has his home) adjoins the Libode district. It cannot, however, be surmised from this that drought conditions prevailed in Maseweni location of such a severity that it can be said with certainty that the beast would have died if it had been there. In any case, there is no evidence as to where plaintiff intended to keep the beast if it had been handed to him at the proper time.

For these reasons, I come to the conclusion that the Native Commissioner was not justified in holding that defendant did not have a case to meet. The application for a judgment of absolution from the instance should have been refused and defendant should have been called upon to present his case.

The appeal should be allowed with costs, the judgment of the Court below set aside and the record returned for further hearing and the delivery of a fresh judgment.

Israel (President): I concur.

Wakeford (Member): I concur.

For Appellant: Mr. Vabaza, Libode.

For Respondent: Mr. Birkett, Port St. John's.

SOUTHERN NATIVE APPEAL COURT.

BADUZA *v.* DIZENI AND ANO.

N.A.C. CASE No. 58 OF 1954.

KOKSTAD: 8th February, 1955. Before Israel, President. Warner and Fenwick, Members of the Court.

COMMON LAW.

Damages for assault, wrongful imprisonment and defamation—Plea admitting utterance of defamatory words but denying that they are actionable—Not bare denial—No prejudice suffered by absence of more specific pleadings—Right to detain suspected wrongdoer pending tribal investigation—Established Native Law and Custom principal—Headman's official duties at tribal enquiry enunciated—Report made, raison d'etre *of enquiry—Onus on defendant to excuse utterance of words clearly defamatory* per se*—Ntlonze—What constitutes and its object.*

Summary: Plaintiff, who was caught in compromising circumstances with a certain girl whose father was, and still is, away from home (she was residing with second defendant acting temporarily in *loco parentis* to her at the time), used 2nd defendant jointly with his son, first defendant (who made the first discovery), for damages for alleged wrongful and unlawful assault and imprisonment; for alleged false and malicious publication of a defamatory statement concerning him made at the headman's enquiry and for alleged detention of certain articles of his clothing of which he remains dispossessed. Judgment was entered for defendant with costs, on all three claims.

Held:

(1) It is true that defendant's plea could have been more explicit but no exception was taken at the trial to its *prima facie* vagueness, nor is it entirely correct to say that the plea was a bare denial, at least in so far as the claim for damages for defamation is concerned. The defendants admitted using the words complained of but denied that they were actionable.

(2) Plaintiff suffered no prejudice by the absence of more specific pleading as, far from excepting to defendant's plea, he took, and was afforded every facility of placing the facts, as he saw them, before the trial Court where the acts of which he complained were fully investigated.

(3) The evidence that no physical violence was offered plaintiff weighs in favour of defendants, while the right to detain a suspected wrongdoer caught in questionable circumstance pending the necessary tribal investigation is an established principle of Native Law and Custom.

(4) As the words used were clearly defamatory *per se* the onus was on defendants to exeuse their publication by showing that they were uttered on a privileged occasion and were relevant.

(5) The defendants were under a social duty towards the girl and the headman was duty-bound, by reason of his office, to hold the enquiry and to receive thereat the communication made, and there can be no question that the *raison d'etre* at the enquiry was the report made by the defendants.

(6) It must have been apparent to plaintiff that his clothing was dispossessed for purpose of constituting *ntlonze* upon which the girl's father or representative could base his action for seduction. Plaintiff cannot be said to have been misled by defendants' silence on the point into proceeding with the particular claim.

(7) He preferred his claim with his eyes open and having failed in it should pay the costs incurred in connection with it.

Cases referred to:

Robinson *v.* Randfontein Estates G.M. Co., Ltd., 1925, A.D.

Appeal from the Native Commissioner's Court, Mount Ayliff.

Israel (President):—

In this action plaintiff's particulars of claim in the Court of Native Commissioner read as follows:—

"1. The parties to this action are Natives as defined by Act No. 38 of 1927, but it is brought under the Common Law of the Union of South Africa.

2. Defendant No. 1 is the son of defendant No. 2 and is assisted by the latter in so far as needs be.

3. That on or about the 14th of May, 1952, and at or near Sigidini Location in the District of Mount Ayliff the defendants acting in concert did wrongfully and unlawfully assault the plaintiff by laying their hands upon him and there and then dragging him to a certain kraal and there and then locking him up detaining him as a prisoner in a certain hut for several hours.

4. That about the same time and place mentioned in paragraph 3 hereof, both the defendants did wrongfully, unlawfully, falsely and maliciously make use of and **publish in the presence** of others the following defamatory words or words to the following effect, of and concerning the plaintiff in the Xhosa language: 'Ulala no Makoko Wani uyamtshina' which being interpreted mean: 'You (meaning Fanele Baduza) are sweet-hearting with Makoko Wani and having immoral sexual intercourse with her (Makoko Wani)."

5. That the defendants are in possession of and wrongfully and unlawfully detain from the plaintiff the following articles of his clothing: A waistcoat, a shirt, a pair of shorts and a blanket, which said articles despite demand for their restoration they either neglect or refuse to restore to the plaintiff.

6. That the value of the articles enumerated in paragraph 5 hereof is £6. 6s. 6d.

7. That by reason of the allegations in paragraph 3 hereof plaintiff has sustained and suffered damages in the sum of £20.

8. That by reason of the defamatory allegations set forth in paragraph 4 hereof plaintiff has suffered in his fair name fame and reputation and has thus suffered damages thereto to the extent of £20"

Defendants' plea was to the effect that they—

"1. Admit paragraphs 1 and 2 of the summons.

2. Deny paragraph 3 of the summons and put the plaintiff to the proof thereof.

3. Admit paragraph 4 of the summons save and except that the words complained of are wrongful, unlawful, false or malicious and that they are defamatory.

4. Deny paragraphs 5, 6 and 7 of the summons and put the plaintiff to the proof thereof.

5. Deny paragraph 8 of the summons and put plaintiff to the proof thereof and deny that plaintiff is in law entitled to any damages whatsoever."

It is common cause that plaintiff and a girl named Makoko, a close relative of defendants residing at their kraal at the time, were found together late at night in a hut of a neighbouring kraal. Plaintiff tried to put an innocent interpretation on the incident, but there can be no doubt that, whatever may have happened in that hut, the circumstances, to say the least, were most compromising and defendants were fully justified in regarding them as such. It is, hovewer, not necessary for the purposes of this appeal to enquire closely into whether misconduct took place or not, for the questions to be decided rest on subsequent events.

It is further not disputed that, when found as stated above, the couple were locked up together by defendants and not released until the next morning when the headman (who has unfortunately, since died), came at the instance of defendants and held an enquiry according to custom. In the course of this investigation defendants accused plaintiff of having illicit intercourse with the girl (there is an immaterial difference of opinion as to what words were actually used), and the outcome was that plaintiff was ordered by the headman to take off certain articles of clothing which were to be retained as *ntlonze* pending the bringing of an action by Makoko's father who was then, and still is, away from home. At the trial it was accepted by plaintiff that the clothing is now not in the possession of defendants but of the girl's grandfather to whom it was handed the day after the enquiry and by whom it is being retained on behalf of her absentee father, again according to custom.

The presiding Assistant Native Commissioner gave judgment for defendants on all three claims, with costs and plaintiff has new noted appeal against:—

"A. That portion of the said judgment dismissing plaintiff's claim for damages for assault and unlawful imprisonment;

B. that portion of the said judgment dismissing plaintiff's claim for damages for defamation of character;

C. that portion of the said judgment awarding costs to defendants in respect of plaintiff's claim for the restoration of certain articles of clothing.", on the following grounds:—

"1. That in view of the plea which is a bare denial the judicial officer erred in basing his judgment in favour of defendants on the grounds of justification both in regard to the claim for damages for assault and wrongful imprisonment and in regard to the claim for damages for defamation.

2. That in any event the judgment in respect of the said claims for damages is against the weight of evidence.

3. That the judicial officer erred in awarding costs to defendants in respect of plaintiff's claims for the return of his clothes inasmuch as the judicial officer failed to attach sufficient importance to the fact that defendants, when faced with plaintiff's claim, did

not notify him either informally or in their plea that they had parted with his clothes to Wani and that defendants thereby misled plaintiff into proceeding with the said claim against them."

With regard to ground I, it is true that defendant's plea could have been more explicit, but no exception was taken at the trial to its prima facie vagueness. Nor is it entirely correct to say that the plea was a bare denial, at least in so far as the claim for damages for defamation is concerned. The defendants admitted using the words complained of in the circumstances as stated but denied that they were actionable. As the words were obviously defamatory *per se,* this could only mean that defendants relied on the only defence which on the face of it was open to them, namely, the defence of privilege. I can, also, see no reason for criticising the simple plea denying the alleged unlawful assault and the damages. But, be this as it may, the fact remains the plaintiff, far from excepting to defendants' plea, took, and was afforded every facility of placing the facts, as he saw them, before the trial Court and the acts of which he complained were fully investigated. He thus suffered no prejudice by the absence of more specific pleadings and this Court, therefore, following the principle laid down in the case of Robinson *v.* Randfontein Estates G.M. Co., Ltd., 1925 A.D. at page 198, must hold that there is no justification for it to interfere on the grounds in question.

As to the second ground of the appeal in so far as it concerns the allegations of assault and wrongly detention, there is only the evidence of plaintiff that the locking up was accompanied by violence, and even he under cross-examination admitted that he suffered no physical hurts and that only his pride was injured. On the other hand both the girl Makoko and the defendants said that no violence was offered plaintiff. The former also contended, and the Assistant Native Commissioner found as a fact, that they were justified according to Native Custom in locking the plaintiff up in view of the circumstances in which he and the girl were found and because the latter was residing at the defendants' kraal at the time and they were consequently responsible for her behaviour. We have been shown no reason for disagreeing with these findings. The evidence that no physical violence was offered plaintiff, in our opinion, weighs in favour of defendants; while the right to detain a suspected wrongdoer caught in questionable circumstances, pending the necessary tribal investigation is an established principle of Native Law and Custom.

In so far as the claim for damages for defamation is concerned, it is clear that the words used, whether identical with those claimed to have been used, or not, were as I have said defamatory *per se,* and the onus was then on defendants to excuse the publication of the defamatory statement. They showed —indeed it is common cause—that the accusation was made at an enquiry into the matter instituted according to custom by the headman of the location in which both sides lived. The question to be answered then is whether that occasion was privileged, i.e. whether the defendants had moral or social duty or interest to make the communication which they did and whether the headman had a corresponding duty or interest to receive the communication (see de Waal *v.* Ziervogel, 1938, A.D. 112). The answer is undoubtedly in the affirmative. Second defendant was temporarily *in loco parentis* to the girl who was living with him at the time, while first defendant, his son, was the one to make the first discovery; their social duty or interest was therefore clear. And it is equally clear that the headman had a duty, by reason of his office, to hold the enquiry and to

receive thereat the communication made. But to come within the protection of the privileged occasion, the communication must be relevant (see de Waal's case, *supra*, at page 122), and there can be no question, that this was so, for the *raison d'etre* of the enquiry was the report made by the defendants.

With regard to the question of costs in respect of the claim for the clothing, it must have been apparent to the plaintiff that he was deprived of it for the purpose of constituting *mlonze* upon which the father of the girl could base his action for seduction and that it would naturally be retained, not by defendants, but by her father's representative pending his return and/or the prosecution of the action. That others at the enquiry knew that this was the position was confirmed by one of plaintiff's own witnesses who stated that he knew the clothing had been passed to Wani, the girl's grandfather, and was not in defendant's possession. Plaintiff therefore cannot be said to have been misled by defendant's silence on the point into proceeding with the particular claim. He preferred it with his eyes open and, having failed in it, should pay the costs incurred in connection with it.

The appeal is dismissed with costs.

Warner (Permanent Member): I concur.

Fenwick (Member): I concur.

For Appellant: Mr. Zietsman, Kokstad.

For Respondent: Not represented.

CENTRAL NATIVE APPEAL COURT.

NKOSI *v.* **DHLAMINI.**

N.A.C. CASE No. 1 OF 1955.

JOHANNESBURG: 15th February, 1955. Before Marsberg, President, Menge and Garcia, Members of the Court.

NATIVE CUSTOM.

Locus standi *of Native woman in claim for custody of child in Native Custom—Costs of postponement occasioned by exception.*

Summary: Where a Native's summons alleged that he and defendant (a Native woman) had been partners in a customary union; that one child had been born of the union; that the defendant had deserted him; that his dowry had been refunded and that he claims from defendant custody of the child which the defendant refuses to give up.

Held: (Marsberg, President, *dissentiente*), that a Native woman has no *locus standi* to be sued alone in respect of a claim cognisable only in Native Law if, under that law, her guardian must be sued.

Held further: That where a party raises a preliminary point, having the force of an exception, which the Court should in any case take *mero motu*, costs of a postponement required for consideration of the point should be costs in the cause.

Cases and literature referred to:

ex parte Minister of Native Affairs: In *re* Yako *v.* Beyi, 1948 (1) S.A. 388.

Seymour: "Native Law in South Africa", page 125.

Appeal from the Court of the Native Commissioner, Johannesburg.

Menge, Permanent Member:—

This is an appeal against the refusal of the Native Commissioner, Johannesburg, on the 6th October, 1954, to rescind a default judgment granted by another judicial officer of that Court on the 28th May, 1954.

Plaintiff in the Court below had issued a summons against the defendant in which he alleged that he entered into a customary union with defendant in October, 1953; that a male child was born of the union; that the defendant deserted him in December, 1953, and that in March, 1954, his dowry was refunded by defendant's mother. On these premises he asked for custody of the child. The summons was served on the 30th March, 1954, and on the 14th April, the defendant entered appearance to defend. She, however, failed to file a plea and in consequence default judgment was applied for and granted by the Native Commissioner to whom the Clerk of the Court had, very properly, referred the application.

It was only after about six weeks had elapsed from the date when she became aware of the default judgment that the defendant applied to have it set aside. She alleged that she could not attend to the filing of the plea as she was in an advanced stage of pregnancy. She asked for condonation of the late noting of her application.

The Native Commissioner, after hearing argument on the application on the 6th October, 1954, refused with costs to rescind the default judgment. The following order was also added: "Court not prepared to condone late application as Court considers that applicant was in wilful default".

The defendant noted an appeal against this decision on the ground, *inter alia,* that she was not in wilful default. Meanwhile, it may be remarked, an application is pending in the Native Commissioner's Court to have the default judgment made specific and seeking an order for the committal of defendant for contempt of court on failure to comply with such order.

When the matter came before us on the 15th February, 1955, counsel for the defendant (now appellant) took the preliminary point that the defendant had no *locus standi in judicio* to be sued as she was not assisted and, in fact could not be sued on the claim at all. This was not one of the grounds of appeal; but Counsel submitted that the Court could and should deal with this aspect of the case *mero motu.* In the event of the Court refusing to allow the point to be taken without notice, he asked for an amendment of the notice of appeal so as to include the exception.

Mr. Gordon on behalf of plaintiff (now respondent) objected, but this Court allowed the preliminary point to be raised under Rule 16. Mr. Gordon thereupon asked for a postponement to enable him to consider the point. He asked for wasted costs. The matter was accordingly postponed until to-day, but for reasons to be stated presently costs were made costs in the cause.

On resumption to-day Mr. Gordon contended that the defendant had *locus standi,* but he cited no authority in support. He also submitted that in any case this Court had no right to take cognisance of the point since it was not raised in the Court below.

There can be no doubt that Mr. Muller's preliminary point is well founded. The position is this: taking the summons by itself, without regard to further pleadings or to the possible merits of the case, if the citation of this woman as defendant is unexceptionable, as it would be in an action under the ordinary law

of the land, then the summons discloses no cause of action, because a father cannot claim a child which he has by a woman to whom he is not married by civil law. If, on the other hand, the summons does disclose a cause of action, as it may in the application of Native Law, then the citation is wrong. The claim would have to be brought against the woman's guardian for in pure Native Law, upon dissolution of the marriage by return of the dowry, the woman reverts to the guardianship of the person who gave her in marriage, i.e. her father or other paternal relative.* As Seymour expresses it in his "Native Law of South Africa", at page 125: "Dissolution of a union restores the antenuptial *status quo* of the spouses". I do not see how the woman's common law status as a major can affect that. The claim is based on Native Law. Where the claim is one which is valid under common law she has *locus standi* to be sued as laid down in the case of *ex parte* Minister of Native Affairs: In *re* Yako *v.* Beyi, 1948 (1) S.A. 388; but where the claim is valid only in Native Law which requires that it be brought against her guardian, she has no such capacity. The plaintiff must follow the law on which he bases his right. It is like the old adage: In Rome you do as the Romans do. There is nothing in the judgment of Schreiner, J.A., in *Yako's* case to suggest that an unmarried woman always has *locus standi in judicio* even if the claim is only cognisable in Native Law. In fact the learned judge says (at page 402): "If the question" (i.e. whether a Native has or has not a right) "depends on or is governed by Native Law the capacity of any Native whose right is in question is to be decided by Native Law".

Consequently in this case the plaintiff could not possibly succeed on his summons, irrespective of the merits and whether or not the defendant opposes the action. This Court cannot go into the merits of an action or of a defence or a default if it is apparent that irrespective of all these features the original summons is bad; and it is therefore of no avail for Mr. Gordon to urge that this Court should not entertain the exception because it was not raised in the Court below. It is the duty of this Court *mero motu* to take the point.

Mr. Gordon, if I understand him correctly, also made the startling suggestion that if the defendant had no *locus standi* to be sued, she has no *locus standi* to appeal against the judgment that was given against her. This, of course, loses sight of the fact that the present proceedings are a continuation of those started in the Court below.

The appellant's preliminary exception is therefore upheld and the Native Commissioner's default judgment is rescinded. The respondent is ordered to pay the costs in this Court and in the Court below.

It remains to state my own reason for the decision not to award plaintiff the costs of the postponement granted on the 15th instant. Normally in such an event the party who is obliged to ask for a postponement because of an application which takes him by surprise is entitled to wasted costs. But in this case Mr. Muller urged that quite apart from his submission the Court could and should take the point *mero motu*. That is correct, and in fact the attitude taken by Mr. Muller was, to us, not unexpected. We would have had to take the point even if Mr. Muller had not done so. It was consequently not purely the convenience of plaintiff which occasioned the postponement.

Garcia, Member: I concur.

(* *Note.*—Messrs. Menge and Garcia consider that this statement should have been amplified by the following further statement: "She should, however, be joined as co-defendant because of her interest as mother of the child").

Marsberg (President) (*Dissentiente*):—

In the Native Commissioner's Court at Johannesburg plaintiff, Rexley Dhlamini sued defendant whom he cited as:—

> "Beatrice Nkosi (formerly Dlamini) Native female, and employed at Poirette Chocolate and Sweet Industries, Limited, 274, Commissioner Street, Johannesburg."

The claim was for—

(1) "Custody of the minor child named McLean."

On the 28th May, 1954, judgment for plaintiff by default with costs in terms of prayer (1) of the summons was entered by the Native Commissioner.

On the 6th October, 1954, an application for rescission of the default judgment was refused with costs. An appeal by defendant is before us.

Mr. *Muller* who appears for Appellant has taken a preliminary point and asks this Court *mero motu* to uphold his application on the grounds—

> "That citation of defendant in the Court *a quo* was invalid in view of the fact that a Native woman must in Native Law sue or be sued duly assisted by a guardian as she has no *locus standi* to prosecute or defend legal proceedings and because citation is invalid the judgment should be rescinded as void *ab origine*."

In the event of this Court not granting the application *mero motu* he applied for an additional ground, in terms of the foregoing, to be incorporated in his notice of appeal.

In support of his contention he relied on the case of Ruth Matsheng *v.* Nichols Dhlamini and John Mbaushan 1937 N.A.C. (T. & N.) 89). In that case the Appeal Court held:—

> "In all the circumstances then this Court finds that the Native Custom denying *locus standi in judicio* to Native women must be recognised and enforced by it."

This statement of the law seems to have been generally accepted and we find among others the following cases to the same effect. Whomatinise Tognai *v.* Kazomulu Koza (1942 N. & T. 65). Lothi Radebe *v.* Joseph Gambu (1947 T. & N. 88). Elizabeth Mashinini *v.* Samon Moshinini (1947 T. & N. 25).

These cases are in conformity with the views held by the school of thought which was brought into prominence after the passing of the Native Administration Act, No. 38 of 1927, and which held that for Natives in the Union of South Africa Native Law was the primary law to be applied in settlement of their disputes in Native Commissioner's Courts. This was the line of argument adopted by Mr. Muller.

But in 1947 the capacity of Native women to appear in Courts of Native Commissioner was brought before the Appellate Division for determination in the case of *ex parte* Minister of Native Affairs in *re* Yako *v.* Beyi 1948 (1) S.A. Law Reports 388. The Appellate Division stated the proposition before it in these terms:—

> "The matter that is really sought to be determined is whether a Native woman, as such, is debarred from bringing an action for damages for seduction against a Native man in a Native Commissioner's Court. It is in this sense that the question will be considered and answered."

And the answer was:—

(*a*) "A Native woman is not debarred, as such, from succeeding in an action for damages for seduction against a Native man in a Native Commissioner's Court: and if she succeeds her damages are not necessarily limited to the amount her guardian is entitled to claim under Native Law.

(*b*) The interpretation placed on sub-section (3) of section *eleven* of Act 38 of 1927, as amended by section 5 of Act No. 21 of 1943, by the Native Appeal Court (Natal and Transvaal) in its judgment in the case Phillip Mashego *v.* Agrineth Ntombela is not correct."

The incorrect interpretation referred to was to this effect ". . . the plaintiff must sue under Native Law when the obligation is governed by Native Law. Hence the seduced girl has no capacity to sue. Her guardian must do so. In other words the action against a defendant whose obligation rests on Native Law cannot be forced into a European mould."

The question before us, therefore, is whether the Appellate Division's ruling in Yako's case overrides the decisions of the Native Appeal Court that a Native woman has no *locus standi* to sue or be sued. The effect of the decision in Yako's case, read in the light of the whole judgment, is that the capacity of a Native to enforce his (or her) rights in *any* Court of Law shall be determined as if he (or she) were a European. The Appellate Division rejected the Native Appeal Court's reasoning that a plaintiff must sue under Native Law when the obligation is governed by Native Law. That being so, it follows that a Native woman is not debarred, as such, from bringing an action in a Native Commissioner's Court.

Perhaps the position would be made clearer if section *eleven* (3) of Act No. 38 of 1927 were paraphrased.

Subject to *statutory* provision affecting the capacity of a Native, a Native has the same capacity as a European—

We find then that:—

(1) to enter into any transaction;

(2) to enforce his rights in *any* Court of Law;

(3) to defend his rights in any Court of Law;

provided that in relation to any matter affecting a right or obligation the capacity of a Native shall be determined according to Native Law—

(1) if the existence of any right held by a Native depends upon any Native Law;

(2) if the existence of any right alleged to be held by a Native depends upon any Native Law;

(3) if the existence of any right held by a Native is governed by any Native Law;

(4) if the existence of any right alleged to be held by a Native is governed by any Native Law;

(5) if the extent of any right held by a Native depends upon Native Law;

(6) if the extent of any right alleged to be held by a Native depends upon any Native Law;

(7) if the extent of any right held by a Native is governed by any Native Law;

(8) if the extent of any right alleged to be held by a Native is governed by any Native Law;

(9) if any obligation resting upon a Native depends upon any Native Law;

(10) if any obligation resting upon a Native is governed by any Native Law;

(11) if any obligation alleged to be resting upon a Native depends upon any Native Law;

(12) if any obligation alleged to be resting upon a Native is governed by any Native Law.

The Appelate Division states that sub-section (3) has no bearing on the question what law the Native Commissioner is to apply in the exercise of his discretion under sub-section (1). A Native can institute an action as if he were a European. It would be incompetent to challenge such right on the ground that he lacks capacity under Native Law. If, for example, a Native woman were seduced by a Coloured man there can be no question that she would have access to the Courts for redress and Native Law could not be invoked to challenge her capacity to sue. And similarly in a Magisterial District in which no Native Commissioner exercises jurisdiction a Native woman seduced by a Native man would institute an action in the Magistrate's Court. On principle, therefore, there appears to be no reason why in a Native Commissioner's Court there should be any differentiation in regard to the capacity of a Native to enforce his or her rights. The purpose of sub-section (3) is clear, viz. that in *any* Court the capacity of a Native shall be determined as if he were a European.

The interpretation and effect of the proviso to sub-section (3) are to be found at page 402 of the judgment in Yako's case. There it is stated: "But the issue whether or not the question (whether a Native has the right or not) does depend upon or is governed by a Native Law has to be decided *independently* of the question whether the Native has or had capacity in relation to any matter affecting the right". In the solution of these questions the Native Commissioner will be called on to exercise the discretion referred to elsewhere in the Appellate judgment. Normally this will take place at some point in the proceedings. In other words a Native in all Courts can bring or defend an action in the capacity of a European. After he is in Court if the matter in dispute is one falling under the Common Law he will still be regarded as a European, but if the matter in dispute depends on or is governed by Native Law then the capacity changes to and is to be determined according to Native Law.

In the case before us defendant's capacity to be sued must be determined as if she were European. On the face of the summons there is nothing to suggest that defendant suffers any incapacity. It need not be alleged that a party is a *feme sole;* the law does not presume incapacity. As regards the difference of sex, our law does not, as a general rule, draw any great distinction between a man and a woman (Maasdorp's Institutes, Vol. 1, page 2).

Mr. Muller has asked us to hold that the citation of defendant in the Native Commissioner's Court was invalid and in consequence thereof the judgment was void *ab origine.* As the summons stands there is nothing, in my opinion, on which we could hold that defendant had no capacity to be sued. If there was any serious doubt *in fact* in regard to her status the question would need to be resolved by evidence on the point. Mr. Muller's submission cannot possibly be supported in face of the decision of the Appellate Division that a Native woman, *as such,* is not debarred from sueing or being sued. The contention put forward in his application is similar to the interpretation of the law given in Agrineth Ntombela's case, which was held by the Appellate Division to be incorrect. All the decisions of the Native Appeal Court holding the contrary view are obviously overruled.

In my opinion the application by Mr. Muller, for appellant, to set aside the Native Commissioner's judgment on the grounds stated in the application now before us should not be allowed either *mero motu* or as an additional ground of appeal.

Under section 16 of the Rules of the Native Appeal Court the parties are limited to the grounds stated in the notice of appeal and to such additional grounds as may be approved by the Court on application. Under section 14 applications must be filed with the Registrar not less than 24 hours prior to the commencement of the Session and a copy served on the other party.

The provisions of the rule 14 not having been complied with, the Court postponed the hearing to enable Mr. Gordon, for Respondent, to prepare his argument on the applications made to the Court. He subsequently opposed the granting of either application of appellant, pointing out that in the Native Commissioner's Court no application was lodged on the grounds that defendant lacked *locus standi;* that the point should have been taken there; that she was represented by an attorney when application for rescission of the judgment was heard; that the point was not taken in the notice of appeal as framed; that had objection been raised in the Native Commissioner's Court the defect in the proceedings—if there were any which he did not concede—could have been rectified by a formal application by plaintiff to have defendant cited as "duly assisted by her guardian."

I agree with Mr. Gordon's submissions. Moreover, a perusal of the record discloses that defendant was *in fact* assisted by her mother in the proceedings on the application for rescission of the default judgment. An affidavit in material form by her mother is on the record. To all intents and purposes the mother, it is common cause, acted as guardian in the collection of *lobola* for defendant. The submission of Mr. Muller, therefore, that the judgment was void *ab origine* lacks substance. Assuming that citation required amendment no prejudice could have been done to defendant had application for amendment been made and allowed by the Native Commissioner. In my opinion no good cause has been shown to this Appeal Court why the applications of Mr. Muller should be allowed. They should be disallowed and the appeal heard on the merits.

For Appellant: Adv. W. G. Muller, instructed by Messrs. Basner, Willen & Kagan.

For Respondent: Mr. E. Gordon.

SOUTHERN NATIVE APPEAL COURT.

NTANGA *v.* BONGA.

N.A.C. CASE No. 54 OF 1954.

UMTATA: 22nd February, 1955. Before Israel, President, Warner and Bates, Members of the Court.

TEMBU CUSTOM.

Native Customary union—Dissolution of—Husband no claim for damages for adultery in absence of action taken before dissolution—No modification of principle—Damages for adultery to be claimed during subsistence.

Summary: Plaintiff (now appellant) sued defendant for 3 head of cattle or £24 being damages for adultery with his customary wife. No evidence was led but certain facts were admitted and/or conceded for the purpose of argument and as a basis for the Court's decision on the legal points raised.

Held: That a customary union is dissolved when one of the parties thereto contracts a valid civil or Christian marriage.

Held further: That when a customary union is dissolved no claim for damages for adultery committed with the wife during its subsistence can be brought by the husband if he has not "taken action" (according to Native Custom) before the dissolution.

Held further: That no modification of this principle which is universally and stringently applied holds good whether the dissolution was at the instance of the husband, or of the wife of the customary union or her guardian.

Held further: That it is clearly established that action in respect of a claim for damages for adultery committed must be taken before the customary union is dissolved; the rule recognises no excuse for failure to do so.

Cases referred to:

Njoinbani *v.* Tshali, 1952, (1) N.A.C., 62.

Mayile *v.* Makawula decided by the Southern Native Appeal Court on 27th October, 1953, but not yet reported.

Mtyelo *v.* Qolole, 4 N.A.C., 39.

Sobijise *v.* Bheba, 5 N.A.C., 13.

Mendziwe *v.* Lubalude, 3 N.A.C., 170.

Madolo *v.* Hoza, 1 N.A.C., 157.

Sweleni *v.* Moni, 1944, N.A.C. (C. & O.), 31.

Appeal from the Native Commissioner's Court, Mqanduli.

Israel (President):

Plaintiff sued defendant in the Court of Native Commissioner for damages suffered as a result of defendant's alleged adultery with his customary wife.

No evidence was led, but certain facts were admitted and/or conceded for the purpose of argument and as a basis for the Court's decision on the legal points raised. These facts are as follows:—

"1. The marriage of plaintiff to Dora by Native customary union is accepted because of the payment of cattle over 20 years ago, the birth of children and the continued living together, except for periodical absence at work, until the end of 1952.

2. During plaintiff's last absence at work Dora (plaintiff's wife by customary union) married defendant by civil rites on the 18th April, 1953.

3. For the purpose of argument and the decision on the legal issue, plaintiff avers that defendant committed adultery with Dora during his absence and prior to 18th April, 1953, while the customary union still subsisted.

4. Defendant, whilst denying this, for the purpose of argument, is not disputing this allegation at this stage, but avers that in law not action lies even if this adultery prior to the civil marriage is proved, because no claim for damages for adultery was made prior to the civil marriage.

5. The parties agree that the first claim for damages was made on the 18th May, 1953, when a demand for damages was sent by plaintiff through his attorney.

6. It is admitted, however, that plaintiff was still at work and was advised by telegrams on the 7th and 15th April, 1953, that Dora was marrying defendant and that he should return immediately as banns had been published. Plaintiff thereupon left for home on leave on or about the 7th May, 1953.

7. It is further admitted that on the 11th April, 1953, plaintiff's attorney wrote to the Minister who published the banns objecting on behalf of plaintiff, to the marriage. The Minister did not proceed with the marriage which was subsequently performed by the Assistant Magistrate of Elliotdale by special licence."

The Additional Assistant Native Commissioner after hearing argument entered judgment for defendant and based his decision on the case of Njombani *v.* Tshali, 1952 (1), N.A.C., 62, and that of Mayile *v.* Makawula, 1953 (4) N.A.C. 262. He held (*a*) that

the customary union between plaintiff and the woman Dora was dissolved on 18th April, 1953, when she married defendant by civil rites, and (*b*) that no action was taken by plaintiff in respect of the alleged adultery prior to that date, his efforts up to then having been concerned merely with stopping the marriage between defendant and the woman.

Defendant has now appealed on the following grounds:—

"1. That the Additional Assistant Native Commissioner erred in holding that plaintiff is not entitled to damages by reason of the fact that plaintiff had not taken action prior to the 18th April, 1953, in view of the fact that plaintiff was not and could not have been aware of the adultery on that date and so could not have taken action.

2. That it is admitted that plantiff and his wife by customary union lived continuously together until the end of 1952, when plaintiff went to work.

3. It is also admitted that defendant committed adultery with plaintiff's wife during his absence at work between the end of 1952 and April, 1953, while the Native customary union between plaintiff and his wife, was still in existence.

4. It is also admitted that plaintiff returned to his home as soon as he possibly could after being advised of the proposed marriage between defendant and plaintiff's wife on the 18th May, 1953, took legal action.

5. That plaintiff did not consent to the civil marriage of defendant to his wife but on the contrary, did his utmost to oppose it and succeeded in getting the civil marriage by publication of banns, stopped, and defendant then married her by special licence."

Now, both of the cases quoted by the Additional Assistant Native Commissioner contain between them all the elements present in the instant matter. In *Mayile's* case Sleigh, P., I think with respect, admirably summarised the Native Law relating to the taking of action in adultery cases when he said:—

> "It is established Native Law that the right of action for adultery is contingent upon there being in existence a valid customary union between the plaintiff and his wife at the time when action is taken against the adulterer. In Native Law action is taken when the adultery is reported at the adulterer's kraal and damages are demanded. It thus follows that where the union has been dissolved without such action having been taken the husband cannot recover damages for adultery committed with the woman prior to the dissolution."

Njombani's case confirmed the principle, enunciated in Mtyelo *v.* Qotole, 4 N.A.C., 39, and followed in several subsequent decisions, to the effect that a customary union is dissolved when one of the parties thereto contracts a valid civil or Christian marriage.

Recognising his disadvantageous position in the light of these decisions, plaintiff has now come to us and says in effect: "Although my customary union with Dora was dissolved on 18th April, 1953, she committed adultery with defendant whilst that union still subsisted, and because I was away at the time I did not know of it until my return immediately after the civil marriage and I was therefore unable to take action before the union was dissolved." In these circumstances he maintains that he has not lost the right to sue for damages for adultery committed with his former customary wife.

I cannot agree with this contention. The Native Law on the point has been repeatedly confirmed by decisions in this Court and is clear, as the few cases referred to in *Njombani's* (supra)—there have been several others—show. The circumstances of these cases have naturally varied and there has admittedly been some conflict in the respective rulings on collateral issues, but all the decisions agree on the one salient principle: That when a customary union is dissolved no claim for damages for adultery committed with the wife during its subsistence can be brought by the huband if he has not "taken action" (according to Native Custom) before the dissolution. I am of opinion, judging from the general tenor of the various decided cases on the particular point, that there can be no modification of this principle, which is universally stringently applied, and that it holds good whether the dissolution was at the instance of the husband. or of the wife of the customary union or her guardian.

The majority of the cases I have been able to find bearing on the rule in question were indeed concerned with situations brought about by the husband, but in none of the decisions was there any suggestion of a distinction being made between such cases and the comparative few in which the wife and/or her guardian was the mover. Among the latter type of case, that of Sobijase *v.* Bheba, 5 N.A.C., 13, would at first glance seem not to support the principle, as a tender to *keta* after the wife had left her husband's kraal and went to live with defendant, was held not to absolve the defendant from liability to pay the usual damages for adultery. But a careful perusal of that case in comparison with the decision in Mendziwe *v.* Lubalude, 3 N.A.C., 170, would seem to indicate that the point at issue was not so much whether the husband's right of action was extinguished by the *keta* but rather whether the customary union was virtually dissolved thereby. In Madolo *v.* Hoza, 1 N.A.C., 157, the necessity on the part of the husband to sue *during* the subsistence of the customary union was again recognised, and the decision hinged simply on the question whether the union had been dissolved or not. The case of Sweleni *v.* Moni, 1944, N.A.C. (C. & O.), 31, is yet another in which the wife sought to dissolve the customary union, and in it the Native assessors were all agreed that "a man whose marriage (sic) is dissolved by return of his cattle must sue for damages for adultery with his wife before the marriage is dissolved". And finally we come back to *Njombani's* case where, as in the instant case, the woman had entered into a valid civil marriage with her alleged adulterer, but unlike the present matter, had had in fact no sexual intercourse with him prior to the marriage. Nevertheless, the Court held that in addition to being non-suite because of the absence of prior intercourse the customary husband was not entitled to damages for the reason that at the time action was taken the customary union had been dissolved by the civil marriage.

It is thus, to my mind, clearly established that action in respect of a claim for damages for adultery committed with a wife of a customary union must be taken before the customary union is dissolved whether at the instance of the husband or of the wife; the rule recognises no excuse for failure to do so.

The appeal must therefore be dismissed with costs.

Bates (Member): I concur.

Warner (Permanent Member): I concur.

For Appellant: Mr. Muggleston, Umtata.
For Respondent: Mr. Knopf, Umtata.

SOUTHERN NATIVE APPEAL COURT.

GOGOBA *v.* **TYOPO.**

N.A.C. CASE No. 59/54.

UMTATA: 22nd February, 1955. Before Israel, President, Bates and Warner Members of the Court.

PRACTISE AND PROCEDURE.

Appeal noted out of time—Non-compliance with Rules 4 *and* 5 (1). *Grounds of appeal that judgment bad in Law without stating in what respect—insufficient compliance with Rule* 7 (*b*).

Summary: Plaintiff claimed seven head of cattle or their value £15 each and defendant, who appealed, was absolved from the instance on 29th July, 1954.

Notice of appeal although dated 23rd August, 1954, was not delivered to the Clerk of the Court until 2.50 p.m. on 27th August, 1954.

Held:

(1) It was noted out of time in that judgment granted on 23rd August, 1954, was not delivered to the Clerk of the Court in terms of sub-rule (1) of Rule 5 of the Native Appeal Court Rules until 2.50 p.m. on the 27th August, 1954, four days later than the time allowed by Rule 4 for noting an appeal and no application for extension of this period has been made.

(2) While the notice of appeal states that it is against the whole judgment the grounds of appeal are simply "that the judgment was bad in law". It has been previously ruled that to state in a ground of appeal that the judgment is bad in law without stating in what respect it is bad, is not a sufficient compliance with Rule 7 (*b*) requiring the grounds of appeal to be clearly and specifically stated.

Cases referred to:

Chabane *v.* Sietse, 1946, N.A.C. (C & O) 54.

Native Appeal Court Rules 4; 5 (1) and 7 (*b*)—Government Notice No. 2887/1951.

Appeal from the Native Commissioner's Court, Mqanduli.

Israel (President):—

This appeal is invalid for two reasons.

Firstly, it was noted out of time, in that judgment was given on 29th July, 1954, but the Notice of Appeal, although dated 23rd August, 1954, was not delivered to the Clerk of the Court in terms of sub-rule (1) of Rule 5 of the Rules for Native Appeal Courts until 2.50 p.m. on the 27th August, 1954, four days later than the time allowed by Rule 4 for noting an appeal, and no application for extention of this period has been made.

Secondly, while the Notice of Appeal states that it is against the whole judgment the grounds of appeal are simply "that the judgment was bad in law". It has been ruled in several cases before these Courts [e.g. Chabane *v.* Sietse, 1946, N.A.C. (C & O) at page 54] that to state in a ground of appeal that the judgment is bad in law without stating in what respect it is bad, is not a sufficient compliance with the rule [now Rule 7 (*b*)] requiring the grounds of appeal to be clearly and specifically stated.

The appeal is struck off the roll with costs.

Bates (Member): I concur.

Warner (Permanent Member): I concur.

For Appellant: Mr. Mda, Mqanduli.

For Respondent: Mr. White, Umtata.

SOUTHERN NATIVE APPEAL COURT.

ZWENI AND ANOTHER *v.* HLATI.

N.A.C. CASE No. 10 OF 1955.

KING WILLIAM'S TOWN: 11th March, 1955. Before Israel, President, Warner and Pike, Members of the Court.

PRACTISE AND PROCEDURE.

Application for rescission of default judgment—Application noted out of time—Non-compliance with Rule 74 (1)—*No application for extension of time limit—Non-compliance with Rule* 84 (5).

Summary: Judgment by default was entered against defendants (now appellants) on 17th August, 1954. Attempts at execution were resisted on 19th and 21st August, 1954. Application for rescission of this judgment was made on 17th November, 1954. The application was heard on 2nd December, 1954, and was refused. The appeal is against this judgment.

Held:

(1) It is inconceivable that in demanding payment of the "within judgment", the deputy messenger would not have informed defendants what that judgment was.

(2) Defendants' very reply to the messenger's demands of the 19th and 21st August, 1954, is itself proof positive of knowledge.

(3) The presiding officer in the Court *a quo* was justified in finding that defendants were aware of the judgment against them on those dates in August.

(4) Defendant's application for rescission, dated 17th November, 1954, was therefore out of time, and as no application for an extension of the time limit had been made in terms of Rule 84 (5) when the application for rescission was heard on 2nd December, 1954, the presiding officer was correct in refusing on that date to entertain the application.

Cases referred to:

Oldsfield *v.* Sackville—West 39, N.L.R. 286.

Cantamessa *v.* Reef Plumbers, 1935 T.P.D. 56.

Statutes, etc., referred to:

Native Commissioner's Court Rules, 74 (1) and 84 (5).

Appeal from the Native Commissioner's Court, Lady Frere.

Israel (President): —

In this matter judgment by default was entered against defendants on 17th August, 1954, and it was found by the Court that they had knowledge thereof on the 19th August, 1954. They, however, made no move until on 17th November, 1954, where after having resisted several attempts at execution with threats of violence, they applied for a rescission of the judgment. This was refused on 2nd December, 1954, on the grounds that the application was out of time in terms of Rule 74 (1) of the regulations governing courts of Native Commissioner and that no application for an extension of the time had been made as required by Rule 84 (5).

There was then an attempt to rectify matters by an application, dated 7th December, 1954, on behalf of defendants for "leave to apply for rescission of default judgment in terms of section 84 (5) of the Rules". This application was heard on the 14th December, 1954, and was also refused.

In the meantime, however, between the dates of the two hearings i.e. 3rd December, 1954, a request for a written judgment (this could only refer to the order of the 2nd December) was made and complied with on the 6th of the same month. And now this Court is confronted with a notice of appeal, dated the 14th December, 1954, against "the whole of the judgment delivered by the Additional Assistant Native Commissioner on 2nd December, 1954"; the defendants having apparently decided to shun the subsequent proceeding which took place on 14th December, 1954. There are four grounds of appeal, but we need only concern ourselves with the first, namely, that "the judicial officer erred in holding that defendants became aware and understood that a default judgment had been granted against them in August, 1954, and again in September, 1954".

In arriving at his finding in this respect the Additional Assistant Native Commissioner looked to the returns of service of the deputy messenger who attempted to levy the aforesaid executions. That officer recorded that he saw the defendants personally on the 19th and 21st August, 1954, and demanded from them "settlement of the within judgment and costs". Defendants have admitted these visits by the deputy messenger in their supporting affidavits, but maintain that they first became aware of the judgment on 2nd November, 1954, when, according to the messenger, they forcibly resisted attachment. Now, it is inconceivable that in demanding payment of the "within judgment" the deputy messenger would not have informed them what that judgment was. Indeed their very reply to his demands of the 19th and 21st August, 1954, to the effect that they would not pay until they could represent their case themselves, is itself proof positive of knowledge. In these circumstances, therefore, the presiding officer in the Court *a quo* was justified in finding that defendants were aware of the judgment against them on those dates in August. Their application for rescission, dated 17th November, 1954, was therefore out of time, and as no application for an extension of the time limit had been made in terms of Rule 84 (5) when the application for rescission was heard on 2nd December, 1954, the Additional Assistant Native Commissioner was correct in refusing on that date to entertain the application (see Oldfield *v.* Sackville—West, 39 N.L.R. 286 and Cantamessa *v.* Reef Plumbers, 1935 T.P.D. 56, *inter alia*).

The appeal is dismissed with costs.

Warner (Permanent Member): I concur.

Pike (Member): I concur.

For Appellants: Mr. Kelly, Lady Frere.

For Respondent: Mr. Tsotsi, Lady Frere.

SOUTHERN NATIVE APPEAL COURT.

NQONO *v.* **NQONO.**

N.A.C. CASE No. 84 OF 1954.

KING WILLIAM'S TOWN: 14th March, 1955. Before Israel, President, Warner and Pike, Members of the Court.

PRACTICE AND PROCEDURE.

Application for mandament van spolie—Factum *of possession —Affidavits sufficient—No* vivo voce *evidence required— Estate property—Ownership to be decided by proper action.*

Summary: This is an appeal against a judgment of the Native Commissioner making final a rule *nisi* ordering Skinana Nqono (now appellant) to restore to applicant *ante omnia* certain stock which he had spoliated. The matter was decided on an affidavit filed in support of applicant's application for a *mandamente van spolie* and a replying affidavit by respondent. Respondent admitted having removed the stock, but denied that they were in applicant's lawful possession, because being a widow, she could not possess what he claimed was estate property as against him as heir.

Held:

(1) The issue of a *mandamente van spolie* was thus justified as it did not need *viva voce* evidence in terms of Rule 56 (2) or cross-examination of either party in terms of Rule 57 (8) to establish that the stock was in applicant's possession when removed by respondent

(2) The question, that the property is estate property, can only be determined by the institution of a proper action to decide the ownership of the cattle in question.

Statutes, etc., referred to:

Seymour p. 129.

Native Commissioner's Court Rules: 65 (2) and 57 (8).

Appeal from the Native Commissioner's Court, Lady Frere.

Israel (President):—

This is an appeal against a judgment of the Native Commissioner making final a rule *nisi* ordering respondent to restore to applicant *ante omnia* certain stock of which she alleged she was in possession and which respondent had spoliated. The matter was decided on an affidavit filed in support of applicant's application for a *mandament van spolie* and a replying affidavit by respondent.

These documents revealed that the applicant is the second wife of one Ntatiso, now deceased, and lives in one location and that respondent is the son and heir of the late Ntatiso by his first wife and lives in another location. Respondent admits having removed the stock, but denies they were in applicant's lawful possession because, being a widow, she could not possess what he claimed was estate property as against him as heir. Applicant, however, claims that the cattle are her sons' in the right hand house of deceased.

The grounds of appeal are as follows:—

"1. That as there was a dispute on the fact of possession the judicial officer erred in deciding the matter on the affidavits, but should have used the powers conferred on him under section 56 (2) or 57 (8) of the Rules of Court to determine who of the parties was in fact in possession.

2. That on the affidavits filed no irresitible inference can be drawn that the applicant was in possession of the stock in dispute prior to the alleged spoliation by the respondent.

3. That in the premises the judicial officer erred in making the rule *nisi* final."

From the very nature of the application the only point at issue was the *factum* of possession, and I am satisfied from a perusal of the affidavits that this point could have been, and was rightly, decided without recourse to *viva voce* evidence, or without requiring applicant to be subjected to cross-examination. In her affidavit applicant averred that the stock in question had been in her lawful possession at her late husband's kraal where she resided, and she described the manner of their taking. Respondent in his replying affidavit admitted at paragraph 6 that he had taken certain stock "from the kraal of his late father" and in paragraphs 9 and 10 refers to events "prior to or before taking possession.". By his own showing, then, he was not in possession before the act of alleged spoliation, and by admitting having taken the stock from his late father's kraal he has himself raised the inference that applicant was in possession, particularly as in paragraph 4 of his affidavit he admitted applicant's claim that she was living at her late husband's kraal. It, therefore, did not need *viva voce* evidence in terms of Rule 56 (2) or cross-examination of either party in terms of Rule 57 (8) to establish that the stock was in applicant's possession when removed by respondent. The issue of a *mandament van spolie* was thus justified.

Mr. Tsotsi, quoting Seymour, p. 129, contended that an heir could not be said to commit an act of spoliation when, in the exercise of his rights, he takes physical possession of estate property. But it is this very question, that the property is estate property, which the applicant disputes, and this can only be determined, as the Native Commissioner says, by the institution of a proper action to decide the ownership of the cattle in question.

In these circumstances, it is clear that the Native Commissioner did not err when he made the rule *nisi* absolute and refused to invoke the discretionary powers of the sub-rules in question.

The appeal should be dismissed with costs.

Warner (Permanent Member): I concur.

Pike (Member): I concur.

For Appellant: Mr. W. M. Tsotsi, Lady Frere.

For Appellant: Mr. W. M. Tsotsi, Lady Frere.

SOUTHERN NATIVE APPEAL COURT.

MPENDU *v.* **GWIBA.**

N.A.C. CASE No. 1 OF 1955.

KING WILLIAM'S TOWN: 15th March, 1955. Before Israel, President. Warner and Pike Members of the Court.

PRACTICE AND PROCEDURE.

Amendment of summons—Non compliance with Rule 82 (1)—*Amendment made after judgment given—Prejudice suffered by appellant.*

Summary: In this matter a man named Jim Mpendu in his capacity as kraalhead was cited as first defendant in a seduction case. When the matter came to trial, the words "No. 1 deceased, No. 2 absconded" were recorded and judgment for plaintiff was given against second defendant. Execution was levied on this judgment, but one, Vukile Mpendu (now appellant) interpleaded, and succeeded. As a corollary to the interpleader proceedings, Vukile Mpendu was substituted for Jim Mpendu as defendant No. 1. Vukile excepted on the grounds that he had not been cited as kraalhead in the original summons and could not be cited after judgment had been given. The exception was dismissed and Vukile appealed.

Held (1): That Rule 82 (1) of Native Commissioner's Court Rules allows a summons to be amended before judgment but in this case matter was *lis finita* and the presiding officer was *functus officio* when the amendment was allowed.

Held (2): That appellant was prejudiced by being brought into the action when the tortfeasor's liability had already been determined by the Court.

Held (3): That the exception should have been upheld.

Statutes, etc., referred to:
Native Commissioner's Court Rules 82 (1) and 82 (2).

Appeal from the Native Commissioner's Court, Stutterheim.

Israel (President):—

In this matter a man named Jim Mpendu, in his capacity as kraalhead of the tortfeasor, was cited as first defendant in a seduction action. On 24th June, 1953, a plea was filed on behalf of the two named defendants stating, *inter alia,* that second defendant had never lived with, and was not under the control of, first defendant at the time of the cause of action. On the 25th November, 1953, it was recorded on the inside page of the case cover: "No. 1 deceased, No. 2 absconded", and a judgment for plaintiff appears thereunder. This judgment is again shown on the front of the cover in the appropriate place but with the words "against Defdt. No. 2" superimposed thereon.

On 3/12/53 execution was levied on this judgment and on 24th June, 1954, one Vukile Mpendu interpleaded, claiming that the property attached was his. The interpleader which was heard on the 8th July, 1954, succeeded and the cattle were declared not executable.

Immediately this order was issued and, apparently, as a corollary to the same proceedings, plaintiff's attorney applied to amend the original summons by substituting for Jim Mpendu defendant No. 1, the name Vukile Mpendu, the successful claimant in the aforesaid interpleader proceedings, because, as he is recorded to have told the Court, "he had learnt only that morning that Vukile was the present kraalhead". Although opposed, the application was granted, Vukile was substituted as defendant No. 1 and given "time to enter appearance to defend and file his plea".

Vukile Mpendu accordingly entered appearance on 14th July, 1954, and by way of exception pleaded to the effect that—

(1) he could not at that stage be made a party to the action, as he was not cited as kraalhead in the original summons, and

(2) the amendment made citing him as co-defendant was wrong in law, as no amendment is possible once judgment has been given in any action.

The exception was heard on 22nd July, 1954, but, after argument, was dismissed and Vukile was given seven days in which to enter his plea. He now appeals against this judgment on the grounds:—

First: That the Court exceeded its powers in substituting Vukile Mpendu for Jim Mpendu as defendant No. 1 at the conclusion of the Interpleader Action.

Second: That the parties are all inhabitants of the Emgwali Native Reserve, plaintiff could have ascertained from the headman the name of the head of the kraal of which defendant No. 2 was an inmate, before taking judgment, which was only taken on the 25th November, 1953, summons having been issued on 13th May, 1953.

Third: That the Court should have upheld the exceptions pleaded:

Firstly that Vukile Mpendu was not cited as kraalhead in the original summons.

Secondly that in terms of Rule No. 82 no amendment is allowable after judgment has been given.

For the purpose of this appeal it is not necessary, in my opinion, to do more than consider the third ground. Rule 82 (1) of the Regulations for Native Commissioner's Courts lays down that:—

> The Court may *at any time before judgment* . . . amend any summons . . .

(the italics are mine), and there is a proviso that no one other than the applicant therefor shall be prejudiced by the amendment. Now, there is to my mind no question but that the rule is peremptory as regards the time when amendments can be made. Were it otherwise, were it possible to bring in, willy-nilly, other defendants after judgment has been given in a case it would constitute a serious abuse of the Court's proceedings which it is its duty to prevent. The very interpleader proceedings which resulted in applicant being placed in his present position are designed to protect a person from being affected unwillingly in his patrimony by an order to which, when made, he was not party. Arguments which have been advanced in this case to the effect that the judgment was against the tortfeasor only and not yet against the kraalhead; that appellant must be presumed to have assumed the responsibilities of his deceased predecessor, the original first defendant; or that the joinder of appellant simply corrected a misnomer in the original summons and could therefore not vitiate the proceedings [Rule 82 (2)], all merely beg the question. The fact remains that the amendment was allowed after judgment had been pronounced, that is to say, when the matter was *lis finita* and the presiding officer was *functus officio*. But even if, in these

circumstances, the amendment could be allowed—I have endeavoured to show that it cannot—there would still be the question of prejudice to appellant to be considered. That he would be seriously embarrased in his defence is manifest; for his liability springs, not from the commission of the delict itself, but from his responsibilty as kraalhead for the relevant delictal debts of an inmate of his kraal. In the present case the appellant has been brought in when the tortfeasor's liability has already been determined by the Court and the debt, for which he, appellant, can be made responsible, has already been founded, and it is too late, now, for him to challenge that decision. The ground upon which he could have based any defence is, thus, cut from under him, and he has clearly, therefore, suffered prejudice to that extent.

The appeal should be allowed with costs and the Native Commissioner's judgment altered to read "Exception upheld with costs".

It is noted that although all the proceedings are documented as being instituted in the Court of the Native Commissioner, the presiding officer has signed his various orders and judgments and even the certificate of record as "Magistrate", and only once remembered or realised that he was presiding in a court of Native Commissioner. Such a lapse is in direct contradiction to the provisions of section 17 (4) of Act No. 38 of 1927, which abolishes the jurisdiction of magistrates to hear Native cases in areas where Courts of Native Commissioner exist, and it is only the fact that all process was manifestly issued out of the Court of Native Commissioner which saves the proceedings from vitiation.

Warner (Permanent Member): I concur.

Pike (Member): I concur.

For Appellant: Mr. Meathcote, King William's Town.
For Respondent: Mr. Randell, King William's Town.

CENTRAL NATIVE DIVORCE COURT.

SEREKEHO *v.* SEREKEHO.

N.D.C. CASE No. 721/54.

JOHANNESBURG: 14th January, 1955. Before W. O. H. Menge, President, "A" Division.

JUDICIAL SEPARATION.

Discharge of restitution order—Subsequent claim for judicial separation—Res judicata—*Attorney and client costs.*

Summary: The nature of the proceedings appears from the *judgment.*

Held: Where a rule *nisi* for the restoration of conjugal rights was granted on the grounds of malicious desertion and discharged on the return day, the respondent cannot subsequently sue for judicial separation on the same grounds.

Held further: That costs on the attorney and client scale must be formally applied for.

Cases referred to:

Evert *v.* Evert, 1950 (4) S.A. 683 (O).

Genn *v.* Genn, 1948 (4) S.A. 430 (C).

Menge (President):—

This is an application for the amendment of a summons. The position which has arisen, and about which there is no dispute, is this: the plaintiff on 16th January, 1954, issued summons against the defendant, her husband, for restitution of conjugal rights on the ground that "on or about November, 1950, and at Klerksdorp, the defendant wrongfully and unlawfully deserted the plaintiff and notwithstanding demand refuses, fails and/or neglects to return to or receive plaintiff". She obtained a restitution order; but this was discharged by me on the return day (14th September, 1954), on the ground that the defendant had done everything in his power to comply with the order which directed him to restore conjugal rights not later than the 20th August, and that the plaintiff was herself to blame for the failure of the actual restitution. Both parties had been represented by Counsel on the return day.

Plaintiff has now issued a fresh summons for the same form of relief and on the same ground, viz.: that "during November, 1950, and at New Location, Klerksdorp, the defendant wrongfully, unlawfully and maliciously deserted the plaintiff". The defendant filed a preliminary plea in bar that the matter is *res judicata* and in this form the matter came before me yesterday.

Mr. Helman for the plaintiff at the outset applied for an amendment of the summons to substitute a prayer for judicial separation for that of a restitution order. Mr. Williamson, who appeared for the defendant, and who had also represented the latter in the previous proceedings, opposed the amendment mainly on the ground that such an amendment would in no way cure the defect, i.e. *res judicata*, at which his preliminary plea is directed. The desertion which took place in 1950, he argued, was wiped out and cannot now found an action for separation. Mr. Helman on the other hand, contended that as regards the claim for separation, which was never an issue, the previous judgment is not *res judicata*.

Now it seems to me that as between the parties the decision in the previous proceedings amounts to this: that the defendant did desert the plaintiff in 1950, but that his offer to restore conjugal rights purged his guilt and that as at the date of the discharge of the order there was no desertion on which a final decree could be based. Such desertion as there was had come to an end. That is clearly *res judicata* between the parties; and, this being so I do not see how the plaintiff can now claim a decree of judicial separation on the ground that she was deserted by the plaintiff in 1950. Desertion in matrimonial affairs is a continuing form of misconduct. If it comes to an end the guilt is wiped out and there can be no divorce. On what reasoning can it then be urged that in spite of coming to an end it still carries a sufficient infection of guilt to found a claim for separation? Such a notion would be in conflict with the very object with which restitution orders are granted, viz. that a final attempt should be made to let by-gones be by-gones.

No authorities were referred to in argument, but I have found a case which, whilst not directly in point, seems to me to lend very strong support for the view I have taken. In the case of Evert *v.* Evert, 1950 (4) S.A. 683 (O) there had been an alternative prayer for judicial separation and on the return day of the restitution order, when it was evident that the defence would be an offer to restore conjugal rights, counsel argued that he could at that stage still claim judicial separation. De Beer, J.P., concluded that he could not. He said (p. 685):—

> "Although malicious desertion would generally justify an order for judicial separation it seems somewhat illogical to rely on such malicious desertion after the defendant has restored or offered to restore conjugal rights. An order for

judicial separation may well have been granted at the termination of the trial because the defendant was found to have maliciously deserted the plaintiff and the desertion was extant at the time: but if as a result of the restitution order I hold that the defendant has restored conjugal rights it seems to me that the desertion comes to an end and that the plaintiff is precluded from now relying thereon".

Again at page 636, the learned Judge said:—

"Although I find it unnecessary to decide whether the claim for judicial separation lapses in the sense that it is *res judicata*, I am inclined to agree that having elected to proceed with the claim for restitution the plaintiff cannot in the same action have resort to an order for judicial separation should the defendant comply with the restitution order".

I rule, therefore, that the amendment cannot be allowed.

Counsel for the defendant in the course of his argument asked for the dismissal of the application with costs on the attorney and client basis on the ground that the proceedings are vexatious. The special plea, however, merely asks for costs of suit, and consequently a variation of that claim should have been dealt with on a formal basis, viz. an application for amendment of the claim. In the Supreme Court it has been held that notice must be given of such a claim [see Genn *v.* Genn, 1948 (4) S.A. 430 (C)]. In the circumstances the defendant is entitled only to costs as between party and party.

The application for the amendment of the summons is dismissed with costs.

For Plaintiff: Mr. H. Helman.

For Defendant: Adv. D. M. Williamson, instructed by Messrs. Heiman & Maasdorp.

VERSLAE

VAN DIE

NATURELLE-APPÈLHOWE

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