B.b

187/92

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between: CASE NO 98/89

TSHIVHASE ROYAL COUNCIL FIRST APPELLANT

KENNEDY TSHIVHASE SECOND APPELLANT

and

JOHN SHAVHANI TSHIVHASE FIRST RESPONDENT

TSHIVHASE LOCAL COUNCIL SECOND RESPONDENT

And in the matter between: CASE NO 171/91

KENNEDY TSHIVHASE FIRST APPELLANT

GILBERT LIGEGE SECOND APPELLANT

and

JOHN SHAVHANI TSHIVHASE FIRST RESPONDENT

TSHIVHASE LOCAL COUNCIL SECOND RESPONDENT

CORAM: BOTHA, NESTADT, NIENABER JJA et

NICHOLAS, KRIEGLER AJJA

DATE HEARD: 21 NOVEMBER 1991, 25 AUGUST 1992

DATE DELIVERED: 28 SEPTEMBER 1992

J U D G M E N T

NESTADT, JA:

There are two appeals before us, both from judgments of LE ROUX CJ sitting in the Venda Supreme Court. They relate to a dispute as to the chieftainship of a tribe in Venda. The two contenders are Kennedy Tshivhase ("Kennedy") and his uncle, John Tshivhase ("John"). The first appeal (case no 98/89) is by Kennedy, as the second appellant, against an order dated 20 September 1988 ("the first judgment") which, in effect, confirmed the appointment by the President of Venda of John as chief. John is the first respondent. The second appeal (case no 171/91) is also by Kennedy, as the first appellant, against the refusal on 12 November 1990 ("the second judgment") of an application to rescind the first judgment. Here, too, John is the first respondent. I explain later who the other parties

to the appeals are. Both appeals are brought with the leave of the court a quo.

As will be seen, the genesis of the dispute between the parties is to be found in events which took place a long time ago. And, more recently, it led to the keenly contested litigation between them which has culminated in the appeals. The first judgment of the court a quo has been reported (see Tshivhase Royal Council and Another vs Tshivhase and Another 1990(3) SA 828 (VSC)). It fully sets out the history of the dispute and the nature of the proceedings to which, until that stage, it gave rise. For this reason, and having regard to our view that subsequent events (relevant to the second appeal) are the more important ones, it is unnecessary to deal with these prior matters in the detail that might otherwise have been desirable. They can be summarised as follows:

(i) The tribe in question is the Tshivhase tribe. In 1970, its chief having died, his son Kennedy was installed as chief in his place. However, because Kennedy was then still a child (aged seven), the late chief's younger brother John was appointed as acting chief of the tribe until Kennedy attained majority.

(ii) This position continued until 1985. Kennedy now being over 21, steps were then taken on his behalf to have him formally recognised and installed, according to tribal custom, as chief in the place of John.

(iii) John, however, was not willing to vacate office. He had on 25 June 1986, in terms of sec 33(1)(b) of the Venda Tribal and Regional Councils Act 10 of 1975 (V) read with sec 68 of the Republic of Venda Constitution Act 9 of

1979 (V), purportedly been appointed as chief by the President. John therefore gave notice that he was to be enthroned as chief on 3 July 1986.

(iv) This led to the launching on 2 July 1986 of the first of a number of applications in the Venda Supreme Court. In these applications orders were sought relating to the rival claims of Kennedy and John to the chieftainship of the tribe. The first one was brought as a matter of urgency by a body called the Tshivhase Royal Council (the first appellant in the first appeal and allegedly represented by Gilbert Ligege ("Ligege"), the second appellant in the second appeal). The relief claimed against John on behalf of Kennedy was an order preventing the

installation of John as chief. (Later, Kennedy was joined as the second applicant.) The Tshivhase Local Council (the second respondent in both appeals) was also cited. Despite opposition, the application succeeded to the extent that on 3 July 1986 an order was granted by VAN DER SPUY AJ interdicting the installation ceremony of John pending the resolution of the dispute as to the chieftainship by a person holding the tribal position of Vho Makhadzi.

(v) Unfortunately this did not bring about any finality. On 13 July 1986 a person purporting to be the Vho Makhadzi and acting pursuant to the order referred to decided that John be the chief. On 14 August 1988 the President again, in terms of the aforementioned

legislation, in effect confirmed John's appointment as such. A further ceremony at which John was to be installed was arranged for 21 August 1986. Kennedy, however, was not prepared to accept John's appointment as chief. On 17 August 1986 he brought a second urgent application against John to stop his installation as chief. Kennedy alleged that the decision arrived at on 13 July that John be the chief was invalid. Kennedy claimed an order declaring himself to be the chief.

(vi) Opposing affidavits having been filed by John, the matter came before KLOPPER ACJ on 20 August 1986. A temporary interdict in the terms sought was granted and the matter postponed for the filing of further

affidavits.

(vii) These affidavits gave rise to certain legal and factual disputes concerning the parties' rival claims to the chieftainship. The result was that when the matter came before court again on 21 November 1986, it was by agreement once more postponed, this time inter alia for the hearing of oral evidence on a number of factual issues. The temporary interdict granted on 20 August 1986 was ordered to stand "pending the final determination of the trial".

(viii) The date eventually fixed for the hearing was 9 November 1987. On that day, however, the matter did not proceed. The reason was the intervention of the President. He had decided to invoke the provisions of sec 4 of the

Vhuhosi Administration Act, 14 of 1986 (V) ("the Act") and to refer the dispute between Kennedy and John to a body called the Khoro ya Mahosi ("the Khoro"). It is a council of chiefs which acts as an advisory body to the President. Sec 4 (it is quoted at 838 D - E of the reported judgment), in so far as it is relevant, provides that whenever there is any dispute in connection with inter alia the installation of a chief, the President may request the Khoro to "assist with the solution: Provided that no dispute will be entertained after...installation". The President therefore caused a letter dated 4 November 1987 to be written to the registrar of the court requesting the parties to agree to a postponement until the findings of the

Khoro were made known. The full terms of the letter are quoted at 834 D-G of the reported judgment. The parties agreed to the postponement.

(ix) The Khoro met on 27 November 1987. It resolved (so the parties thought) that John be the chief. And according to a letter dated 11 January 1988 written by the Director-General: National Assembly and Local Governments to the parties' attorneys (the letter is quoted at 835 A-C) the President "accepted the advice given to him" by the Khoro.

(x) There followed on 15 June 1988 a third application to court. This one was brought by John. It was for an order dismissing Kennedy's still pending application and in particular that the temporary interdict

granted in his favour on 20 August 1986 be discharged. The submission made in John's founding affidavit was that the issues referred to trial on 21 November 1986 ((vii) above) had been "superseded by the...procedure initiated and...confirmed by...the...President" under sec 4 of the Act.

(xi) Kennedy opposed the application. He did not deny the existence of a "dispute in connection with...installation". Nor did he contend that the proviso to sec 4(1) applied. Presumably this was because, having regard to the postponement on 9 November 1987, it was recognised that he had consented to the entertainment of the dispute by the Khoro and the President under the section. Kennedy's case rather was that the President's purported

invocation of sec 4 and pursuant thereto his appointment of John as chief were invalid; the issue of who should be the chief had not been superseded or resolved; Kennedy's application for an order that he be declared the chief should therefore be allowed to proceed; and John's application should be dismissed. The main argument was that sec 4 does not empower either the Khoro or the President to deal with questions concerning who should be chief; only disputes as to installation fall within the purview of the section; the dispute between Kennedy and John primarily concerned one of identification of the chief; and in terms of sec 2 of the Act (see 838B) the resolution of such a dispute vested in the royal family of the tribe. A

second submission was that, in any event, there were certain procedural flaws or irregularities which fatally affected the President's acceptance of the Khoro's advice and consequential appointment of John as chief.

(xii) On 20 September 1988, LE ROUX CJ granted John's application. The learned judge found (at 843G) that the President "has acted to solve the dispute and has appointed John... as the new permanent chief of the Tshivhase tribe. No adequate grounds have been shown why he should not be installed as khosi." In the result, John's appointment as chief was, at least by necessary implication and as I have already stated, confirmed. This is the order under attack in the first appeal.

The first appeal was on the roll for 21 November 1991. Also then before us were certain applications for condonation by Kennedy and his co-appellant. They related to the late filing of their notice of appeal and their failure to timeously lodge the record. When the matter was called, Mr Zeiss on behalf of the respondents drew attention to and relied on a further breach of the Rules, namely that no power of attorney as required by the then AD Rule 5(3)bis(a) (now 5(3)(b)) had been lodged. Counsel submitted that in the circumstances the appeal be struck off the roll. On behalf of the appellants, this was opposed. The preliminary issue having been argued, an order was made (i) that the applications for condonation and the appeal itself be postponed sine die; (ii) that the appellants pay the wasted costs, including the costs of two counsel; and (iii) that any application for condonation

in respect of the power of attorney be filed within one month.

This brings me to the events relevant to the second appeal. They begin to unfold shortly after the court a quo's first judgment and at a stage when the appeal against it had already been noted. One takes up the narrative on 3 March 1989. On this date the Khoro met for the first time since 27 November 1987 ((ix) above). The minutes of the previous meeting were produced for confirmation. They reflected that the Khoro had resolved that John be the chief. It would seem that this came as a surprise to members. They stated that this had not been the Khoro's decision. The decision had been quite different, namely that the Tshivhase Royal Family (or the tribe) settle the problem of who should be the chief. Some months later Kennedy and Ligege came to hear of what had happened.

They understandably took up the attitude that this put a different complexion on things. The result was the bringing by them (in June 1990) of the application to rescind the first judgment. (No point has been made of the fact that whereas the first judgment involved Ligege acting on behalf of the Tshivhase Royal Council, the application to rescind was brought by Ligege in his personal capacity.) The application was based on the allegation that it had been granted as a result of a mistake common to the parties, viz that the Khoro had resolved that John should be the chief. Reliance was placed on Rule 42(1)(c) of the Rules of the Venda Supreme Court. It is in the same terms as Rule 42(1)(c) of the Rules of the Supreme Court of South Africa. It reads:

> "42.(1) The court may, in addition to any other powers it may have, mero motu or upon the application of any party affected, rescind or vary:
> ...
> (c) an order or judgment granted as the result of a

mistake common to the parties."

John and the Tshivhase Local Council opposed the application. As I have said, it was refused. This is the order under attack in the second appeal.

It was obviously desirable that both appeals be placed on the roll for hearing on the same day; and this, as I have indicated, was done. Virtually the same parties are involved; and both appeals have a common factual background. It is true that they are based on different substrata. The first appeal presupposes that the Khoro's decision was that John should be the chief; nevertheless, so it is said (for the reasons explained in (xi) above), the dispute was not effectively resolved; John's application should therefore have been dismissed; the first judgment should not have been granted. The second appeal, on the other hand, is based on the contention that the

Khoro never in fact resolved that John should be the chief; the first judgment having accordingly been granted as a result of a mistake, it should have been rescinded. It will be evident, however, that both appeals involve an attack on the first judgment; both are aimed at setting aside the appointment of John as chief in terms of such judgment. In the event of this happening, the parties were agreed that the dispute as to the chieftainship would not go back to the Khoro or the royal family (or the tribe). The matter would have to be remitted to the Venda Supreme Court for it to resolve the issue of who should be chief. This would be achieved by the continuation of the proceedings which were postponed on 9 November 1987 ((vii) and (viii) above).

It follows from what has been said that success on the one appeal would render the other

redundant. For this reason, only the one appeal was argued, namely the second one. On the conclusion of argument, counsel were advised that in the event of the second appeal being dismissed, the first appeal would have to be set down for argument afresh.

I turn then to a consideration of the second appeal. Here, too, there have been certain procedural irregularities. The preliminary issue which therefore arises for determination is whether, in the face of the respondent's opposition, they should be condoned. One breach of the Rules relates to the appellants' power of attorney. A power dated 2 April 1991 was timeously prepared by the appellants' former Venda attorney and sent to a Mr Gous, his Bloemfontein correspondent. But it was defective in certain respects. Moreover, it was never lodged. The reason for this is given by Mr Gous in an affidavit in support of an application for

condonation. He states that he thought it was unnecessary to do so. He alleges that he had previously been told by a member of the registrar's staff in the Appellate Division that "it was no longer necessary to file a power of attorney"; though he was "uncertain whether this was in fact so" he "accepted her word"; he had not lodged notices of appeal "that often" in this Court. He only discovered his mistake on 21 November 1991. The result was that in breach of Rule 5(3) bis(a) a power of attorney was tendered almost a year out of time. This occurred on 17 February 1992 when an application for condonation, to which was attached a fresh power of attorney dated 22 January 1992, was served and filed. A second respect in which there was non-compliance with the Rules relates to the furnishing of security. The respondents were sent a document in which the appellants declared themselves jointly and

severally liable for the payment of security (in an amount of R10 000). Obviously this undertaking does not constitute the furnishing of security within the meaning of Rule 6(2); it was no security at all. Thirdly, although a notice of appeal was in terms of Rule 5(1) timeously lodged, the copy served on the registrar of the Venda Supreme Court and on the respondents' Venda attorney differed from the notice lodged with the registrar of this Court. The heading of the former notice reflects the matter as being "in the Supreme Court of Venda". And it bears the stamp of the registrar of that court with the date 4 April 1991. The notice of appeal lodged with the registrar of this Court, however, has a heading reflecting the matter as being in this Court and it is differently stamped, viz with the stamp of the registrar of the Appelate Division dated 19 April 1991. Finally, the respondents take the

point that the record lodged in terms of Rule 5(4) was defective in that it did not include the judgment of the court a quo granting leave to appeal. This is indeed so. The appellants' Venda attorney mistakenly thought that only an order (dated 21 March 1991) granting leave had been made but that no reasons were given. The omission was only remedied when a copy of the relevant judgment was annexed to a petition for condonation dated 27 July 1992. But even now, matters are not what they should be. The judgment has neither been revised nor signed by LE ROUX CJ; and it is not verified by the transcriber of the judgment (which was mechanically recorded).

This Court has often said that in cases of flagrant breaches of the Rules, especially where there is no acceptable explanation therefor, the indulgence of condonation may be refused whatever the merits of the

appeal are; this applies even where the blame lies solely with the attorney (see, for example, P E Bosman Transport Works Committee and Others vs Piet Bosman Transport (Pty) Ltd 1980(4) SA 794(A) at 799 D-H). On behalf of the respondents, Mr Zeiss submitted that the present matter was such a case. He asked that the appeal should, in the circumstances, be struck off the roll. The argument is not without merit. The handling of the appeal by the appellants' attorneys calls for critical comment. Mr Gous was seriously remiss in assuming that a power of attorney was unnecessary. It was his duty to know the Rules (Ferreira vs Ntshingila 1990(4) SA 271(A) at 281G). He was not entitled to act on what he alleges he was told by a member of the registrar's staff. The appellants' Venda attorney was also guilty of a lack of diligence in a number of respects. As I have said, the original

power of attorney drafted by him was defective; manifestly, the security bond which he prepared and which the appellants signed, did not comply with the Rules; he is to blame for the differences in the notices of appeal that were lodged; and he ought to have known that a reasoned judgment was given when leave to appeal was granted. Criticism of the Venda attorney does not end here. The application to condone the failure to lodge a power of attorney is in the form of a notice of motion. It should have been by petition. The application is neither paginated nor indexed. There is no explanation for the delay (from 21 November 1991 to 17 February 1992) in bringing the application. The supporting affidavits contain a number of spelling mistakes (or typing errors). Nothing is said, as it should have been, about the length of time he has been in practice. Not even an apology for what can only be

categorised as work ill-becoming an attorney, is tendered.

These considerations notwithstanding, I have come to the conclusion that the argument that condonation summarily be refused should not be acceded to. There is nothing sinister in the fact that the notice of appeal lodged in this Court is different to that served on the respondents' attorney and lodged with the Venda Supreme Court. The objection is a somewhat technical one. So, too, is the fact that a revised and signed judgment granting leave to appeal is not before us. Moreover, in mitigation of the attorney's original omission to include this document in the record, is the fact that he had been told by the registrar of the Venda Supreme Court that "no judgment on the application for leave to appeal was given". The failure to lodge proper security (which, incidentally, the respondents'

attorney never complained about for approximately eight months) has been remedied. Neither Kennedy nor Ligege can in any way be blamed for what has happened. Mr Coetzee, on their behalf, rightly emphasised that they have at all stages demonstrated a firm intention to appeal. Their disquiet at the way their case has been dealt with is a factor to be taken into account and is shown by their having terminated the mandate of Mr Gous and the Venda attorney and appointed new attorneys in their stead. There has been no real prejudice to the respondents. The prosecution of the appeal has not been delayed. Its outcome is of vital importance not only to the appellants (and particularly Kennedy) but to the tribe as a whole. It would be unfortunate were non-compliance with the rules in effect to determine the issue of the chieftainship. In the result, it seemed to us, that in the exercise of our discretion, argument

on the merits should (as in Federated Employers Fire and General Insurance Co Ltd and Another vs McKenzie 1969(3) SA 360(A) at 364A-C and Louw vs W P Kooperasie Bpk 1991(3) SA 593(A) at 597 B-C) be allowed to proceed in order to determine what the prospects of success are and thus ultimately whether the application for condonation should be granted and the appeal succeed. The matter continued on this basis.

In deciding the merits of the appeal, it is necessary in the first place to consider whether the appellants have established what is basic to their case, namely that the true decision of the Khoro was that the dispute as to the chieftainship be referred to the Royal Family. In support of the proposition that this is what happened, the appellants relied in the first place on the affidavits of seven chiefs who as members of the Khoro, and unlike Kennedy, attended the meeting held on

27 November 1987. It is clear from what they say that it was never decided that John be appointed the chief; the issue was referred back, according to some, to "the Tshivhase tribe", according to others to "the Tshivhase Royal Family" and according to one deponent to "the Tshivhase people". It has not been suggested that there is any significance in these differences. Chief Nelwamondo gives the reason for the decision. He states:

> "That the meeting resolved that the Khoro ya Mahosi was not in a position to entertain the Tshivhase chieftainship problem, since the Khosi who is Kennedy Tshivhase has already been appointed as the rightful heir to the throne;
> That because it is not alleged that the said Kennedy Tshivhase is guilty of any misconduct, it would be advisable to refer the matter back to the Royal family of Tshivhase to sort out the matter."

Secondly, there are the affidavits of two Venda government officials who, in addition to confirming what

the decision of the Khoro was, explain how it came about that the minutes wrongly reflected what was decided. The learned judge a quo's description of their disclosures as "startling" and "rather sensational" is hardly an exaggeration. It appears that at the meeting the President's initial attitude was that John should be the chief. However, some chiefs spoke out against this. The President then, in effect, recanted and at his suggestion the decision referred to was taken. Subsequently, minutes which reflected this were prepared. They were presented to the President for his approval by one of the officials, a Mr Joseph Ramabulana. He was the Director-General of what was then known as the Department of National Assembly and Local Governments. At the President's instance the minutes were altered and returned to Mr Ramabulana. They now read that the Khoro had resolved that John be

the chief. Mr Ramabulana having been at the meeting, knew this to be incorrect. He went to speak to the President about the matter and pointed out the error. However, the President's reaction was that the minutes as altered were nevertheless to be circulated. When Mr Ramabulana objected to this, the President accused him of insubordination. In the result, he complied. The minutes as altered were sent out and the letter dated 11 January 1988 ((ix) above) written.

In April 1988, the President died. It was only thereafter that what is said to be the true decision of the Khoro was revealed. As I indicated earlier, this took place at the meeting of the Khoro on 3 March 1989. And it was not until later and after there had been a change of government in Venda, that Mr Ramabulana came forward with his account of what had happened. Before that, though obviously aware of the

application that John had brought ((x) above), he remained silent. So there was not only a culpable delay in the version now relied on being advanced, but the allegations on which it is founded are made against a deceased person. In these circumstances, the appellants' evidence must be scrutinised with caution (see Randaree and Others NNO vs W H Dixon and Associates and Another 1983(2) SA 1(A) at 6A). Moreover, the type of conduct now attributed to the late President will not lightly be found proved (Hoffmann and Zeffertt: The South African Law of Evidence, 4th ed, 528-9).

Despite these considerations, however, I am of the opinion that the appellants' evidence as to what the Khoro decided must be accepted. There is, in essence, nothing to controvert it. John's bald denial in his answering affidavit of what the chiefs and the two officials say does not raise a genuine dispute of fact.

He was not present when the chieftainship was discussed at the meeting on 27 November 1987. And obviously he cannot deal with what happened between Mr Ramabulana and the late President. John alleges though that after the meeting, he was congratulated by one of the chiefs, namely Chief Netsianda. The inference sought to be drawn from this is that the meeting decided that John be the chief. But Chief Netsianda in an affidavit annexed to the appellants' replying affidavits denies having congratulated John. And he goes on to confirm that the resolution taken at the meeting was that the matter be referred to the tribe. Nor does it avail John to say, as he does, that he unsuccessfully attempted to obtain affidavits from certain other persons who attended the meeting. Indeed, some of them have now deposed to affidavits and these, too, are annexed to the appellants' replying affidavits. Not

all of them deal with what happened at the meeting but those who do also confirm the appellants' version of what resolution was taken there. As regards Mr Ramabulana's delay in disclosing what had happened, it appears that he was in February 1988 transferred to a different government department. He states in a supplementary affidavit that when this happened "one cannot go and interfere with the department of another Director-General". This might not be a good excuse for his conduct; but it does explain it. The respondents in their affidavits, however, attack the veracity of the appellants' version of events on a number of other grounds. One is that the persons who have deposed to affidavits in support of their case have been intimidated or unduly influenced. Another is that some of them are partial to the appellants. There is no factual basis for either of these assertions.

Finally, it was argued that the minutes of the meeting held on 3 March 1989, properly construed, do not support the appellants' version; that far from correcting the minutes of the previous meeting they confirm them. There is no merit in the point. It is true that in the minutes of the 1989 meeting it is recorded that "Minutes of the previous meeting were read and adopted as a true record". But the next paragraph of the minute, with specific reference to the 1987 resolution, states that:

> "(It) is not the decision reached by the Council of Mahosi; the correct decision being the one that reads or says:
> the Tshivhase Royal Family should be allowed to settle the problem on who should succeed to their throne."

In the result, and by way of summary, it seems to me that the issue under consideration was capable of resolution on the papers. This is what LE ROUX CJ decided and I think he was right. The appellants'

evidence as to what the true decision made at the meeting of the Khoro on 27 November 1987 was, was overwhelming. And there was nothing to gainsay it.

On this factual basis, the question is whether the first judgment was granted "as the result of a mistake common to the parties" within the meaning of this expression as used in Rule 42(1)(c). Before attempting to answer it, I would make one or two general observations as to the effect and meaning of the Rule. It has its counterpart in sec 36(b) of the Magistrates' Court Act, 32 of 1944 (and in that section's predecessor, ie sec 36(2) of Act 32 of 1917). Herbstein and van Winsen: The Civil Practice of the Superior Courts of South Africa, 3rd ed, 468 say that it (or rather Rule 42 generally) effects a codification of the common law. Whether or not this is entirely correct, it is clear, as the learned authors go on to

observe, that the Rule sets out exceptions to the general principle that a final order, correctly expressing the true decision of the court, cannot be altered by that court. The judge is functus officio (Firestone South Africa (Pty) Ltd vs Gentiruco A.G. 1977(4) SA 298 (A) at 306 F-G). I agree with the statement of VIVIER J in Theron NO vs United Democratic Front (Western Cape Region) and Others 1984(2) SA 532(C) at 536 G, that the court has a discretion whether or not to grant an application for rescission under Rule 42(1). In relation to sub-rule (c) thereof, two broad requirements must be satisfied. One is that there must have been a "mistake common to the parties". I conceive the meaning of this expression to be what is termed, in the field of contract, a common mistake. This occurs where both parties are of one mind and share the same mistake; they are, in this regard, ad idem (see

Christie: Law of Contract in South Africa, 2nd ed, 382 and 397-8). A mistake of fact would be the usual type relied on. Whether a mistake of law and of motive will suffice and whether possibly the mistake must be reasonable are not questions which, on the facts of our matter, arise. Secondly, there must be a causative link between the mistake and the grant of the order or judgment; the latter must have been "as the result of" the mistake. This requires, in the words of ELOFF J in Seedat vs Arai and Another 1984(2) SA 198(T) at 201 D, that the mistake relate to and be based on something relevant to the question to be decided by the court at the time. Other cases which illustrate this are Ex Parte Barclays Bank 1936 AD 481 and Van Zyl vs Van der Merwe 1986(2) SA 152 (NCD). The principle is that you cannot subsequently create a retrospective mistake by means of fresh evidence which was not relevant to any

issue which had to be determined when the original order was made. The reason is obvious: the court would at that time have had before it no evidence and thus no wrong evidence on the point; hence there would have been no mistake. Contrast this with the case where the subsequent evidence is aimed at showing that the factual material which led the court to make its original order was, contrary to the parties' assumption as to its correctness, incorrect. Here, one would have the type of situation envisaged by Rule 42(1)(c).

One finds in the reports examples of the successful invocation of Rule 42(1)(c) (see Ex Parte Jooste en 'n Ander 1968(4) SA 437(O), Ex Parte Kruger 1982(4) SA 411 (SECLD) as also, in relation to the corresponding provisions in the magistrates' court, the cases cited by Jones and Buckle: The Civil Practice of the Magistrates' Courts in South Africa 8th ed, 139-

140). But there do not appear to be many such cases. The reason, I would apprehend, is that the circumstances giving rise to the operation of the Rule are inevitably somewhat unusual. In my opinion, however, our matter is such a case. It provides a text-book example of a judgment granted as a result of a mistake common to the parties. Plainly, both Kennedy and John believed the statement in the letter dated 11 January 1988 ((ix) above) that the Khoro had "after deliberating on this matter...resolved that (John) be (the chief)" and that the President "has accepted the advice given to him by the...Khoro". They, therefore, assumed a state of affairs which, as it turned out, was a wrong assumption. In other words, they laboured under a common mistake. It was, moreover, a mistake of fact and clearly iustus.

But was the mistake the cause of the grant of

the first judgment, ie has the second requirement of Rule 42(1)(c), discussed earlier, been satisfied? In my opinion, the answer is clearly in the affirmative. The evidence as to the Khoro's true decision was not fresh evidence of the kind dealt with in Barclays Bank, Seedat and Van Zyl, supra. It simply establishes that the parties' assumption that the Khoro had recommended that John be the chief was incorrect; that there had therefore been a common mistake. This mistake was not only relevant, it was fundamental. The assumption that the Khoro had recommended John as chief was the substratum of the first judgment. Consider the following. The reason for the postponement of the proceedings which were pending on 9 November 1987 was the desire of the President to refer the controversy concerning the chieftainship to the Khoro for it "to assist with the solution" thereof ((viii) above).

John's subsequent application ((x) above) was based on the allegation in his founding affidavit that the Khoro had resolved that he be the chief and that the President "has accepted the advice" of the Khoro. And Kennedy's answering affidavit admits this. One looks then to the first judgment itself. The (supposed) decision of the Khoro is at the forefront of the court's reasoning. Various attacks by Kennedy on the validity of the Khoro's decision are rejected and on this basis the following conclusion is arrived at (at 840 A-B):

> "It seems to follow that the dispute referred to the khoro ya mahosi for its finding and recommendation encompassed the main dispute between the parties in this Court, viz who should be chief of the Tshivhase tribe. Both parties assented to this submission on 9 November 1987, and both are bound by the result, if it has been fairly and properly attained."

In what follows, LE ROUX CJ finds that the result was fairly and properly attained.

There is, however, one aspect of the judgment that requires closer attention. It relates to the last-mentioned point, viz that the decision of the Khoro was fairly arrived at. One of Kennedy's contentions was that the Khoro should have applied the audi principle and afforded him a hearing. In rejecting this argument, the court a quo held, inter alia, that the Khoro acts in a purely advisory capacity; the President was not bound by the advice given. And in refusing the application to rescind, ie during the course of the second judgment, the learned judged returns to this theme. Thus he states:

> "It is clear that the Khoro is a purely advisory body with no executive powers and it was so held in the Tshivhase judgment which is now on appeal. It was for this very reason that the audi alteram partem rule was held to be inapplicable. In my view the State President could consult any other body or person before reaching a decision on any issue submitted to the Khoro, or he could in his discretion appoint a commission of inquiry to investigate the very same question which he had

> previously referred to the Khoro if he is not satisfied that their findings are in accordance with 'the law and customs' (sec 4(3)), but is not obliged to do so. The controversy concerning the minutes is therefore irrelevant as far as the State President's decision is concerned and even if the Court had been aware of the duplicity practised on it, it would not have affected its decision."

I am not sure that this is a correct interpretation of the President's powers under the Act. But in any event, this is beside the point. What the parties agreed to on 9 November 1987 was that the matter be referred to the Khoro for its decision. They did not agree that the dispute be decided by the President irrespective of the Khoro's decision. In my view, therefore, the true basis for granting the first judgment could only have been and was the Khoro's supposed recommendation to the President that John be the chief. This being so, the order made was indubitably as a result of the parties' mistaken

assumption that the Khoro had made this recommendation. Obviously LE ROUX CJ was under the same misapprehension. Had he known the truth, he would not have been entitled to grant John's application. It would have been bound to fail. And Kennedy's then pending application ((v) above) would have had to proceed.

Mr Zeiss made one further submission, namely that the first appeal was a bar to the application for rescission. I disagree. In principle, I can see no reason why Kennedy and Ligege were not entitled to pursue this quite separate and independent remedy, irrespective of the pending first appeal. Rule 42(1)(c) does not (unlike sec 36(c) of Act 32 of 1944) require that no appeal should be pending. Nor, as counsel suggested, were the appellants put to any election between pursuing the appeal and applying for rescision. They could do both.

In the result, the application for rescission should have been granted. It follows that the second appeal must succeed. So too, therefore, must the applications for condonation. The first appeal, as I indicated earlier, becomes, in these circumstances, pointless. To regulate the further conduct of the litigation certain special orders will be made. These speak for themselves. It remains to refer briefly to certain orders for costs that will also be made. Those relating to the applications for condonation were tendered by the appellants. There is no reason, however, why they should not be awarded their costs in the court a quo and on appeal. The costs of John's application which led to the first judgment should be costs in the main application. Neither party was at fault here; they were both misled. The appellants tendered the costs of the applications for condonation

in relation to the first appeal.

The following order is made:

A. As to the first appeal (case no 98/89):

(1) No order on the appeal itself is made.

(2) The costs of the appellants' applications for condonation including the fees of two counsel are to be paid by them jointly and severally.

(3) Subject to this Court's order dated 21 November 1991, the costs of the appeal, including the fees of two counsel are, however, to be costs in the application brought by the appellants under case no M 177/86 on 17 August 1986.

B. As to the second appeal (case no 171/91):

(1) The applications for condonation are granted. The appellants are to pay the costs thereof including the fees of two counsel.

(2) The appeal succeeds and is upheld with costs including the fees of two counsel and including the costs (on an opposed basis) of the application to the court a quo for leave to appeal.

(3) The order of the court a quo dated 12 November 1990 is set aside. In its stead the following is substituted:

(a) The judgment granted on 20 September 1988 (case no M 154/86) is rescinded. The respondents are to pay the costs of the application to rescind.

(b) The costs of the proceedings giving rise to the judgment referred to in sub-paragraph (a) are to be costs in the prior application (case no M 177/86) (referred to in paragraph A (2) hereof).

(4) This application (case no M 177/86) is to proceed. Pending its outcome, the temporary interdict granted on 20 August 1986 is to remain in force.

NESTADT, JA

BOTHA, JA )
NIENABER, JA ) CONCUR
NICHOLAS, AJA )
KRIEGLER, AJA )