126/1959

C.P.-S.134917–1959-6–1,000. U.D.J. 219.

126/1959

In the Supreme Court of South Africa
In die Hooggeregshof van Suid-Afrika

(APPELLATE [redacted] Division.)
([redacted] Afdeling).

Appeal in Civil Case.
Appèl in Siviele Saak.

JEREMIAH MTSHALI *Appellant,*

versus

ENOCK GWALA *Respondent.*

Appellant's Attorney / *Prokureur vir Appellant* Naude + Naude

Respondent's Attorney / *Prokureur vir Respondent* Goodrick & Frankl...

Appellant's ~~Advocate~~ / *Advokaat vir Appellant* In person

Respondent's Advocate / *Advokaat vir Respondent* S. A. Visser.

(Leave-AD) (NAC)

Set down for hearing on / *Op die rol ~~geplaas~~ vir verhoor op* Tuesday, 17th November 1959

(B)

10.11.

C.A.V.

9.45 a.m. - 11.30 a.m.

W. Rawlinson
Reg.

Partes: Thursday 3rd December 1959

Appeal allowed with costs. The order of the Native appeal Court is set aside, and there is substituted an order dismissing with costs the appeal from the decision of the Native Commissioner.

Schreiner J.A.
Ramsbottom J.A.
van Blerk J.A.
Holmes A.J.A.
van Wyk A.J.A.

W. Rawlinson
Reg.

IN THE SUPREME COURT OF SOUTH AFRICA.

(APPELLATE DIVISION.)

In the matter of:

J. MTSHALI ..... Appellant,

versus

E. GWALA ..... Respondent.

CORAM: SCHREINER, MALAN, VAN BLERK, JJ.A.; HOLMES et VAN WYK, A.JJ.A.

HEARD: 17th November, 1959. DELIVERED: 3rd Dec., 1959.

J U D G M E N T.

HOLMES, A.J.A.: This is an appeal, on leave, from a decision of the Native Appeal Court (North Eastern Division), sitting in Natal, reversing the decision of a Native Commissioner. It will be convenient to refer to the parties throughout as the plaintiff and the defendant.

In the trial court the plaintiff sued for 9 head of cattle as lobolo (or their value, £45); alternatively he claimed 9 head of cattle (or their value, £45) as damages. The claim for lobolo was not pressed at the trial, nor mentioned in the grounds of appeal to the Native Appeal Court. Hence we are concerned only with the claim for damages.

The...../

The plaintiff's averments in his particulars of ~~the~~ claim, as set out in the summons, further particulars, and amendment, may be summarised as follows:

(1) The parties are Natives as defined by Act 38 of 1927. They live in Natal.

(2) In 1949 the plaintiff's son Isaac married a Native girl named Irene in the Cape Province. The marriage was according to Christian rites. Community of property was excluded. By agreement, the plaintiff paid the bride's father £107. 10s., said to be in respect of lobolo. Thereafter the couple lived in Natal.

(3) In 1951 Isaac died. Irene returned to her parents' home in the Cape.

(4) The plaintiff was his deceased son's heir, and guardian of his widow, Irene.

(5) In 1955 the defendant married Irene in the Cape, without the consent of the plaintiff. The marriage was according to Christian rites.

(6) The defendant induced Irene to marry him without the plaintiff's consent. Thereby the

defendant...../

defendant induced her to leave the plaintiff's kraal without the plaintiff's consent.

(7) The defendant committed the wrongful act of marrying Irene without the plaintiff's consent, as he had actually abducted her and caused her not to return.

(8) The claim for damages is based on the Natal Native Code.

I pause here to set out the relevant provision of the code, namely, section 140:

"140. Any person abducting the wife, child, or ward of another or inducing the wife, child, or ward of another to leave her kraal without the consent of her husband, father or guardian, shall be liable in damages to such female's husband, kraal head or guardian, as the case may be: provided that no action will lie if the absence is only in connection with the betrothal visit of a girl to the kraal of a proposed future husband."

Paras. 1, 2, 3, and 5 of the plaintiff's claim were not in dispute. The defendant pleaded that there was no

Native custom entitling the plaintiff to lobolo or damages. He denied that, when he married Irene, the plaintiff was her guardian, or that his consent was nedessary to the marriage; and he denied that his marriage amounted to abduction. Finally, he pleaded that the plaintiff, by suing the defendant for lobolo, had thereby admitted the validity of the defendant's marriage to Irene, and was accordingly estopped from claiming damages for abduction.

After hearing evidence, the Native Commissioner gave judgment in favour of the defendant. The ratio of his judgment was that the plaintiff was never Irene's guardian. An appeal to the Native Appeal Court was successful and (by a majority) the Commissioner's judgment was altered to one in favour of the plaintiff for 7 head of cattle, as damages. The ratio of the majority judgment was that the plaintiff became Irene's guardian on her first husband's death and that the defendant either abducted her or enticed her from her guardian's control when he married her.

In granting leave to appeal, the Native Appeal Court stated the following points, in terms of Sec. 18 (1) of Act 38 of 1927:

(a) Are the...../

(a) Are the provisions of the Natal Native Code published under Proclamation No. 168 of 1932 relating to status and guardianship as enunciated in Sections 25 and 140 not applicable to a woman who has married by Christian rites;

(b) Was this Court wrong in awarding damages to Plaintiff in the circumstances of the case before it.

At this stage I set out certain sections of the Natal Native Code:

"25. Every Native is either a kraal head or a kraal inmate subject to the kraal head in all kraal matters.

27(2). Subject to the provisions of section tweny-eight a native female is deemed a perpetual minor in law and has no independent powers save as to her own person and as specially provided in this Code." (section 28 deals with emancipation by a Native commissioner.)

"44(1). The natural guardian of a widow is the head of the kraal to which she belongs."

In the light of section 2 of Law 14 of 1888 (Natal) it would seem that the Code applies to all Natives while and so long as they sojourn or are resident in Natal. But having regard to the varied nature of the provisions of the Code, it may be that the foregoing applicability arises only in the absence of considerations to the contrary.

The basic question in the case is whether Irene was the plaintiff's ward when, without his consent, she married the defendant. The answer depends upon whether the status and guardianship provisions of the Natal Code of Native Law (in particular, sections 25, 27(2), and 44(1) thereof) applied to her immediately before her marriage to the defendant. In the absence of fuller argument we do not think that it is advisable for us, in deciding the appeal, to answer the broad first question stated by the Native Appeal Court, For the purposes of this judgment I shall assume, without deciding, in favour of the plaintiff, that the status and guardianship provisions of the Natal Code applied to Irene after she had married the plaintiff's son and came to live with him in Natal, in 1949, although their marriage was according to Christian rites. On that footing, the

question is whether the Code ceased to apply to Irene, when her husband died and she left Natal and returned to the Cape.

Mr. Visser, who appeared in this Court for the plaintiff, contended that although Irene and the plaintiff's son were married by Christian rites, the legal consequences of this marriage were governed by Native Law, by reason of section 11 of Law 46 of 1887 (Natal), and that therefore, inter alia, Irene was the plaintiff's ward, and required his consent to her marriage to the defendant. That Law makes provision for the solemnisation of marriages between Natives according to Christian Rites. Section 11 reads as follows:

> "11. No marriage between Natives solemnized under this Law shall, when the male Native is subject to the Native Law in force in this Colony in anywise, except as in this Law provided, removed either of the parties to such marriage from the operation of such Native Law, either in their persons or in their property."

This argument cannot avail Mr. Visser, because

Irene and the plaintiff's son were not married under the provisions of the foregoing Natal Law. They were married in the Cape Province.

The defendant appeared in this Court in person. In view of what I am about to say, I do not think that it is necessary to refer to his argument.

In my view there is a simple reason for holding that Irene was not the plaintiff's ward immediately before she married the defendant. The status and guardianship provisions of the Natal Code (assuming that they applied to Irene at all, in view of her Christian marriage to the plaintiff's son) only applied by reason of her marriage to the plaintiff's son and her residence with him in Natal. (I emphasize that she came from the Cape.) When such marriage and Natal residence ended and she returned to the Cape, there seems to me no ground at all for holding that the said provisions continued to apply to her. I therefore hold that Irene was not the plaintiff's ward when her husband died and she returned to the Cape. It follows that the plaintiff has no cause of action against the defendant based on section 140 of the Natal Native Code. The fact that the defendant is a Natal Native does nothing to advance the plaintiff's cause of action. [On

this view of the case it is not necessary to enquire whether section 11(3) of Act 38 of 1927 operated to confer on Irene the legal capacity to marry the defendant without the plaintiff's consent.

In the result, the appeal is allowed with costs. The order of the Native Appeal Court is set aside, and there is substituted an order dismissing with costs the appeal from the decision of the Native Commissioner.

Neville Holmes

SCHREINER, J.A.
LALAN, J.A.
VAN BLERK, J.A.
VAN WYK, A.J.A. } concurred